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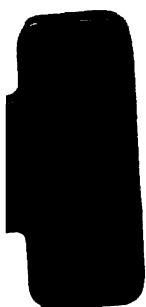
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# THE LAWYERS REPORTS ANNOTATED

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BOOK LIII.

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ALL CURRENT CASES OF GENERAL VALUE AND  
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH, EDITOR, AND  
HENRY P. FARNHAM, Asst.

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# LAWYERS' REPORTS

## ANNOTATED.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

W. T. WELLS, *Plff. in Err.*,  
v.  
NATIONAL LIFE ASSOCIATION OF  
HARTFORD.

(39 C. C. A. 476, 99 Fed. 222.)

1. A claim for loss of anticipated profits may be joined with a claim for actual outlay and expenditures, in a suit for damages for breach of a contract employing a general manager of an insurance company.
2. Loss of anticipated profits may be included in a recovery for breach of a contract to employ plaintiff on commission as exclusive general agent of an insurance company for particular territory during a specified time, which may be estimated by considering the value of renewals on policies already written not shown by the company to have lapsed, and the probable future busi-

ness as indicated by that actually done by the company through other agents after the breach, the respective facilities of the two for doing the work, the probable expense, and the amount to be done.

3. In a suit for breach of contract for exclusive employment as general agent of an insurance company, in which lost profits and expenditures made on the faith of the contract are both sought, the recovery must be confined to the latter claim, unless probable profits in excess of that amount are shown.
4. Testimony of persons who have had actual experience in the transaction of insurance business, as to particulars and results of such business, may be received in an action seeking lost profits for breach of a contract for employment as general insurance agent.

(January 9, 1900.)

**NOTE.**—Loss of profits as an element of damages for breach of contract.

- I. Scope.
- II. General rules applicable to breach of all kinds of contracts.
  - a. Allowance of profits lost generally.
  - b. Right of action for.
  - c. Effect of remoteness.
  - d. Effect of speculativeness or contingency.
  - e. Effect of uncertainty in amount.
  - f. Requirement that profits should have been within contemplation of parties.
  - g. Distinction between direct and collateral profits.
  - h. Loss of subcontracts and special bargains.
  - i. General effect of preventing performance.
  - j. What amounts to prevention of performance.

- III. Contracts for services.
  - a. Breach by contractor or employee.
    1. General rules.
    2. Particular contracts.
      - a. For construction or repair of ways, bridges, public works, etc.
      - b. For construction or repair of buildings, vessels, etc.
      - c. Logging and lumber contracts.
      - d. For general service or labor.
      - e. For services as agent or attorney.

III.—continued.

- b. Breach by employer or owner.
  1. General rules.
  2. Effect of preventing performance.
  3. What constitutes prevention of performance.
  4. Particular contracts.
    - a. For railway construction.
    - b. Elevator and storage contracts.
    - c. For construction of buildings.
    - d. For construction or repair of bridges, roads, or streets.
    - e. For grading, excavating, dredging, etc.
    - f. Logging and lumber contracts.
    - g. For mechanical work.
    - h. For services or labor generally.
    - i. For real estate, insurance and loan agencies.
    - j. Contracts with salesmen and for other agencies.
    - k. Between attorney and client.
    - l. For compensation based on share of profits.
- IV. Partnership contracts.
- V. Contracts for sale or purchase.
- VI. Contracts for carriage.
  - a. Breach by shipper.
  - b. Breach by carrier.

**ERROR** to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of defendant in an action brought to recover damages for the alleged breach of a contract employing plaintiff as general agent of defendant for the state of Texas. *Reversed.*

Statement by **McCormick**, Circuit Judge:

The petition in this case shows, substantially, that the defendant, the National Life Association of Hartford, on June 6, 1894, entered into a contract in writing with Adolph J. Miller, whereby it appointed him its manager for the state of Arkansas and a part of the state of Texas, designated in the contract. This writing expressly provided that the contract then entered into might be sold, assigned, or transferred, with the writ-

ten consent of the company, and not otherwise, and provided that the contract should terminate by limitation ten years from and after the date above written. Thereafter Miller did sell, assign, and transfer this contract to the plaintiff, W. T. Wells, and one W. T. Shaw; and on March 23, 1896, the defendant expressed in writing its assent to this transfer, and by the same writing agreed to extend the time of the contract so as to run ten years from the date of this written assent. On June —, 1896, the plaintiff and Shaw, by and with the consent of the defendant, released their right under the contract to represent the defendant in the state of Arkansas; and the defendant, in lieu thereof, conceded to them all rights under the contract and agreements to solely represent the defendant throughout the entire state of Texas for and during the ten-

VI. b.—continued.

1. *Measure of damages generally.*
2. *Remoteness, contingency, and their effect.*
3. *Notice of sale and its effect.*
4. *Notice of use and its effect.*

VII. *Contracts for transmission of telegrams.*

- a. *Rule as to message in cipher, or not showing meaning.*
- b. *Rule when message is in plain terms.*

1. *The general right to recover.*
2. *Remoteness, contingency, and uncertainty, and their effect.*

VIII. *Contracts with relation to railroad and station construction.*

IX. *Agreements not to compete.*

X. *Leases and contracts and covenants with reference to.*

- a. *General rules.*
- b. *Breach of covenant to lease or renew.*
- c. *Breach of covenant to give possession.*
- d. *Breach of covenant for peaceable possession.*
- e. *Breach of covenant to repair or rebuild.*
- f. *Eviction.*
- g. *Tenancy on shares.*
- h. *Breaches by tenant.*

XI. *The charter or rental of vessels.*

XII. *Miscellaneous contracts.*

XIII. *Duty to prevent or reduce damages.*

XIV. *Deduction for release from responsibility.*

XV. *Effect of illegality in contract.*

XVI. *Conclusion.*

I. *Scope.*

This note deals with profits distinctively as such, consisting of net earnings or the excess of receipts over expenditures. Questions as to loss of rents or of wages, or income, or compensation, or property, or bargains, etc., are excluded. It covers the whole field of contracts, however, except questions with relation to loss of profits of sale or purchase, which are made the subject of another note in this series.

II. *General rules applicable to breach of all kinds of contracts.*

a. *Allowance of profits lost generally.*

The allowance of profits lost as damages for 53 L. R. A.

breach of contract is governed by the general rules applicable to damages, a recovery for a loss caused by a breach of contract depending upon whether or not the loss was the proximate or remote result of the breach, and whether it was speculative, contingent, or uncertain, and whether it was one which was or should have been within the contemplation of the parties as the natural result of the breach, as well where the loss was of profits as where it was one of property or property values, or of the use of property, the only difference arising from the increased difficulty in estimating profits owing to their greater contingency and uncertainty.

The general rule is that future profits which might have accrued upon the performance of a contract cannot be allowed in estimating damages for its breach. *Stresau v. Fidell*, 1 Tex. App. Civ. Cas. (White & W.) § 847, p. 487.

And the grounds upon which the general rule rests are that in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages, and because such loss of profits is ordinarily remote, and not the direct and immediate result of the nonfulfilment of the contract, and because frequently the engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, and cannot be implied from its nature and terms. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Varner v. Dexter Gin & Mill Co-op. Asso.* (Tex. Civ. App.) 39 S. W. 206; *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.* (Tex. Civ. App.) 44 S. W. 929.

The party charged is not presumed to have made his contract with reference to such results unless the special circumstances are communicated to him at the time, or unless they are such as he ought to have contemplated as a reasonable and probable result of the breach. *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.

A party can be held liable for breach of contract only for such damages as are the natural or necessary and immediate and direct results of the breach, such as might properly be deemed to have been in contemplation of the parties when the contract was entered into; and all remote, speculative, and uncertain results, as well as possible profits and advantages and other like consequences, which might have arisen from the fulfilment of the contract,

year period dating from March 23, 1896. On August —, 1896, the plaintiff, for a valuable consideration, purchased the entire interest of Shaw in the contract, by and with the consent and approval of the defendant, and thereby became the sole manager of the defendant for the entire state of Texas. By the terms of the contract it was made the duty of the manager to solicit and procure applications of persons to become members of the defendant company; to procure the appointment of agents in the territory under his charge, whose duty it should be to solicit applications; to forward all such applications to the home office of the company for approval or rejection by the officers thereof; to receive policies and deliver the same, and to receive the first premium; and to thoroughly inspect all business written by any agents appointed by him. It was made his

duty, and he bound himself, to account for, deliver, and pay over on demand, according to the instructions or requirement of the company, all sums of money which he might receive as premiums, advances, or otherwise, and all policies of insurance and other effects which he might receive on account of the company, whether such sums of money or other property were received by him or by any clerk, agent, or other person employed by him. He agreed that during the continuance of this contract he would devote his entire time and energies to the service therein mentioned, and would perform such other duties as should be required of him by the officers of the company in order to thoroughly develop and work the territory confided to his management. The authority of the manager and his agents was strictly limited, to the extent that neither he nor his agents

must be excluded. *Squire v. Western U. Teleg. Co.* 98 Mass. 282, 93 Am. Dec. 157.

There is nothing in the term "profits," however, which of itself excludes their being given in evidence in an action for breach of a contract, and used as a measure of damages. When excluded it is either because they are unnatural or remote, or there are no criteria by which to estimate them with certainty. *Williams v. Island City Milling Co.* 25 Or. 573, 37 Pac. 49; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177; *Cohn v. Norton*, 57 Conn. 480, 5 L. R. A. 572, 18 Atl. 595; *Fell v. Newberry*, 106 Mich. 542, 64 N. W. 474; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Iavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901; *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1097.

The rule which precludes an allowance of profits by way of damages, for the breach of an executory contract, is not a primary rule, but a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

And when loss of profits arising from a breach of contract can be proved with a reasonable degree of certainty, and such loss is directly traceable to the breach of the contract, they may be recovered in an action for the breach. *Atkinson v. Morse*, 68 Mich. 276, 29 N. W. 711; *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876; *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Robinson v. Bullock*, 66 Ala. 548; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Western U. Teleg. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177; *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 264; *Elizabethtown & P. R. Co. v. Pottlinger*, 10 Bush, 185; *Fox v. Harding*, 7 Cush. 516; *Green v. Cole* (Mo.) 24 S. W. 1058; *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Iavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901; *Starbird v. Barrons*, 38 N. Y. 230; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422; *Freeman v. Clute*, 3 Barb. 424; *Flegel v. Latour*, 81 Pa. 448; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Sabine Tram Co. v. Jones* (Tex. Civ. App.) 43 S. W. 905; *Morey v. King*, 49 Vt. 304; *Shepard v. Milwaukee Gaslight Co.* 15 Wis. 318, 82 Am. Dec. 679; *Taylor Mfg. Co. v. Hatcher*, 3 L. R. A. 587, 39 Fed. 444.

When profits form an elemental constituent 53 L. R. A.

of a contract, and their loss is the natural result of its breach, and the amount can be estimated with such certainty as satisfies the mind of a prudent and impartial person, they are allowed as damages for the breach. *Young v. Cureton*, 87 Ala. 727, 6 So. 352; *Stewart v. Patton*, 65 Mo. App. 21; *Wolcott v. Mount*, 36 N. J. L. 202, 13 Am. Rep. 438.

In *Stewart v. Patton*, 65 Mo. App. 21, *supra*, *Connoble v. Clark*, 38 Mo. App. 476, which was a case of a breach of warranty of a horse kept for breeding purposes, was distinguished upon the ground that in the present case evidence was given from which the extent of the profits could be shown with reasonable certainty.

The profits which are not allowed as damages for a breach of contract are only such as are uncertain and contingent, and not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates, or other like definite criteria. *James v. Adams*, 8 W. Va. 568; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Hoge v. Norton*, 22 Kan. 374; *Sabine Tram Co. v. Jones* (Tex. Civ. App.) 43 S. W. 905; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

The broad general rule in cases of breach of an executory contract is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; but the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, and such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422; *Wisner v. Barber*, 10 Or. 343; *Wittenberg v. Molyneaux* (Neb.) 83 N. W. 842; *Western U. Teleg. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870; *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. 86; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Hoge v. Norton*, 22 Kan. 374; *Gobet v. Municipality No. One*, 11 La. Ann. 300; *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4; *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1097; *Varner v. Dexter Gin & Mill Co-op. Asso.* (Tex. Civ. App.) 39 S. W. 206; *James v. Adams*, 8 W. Va. 568; *Benjamin v. Puget Sound Commercial Co.* 12 Wash. 476, 41 Pac. 166; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Sile-*

should make, alter, or discharge any contract between the company and others, or waive forfeiture, extend credit, or make collections of money for its account (the first premium excepted), unless he should first be provided with receipts signed by the secretary of the company. For his compensation he was to receive a specified per cent of the original and the renewal premiums charged on the different classes of insurance to be written by the company. It was expressly provided that he should receive no further remuneration for any service than as stated in the contract, and that he should not contract debts in the name of the company, unless specially authorized in writing, and that, in consideration of the specified compensation, he should pay any and all agency expenses, medical examination fees, and all license fees in the state in which he was to do business,

together with the state, county, and municipal taxes which might be required upon the first year's business or premium receipts. It was provided further that, if the manager should neglect or refuse to thoroughly develop and work the territory allotted to him, then the company, at its option, might employ other agents in any portion of the territory so neglected, without otherwise affecting the contract, and that the manager should have no claim on the business so effected by such other agent or agents so employed; that otherwise the company should not appoint other agents within his territory.

The petition avers: That the plaintiff, since he first became manager for the defendant, has devoted his entire time and energies to representing the defendant, and in carrying out and performing all of the duties de-

*mens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; *Boutin v. Budd*, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685.

And no hard and fast rule for ascertaining the profits, for the loss of which a recovery may be had in an action for breach of the contract, can be laid down. Such profits must be determined according to the circumstances of each particular case, and the subject-matter of the contract. *Silberstein v. Duluth News-Tribune Co.* 68 Minn. 430, 71 N. W. 622; *Wright v. Mulvaney*, 78 Wis. 39, 9 L. E. A. 307, 46 N. W. 1045.

But the measure of damages for breach of a contract involving the injured party in labor and expense in performance on his part is not the amount he would have received if the contract had been performed, but the profits he lost by the failure of the other party to keep the contract on his part. *Robinson v. Bullock*, 66 Ala. 548.

Nor can a party to a contract broken by the other party recover the estimated profits he would have made, if he had been permitted to perform his contract, and in addition thereto damages for loss of time. *Blood v. Herring*, 22 Ky. L. Rep. 1725, 61 S. W. 278.

And while the jury in an action for damages for breach of contract, including prospective profits, are authorized to find for the plaintiff for expenses incurred in an effort to perform the contract, where they are unable from the evidence to find profits, if they find profits they should not find expenses. *Cutting v. Miner*, 30 App. Div. 457, 52 N. Y. Supp. 288.

And one who recovers for profits which he might have made from the execution of a contract, had the contract not been broken by the other party, is not entitled to interest on his profits until they are ascertained and determined by the verdict. *Swanson v. Andrus* (Minn.) 86 N. W. 465.

#### b. Right of action for.

One who without fault on his part is prevented by the other party to a contract from performing it, or excused for nonperformance by the conduct of such party, has the right to regard the contract as broken, and to immediately sue for the damages arising from its breach. *McElwee v. Bridgeport Land & Improv. Co.* 54 Fed. 627; *Hale v. Trout*, 35 Cal. 230.

And he is not confined to the actual value of the work done, but may prosecute his action for the breach of the agreement, and may recover as damages the profits he would have

made had he been allowed to complete the work. *Cox v. McLaughlin*, 54 Cal. 605.

The injured party has an election either to treat the contract as rescinded and recover upon a *quantum meruit* so far as he has performed, or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified for performance sue to recover upon the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *McElwee v. Bridgeport Land & Improv. Co.* 54 Fed. 627; *Jones v. Judd*, 4 N. Y. 414; *Clark v. New York*, 4 N. Y. 338; *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60.

In *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773, *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 876, was distinguished upon the ground that in the case at bar the contract was for the manufacture of an article, and not for the sale of an existing article, as in that case.

But a party injured by the stoppage of a contract, who elects to rescind it, cannot recover in damages for a breach of the contract, either by way of outlay or for loss of profits. He can only recover the value of his services actually rendered, as upon a *quantum meruit*. *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

One who desires to recover special damages, such as loss of prospective profits for breach of a contract, must allege the facts and circumstances and knowledge of the situation brought home to the other party at the time the contract was entered into. *Serding v. Andrews*, 106 Wis. 78, 81 N. W. 991.

But one who brings action for breach of contract is not bound to go for profits, even though he counted for them in his petition. He is at liberty to stop upon showing losses. *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

And failure to prove profits in an action for breach of contract will not prevent the party from recovering his losses for actual outlay and expenditure. *Ibid.*

And where suit is brought by a party for the wrongful breaking up and annulling of a contract on which it is claimed large profits would have been realized, it is admissible to show, if it can be clearly made to appear, that it was impossible for the party to have completed the

volved on him by virtue of the contract to thoroughly develop and work the territory allotted to him. That from the time he first became manager for the defendant, up to the breach of the contract by it, he thoroughly worked and developed the business in all of the territory allotted to him, and has not neglected or refused to do the same. That during the time he was so engaged he had correspondence with no less than 300 sub-agents in regard to canvassing, soliciting, and securing policies of insurance for the defendant in the state of Texas, and during that time has had not less than 100 agents actively at work soliciting and securing for the defendant policies of insurance of the classes described in the contract. That the defendant is the only insurance company of the natural premium and old-line insurance companies that writes under-average insur-

ance and substandard insurance (that is, insurance upon negroes; saloon keepers; persons of over and under weights; persons of light physical impairment; debtors or creditors; persons of heart murmur; telephone, telegraph, sawmill, and railroad men and women), and that by reason thereof the plaintiff's contract with the defendant was a most advantageous and profitable one to the plaintiff, as all of these risks are much more easily procured than first-class risks or standard insurance. That up to the time of the breach by the defendant the plaintiff had fully and faithfully carried out his part of the contract, and performed all other duties required of him by the officers of the company. That he has made a scientific study of the insurance business for years, and is a person of great experience in that business, and possessed of more than ordinary push

contract had he not been interfered with, for the purpose of showing that the loss of the profits which would have been realized by the completion of the contract was attributable, in part at least, to his inability to fulfil it, and not altogether to its breach by the other party. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

But where evidence is offered in an action upon a contract, merely on the hypothesis that, although the plaintiff had not violated the contract on his part, he evidently would have been unable to complete it, for the purpose of showing that the loss of the profits were attributable, in part at least, to his own inability to fulfil it, and not altogether to the breach by the defendant, it must be shown beyond all reasonable doubt, in view of all the facts of the case, that the anticipated result must have ensued in the near future, if it had not been anticipated by the termination of the contract. *Ibid*

#### *c. Effect of remoteness.*

Profits, to be recoverable, must flow directly and naturally from the breach of contract, and must not be the remote, but the proximate, consequence of such breach. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Milton v. Hudson River S. B. Co.* 37 N. Y. 214; *Boutin v. Rudd*, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 655; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 82.

And must not embrace speculative profits or damages, which could have been avoided by reasonable exertions of the injured party. *Milton v. Hudson River S. B. Co.* 37 N. Y. 214.

Profits lost as the direct result of a breach of contract may be recovered as damages, where they are not so conjectural and remote as to be incapable of ascertainment with reasonable certainty. *Shepard v. Milwaukee Gaslight Co.* 15 Wis. 318, 82 Am. Dec. 679; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Hodges v. Fries*, 34 Fla. 63, 15 So. 682.

But possible, or even probable, profits which might have been realized had it not been for a breach of contract, are too remote for recovery as damages for the breach. *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519.

The general rule is that no damages are recoverable for a breach of contract except such as are the direct and proximate result of the breach complained of, and which must have been foreseen, and are deemed to have been taken into account by the parties at the time of entering into it. *Walrath v. Whittekind*, 20 Kan. 482.  
53 L. R. A.

The question as to whether loss of profits will be allowed as damages for breach of contract is, Would the loss of profits be the direct result of the breach, and would such loss reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract? *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1097.

And the method of arriving at the damages, by estimating the probable profits that could have been made if the contract had been performed, is too uncertain and speculative, except in cases where the possible or probable profits are the very object of the contract, and are necessarily in the contemplation of the parties. *Washington & G. R. Co. v. American Car Co.* 5 App. D. C. 524.

And the loss of any speculation or enterprise into which a party may have embarked, relying upon the proceeds to be derived from the fulfilment of an existing contract, constitutes no part of the damages to be recovered, but the profits or advantages which are the direct and immediate fruits of the contract entered into between the parties may be recovered. *Cates v. Sparkman*, 73 Tex. 619, 11 S. W. 846.

But when a contract is executory, and the time for performance has expired, and the elements out of which profits were to arise can be ascertained and proved with reasonable certainty, and especially when the compensation for performance is fixed by the agreement of the parties, the difference between the cost of performance and the compensation agreed upon may be recovered as actual damages suffered by the aggrieved party, whether they are called gains prevented or profits lost, as such damages are the direct consequences of the breach. *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. 88.

And where profits would have directly and certainly resulted if the provisions of a contract had been complied with, the refusal to perform such conditions, and the deprivation of the party injured of the profits which would have resulted therefrom, are a direct injury properly measured by the amount of such profits. *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 264; *Morey v. King*, 49 Vt. 304.

And profits which are the legal and natural result of a contract, though to some extent contingent, are not too remote to be recovered, —especially where they are such as may be fairly and reasonably considered as arising, either naturally from the breach of the contract itself, or as may reasonably be supposed to have been in the contemplation of both parties at the time they entered into the contract

and energy, tact and sagacity, and is in every way well fitted for the duties that devolved upon him under the contract. That at the time he purchased the contract he paid therefor \$1,500 in cash, with the knowledge and consent of the defendant. That the contract could not have been purchased for less money, and that the price paid for it was reasonable. That in order to put the business of the defendant on a firm footing in Texas, so as to readily procure applicants to take policies in that company, it was necessary to advertise the same, and to place the merits thereof before the people of Texas, and that in order to do this he had many thousands of circulars printed, setting forth the advantages of the company, and the benefits to be derived therefrom by those who would take policies therein. That he had these circulars distributed all over the state of Texas; send-

ing them to many thousands of persons who would be likely to take insurance in the company, and especially to a great many insurance agents. That, in addition to his correspondence with a great many insurance agents in different parts of Texas, and his employment of over 100 men to work under him to solicit and sell insurance for the defendant company in that state, he was compelled to go in person to different cities of the state, and see the agents, and give them proper instructions for procuring applicants for insurance in the defendant company, and was compelled to incur reasonable expenditures incident to such traveling and establishing subagencies for the defendant company. That the publication and distribution of such literature, the cost of postage and stationery to send the same, and his traveling expenses incurred, amounted to the rea-

as a probable result of a breach of it. *Stewart v. Lanier House Co.* 75 Ga. 582.

As to what constitutes remoteness which will affect a recovery, see *infra*, II. g.

And see also *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1097,—*infra*, II. d; *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718,—*infra*, II. e; *Somers v. Wright*, 115 Mass. 298,—*infra*, II. f.

#### d. Effect of speculativeness or contingency.

Profits to be recovered for breach of contract must not be conjectural or speculative in their nature, or dependent upon the chances of business or other contingencies, and must have some reference to the nature of the contract and breach complained of. *McKinnon v. McIlwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828.

In simple breaches of contract, the nature of the thing admitting of certainty and precision, the plaintiff is not entitled to damages for fancied or probable advantage he might have derived from his contract. *McWhirter v. Douglas*, 1 Coldw. 591.

And profits which are speculative and conjectural, and cannot be measured by the usual rules of evidence to a reasonable degree of certainty, are not recoverable as damages in actions for breach of contract. *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 614, 44 Pac. 621; *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60; *Atkinson v. Morse*, 63 Mich. 276, 29 N. W. 711; *Dorlocourt v. Lacroix*, 29 La. Ann. 286; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. 398; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Milton v. Hudson River S. R. Co.* 37 N. Y. 214; *Hendrick v. Stewart*, 1 Overt. 476; *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876; *Western U. Tele. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 649; *McWhirter v. Douglas*, 1 Coldw. 591; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Priestly v. Northern Indiana & C. R. Co.* 26 Ill. 205, 79 Am. Dec. 369; *Olmstead v. Burke*, 25 Ill. 86.

And they are not generally regarded as an element in estimating damages for breach of contract. *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28.  
53 L. R. A.

When a claim is made for damages arising from breach of contract, and evidence is offered to show losses of profits which might have been realized from a performance of the contract, the question to be determined is, whether the damages claimed are too conjectural, speculative, or contingent to form a safe basis for estimating damages. *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. 88.

And damages for breach of contract can only be recovered when they are averred and proved as the natural, direct, and certain result of the breach, excluding probable profits and prospective or speculative damages. *Jones v. Nathrop*, 7 Colo. 1, 1 Pac. 435; *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901.

The jury cannot be permitted to speculate whether damages have or have not been occasioned, and where it is uncertain whether there has been a loss of profits by a violation of the contract in suit, none can be recovered. *Leach v. New York, N. H. & H. R. Co.* 89 Hun, 377, 35 N. Y. Supp. 306.

And loss of profits, though the natural and probable result of a breach of a contract, and though they may be reasonably anticipated therefrom, will not warrant a recovery where they are so speculative and so contingent that their amount is not susceptible of proof with any reasonable degree of certainty. *Central Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293.

The general rule is that speculative profits are too remote to be included in the estimate of damages in an action on contract, because they are not presumed to have been contemplated by the parties at the time. *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.

And damages for supposed profits, based upon speculative opinions of witnesses, will not be allowed. *Dorlocourt v. Lacroix*, 29 La. Ann. 286; *Gobet v. Municipality No. One*, 11 La. Ann. 300.

Profits are considered uncertain, and not recoverable, where they are purely speculative in their nature, and depend upon so many incalculable contingencies as to make it impracticable to determine them definitely by any trustworthy mode of computation. *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52.

And if a contract was made with reference to embarking in a new business, such as sawing lumber for market, the speculative profits which might be supposed to have arisen therefrom, but which were defeated because of a breach of the contract, which delayed the business, cannot be looked to as an element of damages, as they are dependent largely upon other



sonable sum of \$1,000, made up as follows: Expended for postage, \$700; for printing circulars and stationery, \$100; and for traveling expenses, \$200. That, from the time he acquired the contract until the same was breached by the defendant, he gave all of his time to the faithful performance of the services required, and that for the period thus engaged, namely, ten months, his services were reasonably worth \$250 per month, making for the ten months \$2,500, which is an entire loss to the plaintiff, by reason of the defendant's breaching its contract. That it was necessary to do a great deal more work during the first twelve months after the plaintiff acquired the contract, in order to establish the company in Texas, than at any other time thereafter. That during the time of the plaintiff's service he did succeed in writing about \$150,000 of insurance for

the defendant company, and applicants in Texas acquired policies of insurance in the defendant company, aggregating that amount by and through his efforts prior to the date of the breach of the contract by the defendant, and while he was advertising the company and establishing agencies. That the greater part of the insurance thus written by him were rejected risks from the Hartford Life & Annuity Association and from other insurance companies. That the business of the defendant company in Texas was daily increasing, and that after the date of the breach of the contract by the defendant, by reason of the premises in his petition alleged, it would have involved comparatively little trouble and expense for the plaintiff to have fully performed his contract in Texas for the remainder of the ten years, and to have constantly increased the amount of business, aft-

contingencies. *Vicksburg & M. R. Co. v. Bagdale*, 46 Miss. 458.

Nor does the law contemplate indemnity for the loss of profits a party supposes he would have derived from some business he claims he would have pursued if he had not made the contract alleged to have been violated. *Rigney v. Monette*, 47 La. Ann. 648, 17 So. 211.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat or the use of machinery, etc., are not only susceptible of more exact and definite proof, but would as a general rule be found to be a more exact measure of the damages sustained, in actions for a breach of the contract, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits, just as the ordinary rate of interest is a more accurate measure of damages sustained in consequence of the nonpayment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, *dictum*.

So, in *State v. Ward*, 9 Heisk. 132, it was said that the plaintiff in an action for breach of a simple contract is not entitled to damages for any fancied or probable advantage he might have derived from his contract. But the case was one of loss of property, and not loss of profits.

But the law contemplates, in case of contracts broken, two elements of damage, first, losses sustained, and second, gains prevented. *Bulkley v. United States*, 7 Ct. Cl. 547.

And while profits when contingent or speculative, or when their loss is not the natural and proximate result of the breach of a contract, are not recoverable, they are allowed when they form a constituent element of the contract, and the amount can be estimated with reasonable certainty from established data. *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601.

Whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of market and the chances of business, to constitute a safe criterion for an estimate of damages. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

In the above case it was said that *Master-ton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38, which is a leading case with reference to sale of articles to be manufactured, simply goes to support the other branch of the rule; namely, that profits are allowed where they do not depend upon the chances of trade, and upon the market value of goods, the price of labor, the

cost of transportation, and other questions of a like nature, which can be rendered reasonably certain by evidence.

And the court commented on, and explained, *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250, *infra*, III. b, 2, b, saying that it must have proceeded upon the ground that the profits claimed were subject to too many contingencies, and too dependent upon the fluctuations of market and chances of business, to constitute a safe criterion for an estimate of damages; and the damages must have been disallowed, because they consisted of profits depending, not, as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of freight, and many other contingencies.

Conjectural profits are not allowed for breach of contract, not for the reason that profits are prescribed, but because they are uncertain. If profits become sufficiently certain, and are the direct result of the breach, and the parties are in possession of such facts as would charge them as reasonably intelligent men with the probable consequences of the breach, they may be recovered. *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1097.

And the profits of a regular and established business, the value of which may be ascertained, are not contingent and speculative in the sense that excludes profits from the consideration of the jury as an element of damages in an action for breach of contract. *Gobel v. Hough*, 26 Minn. 252, 2 N. W. 847; *Lovens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901.

And where a party undertakes to perform a contract within a reasonable time, and fails to do so, and the other party claims for profits he would have made had the contract been performed, the jury in an action for the breach is not bound to adopt any specific contract that may have been made, but may assess damages for profits, if reasonable evidence is given that the profits would have been made as claimed. *Waters v. Towers*, 8 Exch. 401, 22 L. J. Exch. N. S. 186, 20 Eng. L. & Eq. 410.

While a person seeking to recover for breach of a contract from which a share of the profits of a business would have accrued cannot recover damages which are uncertain, speculative, and contingent, he is not required to prove, either that profits would have accrued, or the amount of them, by any other or higher evidence than one is compelled to produce in any other civil action; if he makes it appear by a fair preponderance of the evidence that profits would have resulted from a continuance of the business, and produces such evidence as

er having so advertised the company, established agencies, and placed the business of the defendant on a solid basis in the state. That, notwithstanding the facts in the premises, the defendant did on December —, 1896, violate and breach its contract, in the following flagrant manner, to wit: It did on that date, without the knowledge and consent of the plaintiff, employ the Hartford Life & Annuity Association, and the firm of Harris & Patterson, of the city of Dallas, insurance agents, and a great many other agents and insurance companies doing business in the state of Texas, to solicit and procure applicants for policies of insurance for the defendant, and especially to procure substandard risks or insurance for it, and to solicit and procure applications of persons to become members of or policy holders in the defendant company, and did on that date,

and since that time, through these other agents, issue, without the knowledge and consent of the plaintiff, a great many policies of insurance to persons in the state of Texas, and did on that date, without the knowledge and consent of the plaintiff, employ said insurance companies and agents to become permanent representatives and agents for the defendant, in direct opposition to the plaintiff, and to procure applicants for substandard and other insurance, and to deliver policies thereon for it in that state, and agreed with the first-named company, the Hartford Life & Annuity Association, that the defendant would not employ or seek to employ any agent employed by that company, or accept business offered to the defendant by or through any such agents, thereby depriving the plaintiff of the services of the agents who were at and prior to that time in the employ-

would authorize the court upon legitimate and proper inferences to ascertain the amount of profits which would have been made, he is entitled to recover them. *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901.

The rule that the probable profits to be derived from the performance of a contract are too speculative and uncertain to form a safe basis for the recovery of damages for a breach of such contract is only true in cases in which a safer and more certain rule can be applied. *Brincefield v. Allen* (Tex. Civ. App.) 60 S. W. 1010.

And whenever the estimate of profits must be somewhat conjectural, the damages allowed should be moderated, so as to allow for any partial uncertainty that may exist. *Seaton v. Second Municipality*, 3 La. Ann. 44.

It is for the court, and not for the jury, to determine what in any case is the proper rule of damages, and whether damages are speculative, and whether or not profits can be recovered as damages in an action on contract. *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 71, 24 N. W. 344.

On this subject, see also cases set forth *supra*, II. c. and *infra*, II. e.

And on the question as to what constitutes contingency or speculativeness which will affect a recovery, see *infra*, II. g.

#### e. Effect of uncertainty in amount.

The allowance of profits for breach of a contract when not excluded as unnatural or remote is wholly a question of the certainty of proof, and whenever a gain prevented is provable it may be recovered. *Joske Bros. v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. 586.

Damages claimed from a loss of profits for breach of an executory contract, though the ordinary and natural or even necessary result of the breach, must be rejected, if in their nature they are uncertain. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

And where the measure of damages for the breach of a special contract is the loss of profits, and there are no allegations showing what the profits would be, there can be a recovery for nominal damages only. *Singer Mfg. Co. v. Potts*, 59 Minn. 240, 61 N. W. 23.

So, to entitle a defendant sued upon contract to a reduction of the recovery in the way of a recoupment of damages for the partial failure of the plaintiff to perform on his part, the damages claimed must be capable of computation with reasonable certainty and precision, and such as might be recovered in a cross action. *Pettes v. Tennessee Mfg. Co.* 1 Sneed, 381. 53 L. R. A.

The requisite to the allowance of profits as damages for a breach of contract is some standard, as regular market values or other established data, by reference to which the amount may be satisfactorily ascertained. *Hodges v. Fries*, 84 Fla. 63, 15 So. 682.

And loss of profits in a business cannot be allowed unless the data of estimation are so certain and definite that they can be ascertained reasonably by calculation. *Texas Mexican R. Co. v. Willis*, 3 Tex. App. Civ. Cas. (Willson) § 71, p. 94; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

Courts refuse to allow them when they are remote, imaginary, or impossible of ascertainment, but not where they are immediate, and there are criteria by which an estimate of their amount, approximately accurate, can be made. *Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177; *Cohn v. Norton*, 57 Conn. 480, 5 L. R. A. 572, 18 Atl. 595.

Damages for the loss of a contract may be recovered where the plaintiff has been prevented from performing it by the default of the defendant, but there must be evidence from which such damages can be estimated. *Lentz v. Choteau*, 42 Pa. 433.

A person complaining of a breach of a contract, however, is not deprived of the right to recover for profits, with a view to which the contract was made, because they are to some extent uncertain and problematical. *Wakeman v. Wheeler & Willson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.

The rule that speculative damages cannot be recovered applies where it is uncertain whether damages were sustained at all from the breach or not, and not to such as are merely uncertain in amount. *Trigg v. Clay*, 28 Va. 330, 13 S. E. 434; *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647; *Myers v. Sea Beach R. Co.* 43 App. Div. 573, 60 N. Y. Supp. 284.

Proof of amount to a reasonable certainty is sufficient. *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. 191; *Taylor Mfg. Co. v. Hatcher*, 3 L. R. A. 587, 39 Fed. 440.

Especially where, by the action of the party at fault, the profits of a contract entered into by him, which would accrue to the other party, have been prevented. *Taylor Mfg. Co. v. Hatcher*, 3 L. R. A. 587, 39 Fed. 440.

Where a person has violated a contract, he cannot be permitted to escape liability because the amount of the damage which is caused is uncertain; and prospective profits, so far as they can properly be proved, and which would certainly have been realized but for the default, are allowable as damages, though the amount is uncertain. *Myers v. Sea Beach R. Co.* 43

ment of the plaintiff, and depriving him, also, of his commissions and renewals on said insurance, and wilfully violating the most material provisions of his contract, and flagrantly breaching the same, to the great damage of the plaintiff. That, after the defendant had so breached the contract, it employed Adolph J. Miller, and many other agents and agencies, whose names are unknown to the plaintiff, in Texas, to solicit applications and to sell insurance for it, and to do the work that the plaintiff could and would have done, were it not for said breach. That the defendant, through its agents and agencies, after the date of the breach, procured applicants for policies in the defendant company, and delivered policies to persons in Texas to the amount of about \$1,000,000 prior to the time of the filing of this petition, and the premiums on all of said

policies, as stipulated in said contract, were for the first year collected by the defendant and its said agents. That by the terms of the contract the plaintiff could and would have written such insurance, and have collected on all the same an average of \$20 premium per \$1,000 the average amount charged and required by the defendant, in accordance with said contract, as premium therefor for the first year of said insurance, and said premium has been and will be collected by the defendant on said policies for each year after the first year, and that by the terms of his contract he would have earned and been entitled to receive an average of 70 per cent of the first year's premiums on all of said insurance, to wit, the sum of \$14 on the \$1,000, as provided by the contract. That the costs and expenses of every nature whatever in procuring and writing

App. Div. 573, 60 N. Y. Supp. 284; *Stowell v. Greenwich Ins. Co.* 20 App. Div. 188, 46 N. Y. Supp. 802.

And in such a case it is proper to call the attention of the jury to the subject-matter of the contract, its conditions, and consequences which resulted from its breach, and permit the jury to say what was its actual value to the party injured. *Stowell v. Greenwich Ins. Co.* 20 App. Div. 188, 46 N. Y. Supp. 802.

And where it appears that damages have been caused by the breach of a contract, but the amount thereof is uncertain and incapable of ascertainment by computation or by direct evidence, the injured party is entitled to recover for such loss of profits as he can show to be the direct result of the breach. *Leach v. New York, N. H. & H. R. Co.* 89 Hun, 377, 35 N. Y. Supp. 305; *Laubach v. Heaver*, 79 Md. 413, 29 Atl. 1036.

So, where it is certain that some loss has been sustained or damage incurred in the way of loss of profits from a breach of contract, and that such loss or damage is the direct, immediate, and natural consequence of the breach of contract, but the amount of the damage may be estimated in a variety of ways, the law uniformly adopts that way of estimating damages which is most definite and certain. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

Likewise, probable profits which might have been received, not remote or merely speculative, may be allowed in proof, when the damages are not susceptible of estimation, not as a measure of damages, but to aid the jury in estimating the damages. *Niagara F. Ins. Co. v. Greene*, 77 Ind. 594.

And he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced, of devising a perfect measure of damages. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

And where the misconduct of the defendant in an action for breach of contract has rendered proof of damages difficult, the court will not be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits; but such profits cannot be recovered where there are no substantive facts proved from which the necessary inferences can be drawn. *Cutting v. Miner*, 30 App. Div. 457, 52 N. Y. Supp. 288.

That it cannot be demonstrated to a mathematical certainty what profits would or would not have come from a certain source or business is no objection to their recovery in an action for breach of contract; and the fact that a finding of profits rested upon probability only, or was made by drawing inferences from cir-

cumstantial evidence, would not render it improper, if, upon the evidence as a whole, there was a balance of probability in favor of the recovery. *Salinger v. Salinger*, 69 N. H. 589, 45 Atl. 558.

Where, however, a breach of contract is shown for which the loss of profits is recoverable as damages, but the damages are not established with legal certainty, the judgment against the party injured should not be final; it should be one of nonsuit only. *Smith v. Thielan*, 17 La. Ann. 239.

So, the tortious refusal of a party to a contract to perform it authorizes the other party to show, in order to prove with reasonable certainty what the profits would have been, the particular facts which transpired, and the entire transaction on which the claim and expectation of profits is founded. *Taylor Mfg. Co. v. Hatcher*, 8 L. R. A. 587, 39 Fed. 440.

One who seeks to recover for the loss of profits on account of a breach of contract has the burden of showing by proof, both his right to recover, and the measure or extent of the injury for which he demands compensation, and the fact that the contemplated profit would have been realized but for the breach complained of, and the amount thereof. *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. 191; *Ramsey v. Holmes Electric Protective Co.* 85 Wis. 174, 55 N. W. 391.

And where the evidence shows nothing beyond proof of gross receipts, no recovery can be had. *Ramsey v. Holmes Electric Protective Co.* 85 Wis. 174, 55 N. W. 391.

A claim for damages, consisting of the profits which would have accrued upon a contract, but which were lost from a breach thereof, the contract having been performed up to the date of an assignment for the benefit of creditors, is not provable as a debt under the assignment. *Re Adams*, 15 Abb. N. C. 61.

On this subject, see also cases set forth *supra*, II. c, and II. d.

And see *Texas Mexican R. Co. v. Willis*, 3 Tex. App. Civ. Cas. (Willson) § 17, p. 94, *infra*, II. f.

#### 1. Requirement that profits should have been within contemplation of parties.

The general rule that a party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, is subject to the condition that the damages shall be such as may reasonably be supposed to have been fairly within the contemplation of the parties to the contract at the time it was made. *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E.

said insurance, and paying the subagents for their work, would have amounted to not exceeding 50 per cent of the gross amount of the first year's premiums, leaving net profits to the plaintiff of \$4 on the \$1,000, and that by reason of the premises there is due to the plaintiff as commissions on said policies so procured and issued by the defendant, and which could and would have been procured by the plaintiff since said breach, the sum of \$4,000. That the policy holders who actually took insurance by and through the efforts of the plaintiff, and through the efforts of the defendant and its agents, after the breach of the contract, have paid the annual premium to the defendant on said policies for the first year, and will continue to pay the premiums on said policies for each and every year thereafter for the period of at least ten years from the date of such policies, and that

by reason of paying the premium for the first year, or "renewing the insurance," as it is commonly called, the plaintiff would have been entitled to and have earned by virtue of his contract the sum of \$2.50 as renewals on each \$1,000 of insurance, according to the face value of the policies, for all policies renewed or continued by the insured each year after the first year, and that by reason thereof he is entitled to renewals on all of the policies already written and issued by the defendant to persons in Texas since March 23, 1896, to the date of the filing of his petition, for and during the period of ten years after the respective dates of the first anniversary thereof, in accordance with the contract, aggregating the sum of \$20,000, by reason of the breach of the contract.

The plaintiff prays damages in the sum of \$5,000 on account of his expenditures and

58; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Western U. Tele. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 649; *Gobet v. Municipality No. One*, 11 La. Ann. 300; *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647; *Benjamin v. Puget Sound Commercial Co.* 12 Wash. 476, 41 Pac. 166; *Boutin v. Rudd*, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685.

This was the rule of *Hadley v. Baxendale*, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 26 Eng. L. & Eq. 398, 2 C. L. Rep. 517, which since its decision has been the leading case, or at least the case most frequently cited, not only on the question of profits as damages, but also on all questions of consequential damages.

Loss of profits in a business cannot be allowed as damages unless the data of estimation are so certain and definite that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract, or by explanation of the circumstances at the time the contract was made, that such damage would ensue from nonperformance. *Texas Mexican R. Co. v. Willis*, 3 Tex. App. Civ. Cas. (Willson) § 71, p. 94; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

Loss of profits which are the natural and probable result of a breach of contract, and which the parties may have reasonably anticipated as the effect of the breach under the particular circumstances of the case, which were known to them when the contract was made, and those only, may be recovered in an action upon the contract. *Central Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293; *Pettee v. Tennessee Mfg. Co.* 1 Sneed, 381.

A party is not entitled, in seeking compensation for the loss of gains upon a breach of a contract by the other party, to the benefit of, or to be indemnified against, a contract made with a third person, not in the contemplation of the parties when the agreement was made. *Devlin v. New York*, 63 N. Y. 8.

The general rule in all actions on contract is to limit the recovery to an indemnity for the actual injury sustained without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended upon the defendant's punctual performance, and that he had assumed to make good such a loss also. *Staats v. Ten Eyck*, 3 Cal. 116, 2 Am. Dec. 254.

But while profits of a future transaction are as a general rule regarded as too remote to be taken into account in the estimate of damages 53 L. R. A.

for breach of contract, the loss of profits claimed, which must necessarily and directly arise from the breach, and which must have been contemplated by the parties when the contract was made, may be recovered. *Somers v. Wright*, 115 Mass. 298; *Fell v. Newberry*, 106 Mich. 542, 64 N. W. 474; *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785.

Where the situation of the parties to a contract is such that, supposing their attention to have been directed to the contingency, they must have perceived at the time of making it that its breach would probably result in the loss of definite profits of an ascertainable nature, the compensation which the law affords to the injured party for a breach of the contract will embrace such profits. *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425, 36 N. J. L. 262, 13 Am. Rep. 438.

And where a contract is entered into with a view to future profits, such profits are to be deemed to be within the contemplation of the parties, and are recoverable in an action for a breach of the contract. *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.

So, profits may be recovered as damages for the breach of a contract where they are not uncertain or remote, or where from the terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time the contract was made. *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500.

And if the special circumstances under which a contract was made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, and which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from a breach of contract under the special circumstances so known and communicated. *Starbird v. Barrons*, 38 N. Y. 230; *Boutin v. Rudd*, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685.

And in such case both the consequences naturally following from the breach, and such consequences as seem natural in the light of special circumstances communicated at the time, can be recovered. *Boutin v. Rudd*, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685.

The Louisiana statute (Rev. Civ. Code, 1934), providing that damages due to a creditor for breach of an obligation are the amount of the loss he has sustained and the profits of which he has been deprived, and that when the debtor has been guilty of no fraud or bad

the value of his services as set out in his petition, and for the sum of \$24,000, loss of profits, based upon insurance actually written by the defendant since its breach of its contract, which the plaintiff could have written but for that breach, and by reason of the loss of renewals upon all the insurance so written, as well as that written by the plaintiff prior to the breach. This petition was filed on September 9, 1898.

On November 22, 1898, the defendant submitted a general demurrer and sixteen special exceptions. On November 25th the parties filed a written stipulation "that the jury is waived." The judgment recites that "this cause was regularly called for trial on November 25th, and, the jury having been waived, the matters of fact as well as of law were submitted to the court, who, after hearing the pleadings, evidence, and argument of

counsel, took the cause under advisement." Except so far as it may be shown by the formal recitation in the judgment, it does not appear that any evidence was offered by either party, and there is no minute entry, other than the final judgment, of any action by the trial court on the demurrer and exceptions submitted by the defendant. In the final judgment it is further recited that "the court, having duly considered this cause, is of opinion that special exceptions Nos. 2, 5, 7, and 8, of the defendant to the plaintiff's petition are well taken . . . and, it appearing to the court that the exceptions sustained in this cause reach the foundation of the plaintiff's claim," the cause was dismissed, and judgment rendered against the plaintiff and the sureties on his cost bond for all costs incurred in the cause. It appears from the one brief bill of exceptions in

faith he is liable only for such damages as were contemplated by, or may reasonably be supposed to have entered into the contemplation of, the parties at the time of the contract, is to be strictly construed, and only such damages will be awarded thereunder as will fully indemnify the creditor, disallowing speculative profits, confining the allowance to the immediate and direct consequences of the breach. *Schlieder v. Dieleman*, 44 La. Ann. 462, 10 So. 934.

And by La. Civ. Code, art. 1928, when the object of a contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of loss he has sustained and the profits of which he has been deprived, except that, where the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated by, or may reasonably be supposed to have entered into the contemplation of, the parties at the time of the contract. *Goodloe v. Rogers*, 9 La. Ann. 273, 61 Am. Dec. 205, 10 La. Ann. 631.

And loss of profits are not allowed to be assessed as damages in Tennessee, unless expressly provided for in the contract broken, and then all uncertainty, both as to the object of the contract and the amount of damages, must be removed by the contract itself. *Allison v. Tennessee Coal, I. & R. Co.* (Tenn. Ch. App.) 46 S. W. 348.

Whether the circumstances from which a loss results or a gain is prevented are or are not ones which may be reasonably considered to have been in the contemplation of the parties, is from the necessities of the case an introductory question, upon which the judge in an action for breach of contract must in the first instance decide before either evidence of losses suffered or gains prevented can be given to the jury, and if he admits the evidence he should instruct the jury to lay it out of their consideration if they should be of a different opinion as to the preliminary matter. *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521.

It has been held, however, that where the defendant in an action for breach of contract is aware that there is a contract in existence with reference to the subject-matter thereof, the loss which is occasioned by the plaintiff's inability to perform that contract constitutes damages which naturally flow from the breach. *Prior v. Wilson*, 1 L. T. N. S. 549, 8 Week. Rep. 260.

In the above case *Hadley v. Baxendale*, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 C. L. Rep. 517, 26 Eng. L. & Eq. 398, *supra*, was explained by Crompton, J., saying that no more is meant by the decision in that

case than that the damages must be such as naturally flow from the defendant's breach of contract.

And in *Hamilton v. Magill*, Ir. L. R. 12 C. L. 186, it was said by Pailes, C. B., that the rule as stated in *Hadley v. Baxendale*, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 C. L. Rep. 517, 26 Eng. L. & Eq. 398, is not strictly accurate, and that generally when parties enter into a contract they do not contemplate its breach or the probable result of that breach, and that therefore the rule intended to have been laid down would be more accurately expressed by stating that the damages recoverable are such as might arise naturally according to the course of things from the breach of the contract itself, or from such breach committed under circumstances in the contemplation of both the parties at the time of the contract.

As to the question of what profits will be deemed to have been within the reasonable contemplation of the parties, see *infra*, II. g.

#### g. Distinction between direct and collateral profits.

The line of distinction between profits which are remote, consequential, or not within the contemplation of the parties, and therefore not recoverable, and those which are proximate and absolute and certain, and within the contemplation of the parties, seems to rest in the question whether they are to arise directly out of the contract in question or its subject-matter, and to constitute the immediate fruits of the contract, or whether they are to result from collateral engagements or enterprises.

Thus, while, as a general rule, loss of profits affords no basis for awarding damages for breach of contract, the rule does not apply where the anticipated profit was to have been realized directly from the contract in question, by the very terms of which the party was to realize the profits which he claims to have lost by the breach. *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. 191; *Thomson-Houston Electric Co. v. Durant Land Improv. Co.* 144 N. Y. 34, 39 N. E. 7; *Hoy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628; *Wisner v. Barber*, 10 Or. 343.

Such profits are not consequential in the sense in which consequential damages are said to be too remote for recovery, but are in the immediate contemplation of the parties when the contract is made, and recoverable for its breach. *Hoy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628; *Wisner v. Barber*, 10 Or. 343; *Elizabethtown & P. R. Co. v. Pottinger*, 10 Bush, 185.

The rule that profits which would have been derived from the performance of a contract can-

the record that the court sustained the seventh of the defendant's special exceptions before acting on the others. It shows that, in sustaining this exception, the court ordered the plaintiff (orally, of course, as no minute entry thereof appears) to make an election as to whether he would ask for damages for the loss of profits alleged to have been sustained by him by reason of the alleged breach of the contract, and only such profits, or whether he would relinquish his prayer for such profits, and ask merely for the alleged damages occasioned by the alleged breach, based upon the amount alleged to have been paid by him, with defendant's knowledge, for the contract, together with the necessary expenses alleged by him to have been incurred in preparing to carry out the contract, and the reasonable value of his services in so doing (the court holding the petition to be de-

fective, in that it prayed for both classes of damages), and required that the plaintiff eliminate absolutely from his pleadings either his prayer for damages based upon the profits lost, or his prayer for damages based upon the expenditures incurred and the value of his services, to which action of the court the plaintiff excepted. The bill of exception further shows that thereupon the plaintiff asked leave to amend his petition so that the prayer thereof should read as follows: "Plaintiff prays for judgment for damages by loss of profits resulting from said breach in the sum of, to wit, \$24,000, based upon said insurance actually written by the defendant, as hereinbefore alleged, since said breach, and which plaintiff could have written but for said breach, and the renewals upon such insurance, as well as upon the renewals on the insurance written by plaintiff

not be recovered, only applies where such profits are contingent upon some other operation; profits which certainly would have been realized but for the default are recoverable. *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434.

Where extraordinary special damages, such as the loss of profits in a business, are allowed, they must have been incidental to the breach of contract sued for, in such sense as to have been contemplated by the parties at the time the contract was made. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

The general rule is that a party to a contract may show, if he can, that he has suffered some damage by a breach of it, either in gains prevented or losses sustained, whenever such gains or losses directly relate to, or arise out of, the subject-matter of the contract, and are not something collateral thereto. *Hunt v. Oregon P. R. Co.* 1 L. R. A. 842, 36 Fed. 481.

Remote and speculative profits, incapable of clear and direct proof, cannot be recovered in an action for breach of contract, but when they are the direct and immediate fruits of the contract they are then part and parcel of the contract itself, entering into and constituting a portion of its very elements, and are recoverable in an action for the breach. *Taylor Mfg. Co. v. Hatcher*, 3 L. R. A. 587, 39 Fed. 440; *Elizabethtown & P. R. Co. v. Pottinger*, 10 Bush, 185; *Waco Tap R. Co. v. Shirley*, 45 Tex. 355, *dictum*; *Blood v. Herring*, 22 Ky. L. Rep. 1725, 61 S. W. 278.

Whenever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains or speculations or states of the market, or collateral contracts made on the faith of the principal contract, is referred to, and not the difference between the agreed price of something contracted for and its ascertainable cost or value. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 344, 14 L. ed. 173; *Waco Tap R. Co. v. Shirley*, 45 Tex. 355, *dictum*.

And the loss of profits which might have been earned is not too uncertain and speculative in its character for recovery as damages, where either the contract sued on or the collateral contract, where the responsibility for its breach is fixed upon the defendant, consists of undertaking to do specific work for a specified price; and this is true even though in the performance of that work machinery as well as labor may be employed. *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25.

But the profits that may be considered in giving damages for a breach of contract are such only as are the direct and immediate fruits of the contract entered into, and loss of profits 53 L. R. A.

that may result from collateral enterprises are regarded as too remote to be considered. *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. 168.

And where, as a mode of arriving at the exact damages or sum due for a breach of contract, the contract contemplates that other data or proof besides those furnished by the instrument itself are to be resorted to, but what those are to be is not shown in the writing or elsewhere, the attempt to enlarge upon the amount of damages which can be drawn from the contract itself is a departure from the bounds of certainty into the fields of speculation and conjecture. *McWhirter v. Douglas*, 1 Coldw. 501.

Whenever in actions *ex contractu* it is purely problematical whether any profits would have been realized at all had the contract been completed, by reason of contingencies which might never happen, or where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contract, then, without regard to any uncertainty as to mere amounts, probable profits cannot be recovered because too speculative, indefinite, and remote. *Lanahan v. Heaver*, 79 Md. 413, 29 Atl. 1036.

Profits to be recoverable must be the direct and immediate fruit of the contract in question, and must be independent of any collateral agreement or enterprise entered into in expectation of the performance of the principal contract. *Kelly v. Miles*, 26 Jones & S. 495, 12 N. Y. Supp. 915; *Morey v. Metropolitan Gaslight Co.* 6 Jones & S. 185; *Western U. Teleg. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136.

If they cannot be traced directly to the breach of contract or duty, or are not the immediate result of the breach, they are regarded as too remote, uncertain, and unreliable to form the basis of damages. *Morey v. Metropolitan Gaslight Co.* 6 Jones & S. 185; *Harper v. Weeks*, 80 Ala. 577, 8 So. 39.

Damages claimed for loss of profits for breach of an executory contract, though they may be definite and certain and purely consequent upon the breach of contract, cannot be recovered if they are such as would not naturally flow from such breach, but for some special circumstance collateral to the contract itself or foreign to its apparent object. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

And damages arising from the loss of presumable profits of a speculation that was never made are too uncertain to warrant a recovery in an action for a breach of contract. *Bohn v. Cleaver*, 25 La. Ann. 419.

Future profits are rejected as speculative and too remote, where they are entirely collateral to

prior to said breach. But if, for any reason the court should be of the opinion, after hearing the evidence, that plaintiff is not entitled to judgment for damages based upon the loss of said profits, then he prays that he have judgment for his damages in the sum of, to wit, \$5,000, based upon the sum paid by him for said contract, to wit, \$1,500; his expenses incurred in preparing to carry out said contract, to wit, \$1,000; and the reasonable value of his services in carrying out the same, as hereinbefore set forth,"—which amendment the court refused to allow, and required that the plaintiff eliminate absolutely from his pleadings either his prayer for damages based upon profits lost, or his prayer for damages based upon said expenditures and the value of his services as aforesaid, to all of which action of the court the plaintiff excepted. And without waiving his

exceptions, and in obedience to the order of the court, the plaintiff then, under protest, amended his petition by striking out so much thereof as prayed for damages based upon the expenditures made by him in preparing to carry out, and in carrying out, his contract, and upon the reasonable value of his services, and the amount paid for the contract, except such part thereof as corresponded with the unexpired term of the contract (that is to say, amended the same so as to pray only for damages for loss of profits, and such part of the \$1,500 paid for the contract as corresponded with the unexpired term of the contract), which last amendment, though not actually written in the petition, was considered as having been written therein by both parties to the case, and agreed to by the court, and was so considered by the court. After the petition had been amended as just

the subject-matter of the contract in suit, and not consequences flowing in a direct line from the breach of such contract. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

And not brought to the notice of the contracting parties, and not therefore within their contemplation or that of the law. *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52.

And calculations as to prospective profits in other enterprises which a party would have engaged in had his contract with the defendant been fulfilled are altogether too remote to form a basis of damages occasioned by the breach of the latter contract. *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519; *Fox v. Harding*, 7 Cush. 516; *Horne v. Wood*, 16 Barb. 396; *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 88.

So, under the civil law, which is more liberal, as well as under the common law, in the measure of damages for the violation of an executory contract the allowance for loss of profits is confined to the particular thing which is the object of the contract, and does not include such loss of profits as may have been incidentally occasioned in respect to the other affairs of the party injured. *Western U. Teleg. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136.

#### b. Loss of subcontracts and special bargains.

Subcontracts and special bargains, entered into on the faith of the principal contract or otherwise, are distinctively collateral, and not directly within the rules laid down *supra*, II. g. Such contracts and bargains, however, may be made direct, and brought within the contemplation of the parties by notice thereof to, or the knowledge thereof of, the other party to the contract at the time it was entered into, so as to render the profits of such subcontracts or special bargains recoverable in an action for breach of the principal contract if their loss was caused by the breach.

Thus, parties in entering into contracts do not generally undertake to answer for damages arising from loss of special bargains which may thereafter be offered. To render them liable for such loss the contract must be made in view thereof, or with reference thereto. *Hawley v. Floraheim*, 44 Ill. App. 320.

And the loss of other contracts by which large profits would have been realized, and which were entered into by the parties for the purpose of fulfilling another contract, is inadmissible in evidence in an action upon the principal contract, because such collateral undertakings are not necessarily connected with the principal contract, and cannot reasonably be

supposed to have been taken into consideration when it was entered into; and such profits are too uncertain and remote and speculative to form a proper basis of damages. *Fox v. Harding*, 7 Cush. 516.

Where it does not appear that the one contract was made with reference to the fulfilment of the other contract. *Goodrich v. Hubbard*, 51 Mich. 63, 16 N. W. 232.

Where it is claimed, in an action for breach of contract, that the circumstances show that a special purpose was intended to be accomplished by one of the parties, the failure to accomplish which would entail greater loss than would ordinarily flow from the breach complained of, knowledge of such special purpose must have been brought home to the other party at the time of making the contract, or such special damages cannot be recovered. *Voorbels v. Fry* (Tex. Civ. App.) 52 S. W. 580.

As damages recoverable for breach of a contract are the natural and probable consequences which the parties may be supposed to have had in contemplation, knowledge by the party to be charged of the purposes which the other had in view is an essential element in estimating the damages likely to be sustained by the breach. *Lewis v. Rountree*, 79 N. C. 122, 28 Am. Rep. 309.

But where a contract is made in view of an already existing contract with a third person, and the contract sued upon is made with special reference to such contract and to enable the party to carry it out, the profits which might have been realized on such contract with the third person may be a proper subject for consideration as damages for the breach. *Thomson-Houston Electric Co. v. Durant Land Improv. Co.* 144 N. Y. 34, 39 N. E. 7.

And in such case the party committing the breach may be held liable for the difference between the subcontract price and the principal contract price, upon the ground that the parties have impliedly fixed that as the measure of damages for themselves. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

But where a party seeks to recover the profits which he could have derived from advantageous contracts made upon the faith of and under the terms of the contracts in suit, he should set out enough of their terms to show the damages sustained. *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.* (Tex. Civ. App.) 44 S. W. 929.

#### 1. General effect of preventing performance.

Where one party to a contract prevents the other from performing it, the latter loses the

stated, the court sustained the defendant's special exceptions Nos. 2, 5, and 8 to the plaintiff's petition, to which action of the court in sustaining each of the exceptions the plaintiff duly excepted.

On the prayer for a writ of error the plaintiff assigned errors as follows: "(1) The court erred in sustaining defendant's seventh special exception to plaintiff's petition, which is as follows: 'Defendant specially excepts to the entire petition because the same proceeds upon two entirely inconsistent causes of action, to wit, the alleged breach of the contract for which damages are sought to be recovered, and the alleged value of services charged to have been rendered the defendant herein.' (2) The court further erred, when acting on said seventh special exception, in ordering the plaintiff to make an election as to whether he would

pray for damages for loss of profits alleged to have been sustained by reason of the defendant's alleged breach of the contract, relinquishing his prayer for the other elements of damages asked for in the petition, or whether he would relinquish his prayer for such profits, and ask only for the damages alleged to have been occasioned by such breach, based upon the \$1,500 claimed by him to have been paid for the contract with defendant's knowledge, together with the necessary expenses alleged by him to have been incurred in preparing to carry out said contract, and the reasonable value of his own services in so doing, all of which is shown in plaintiff's bill of exceptions. (3) The court erred, after having sustained said seventh special exception, and having made the order complained of in the last preceding assignment, in refusing to allow plaintiff to

profits which he might have made from a full performance, and such profits are, or would necessarily be, the fruits of the contract itself within the meaning of the rules set forth *supra*, II. g. and would be recoverable as such, as they would depend upon the performance of the contract itself, and not upon any collateral engagements or enterprises.

Thus, a party to a contract, performance of which was prevented by the other party, may, if the proof shows that he might have derived profit from the completion of the contract on his part, be entitled to recover what would have been the probable amount of the profit which he had so lost as damages for the termination of the contract. *Doolittle v. McCullough*, 12 Ohio St. 360; *Salvo v. Duncan*, 49 Wis. 151, 4 N. W. 1074; *Devlin v. New York*, 63 N. Y. 8; *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; *Birnback v. Hollender*, 29 Misc. 640, 61 N. Y. Supp. 118; *Gallagher v. Hirsh*, 45 App. Div. 467, 61 N. Y. Supp. 609; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576; *Fairchild v. Rogers*, 32 Minn. 269, 20 N. W. 191; *McElwee v. Bridgeport Land & Improv. Co.* 54 Fed. 627; *Ellithorpe Air-Brake Co. v. Sire*, 41 Fed. 662; *Hitchcock v. Galveston*, 3 Woods, 287, Fed. Cas. No. 6,534.

And the rule is the same whether the prevention was through inability to act or design. *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474.

Where one party, in compliance with his contract, enters upon its performance, and is wrongfully forced to abandon it before completion without fault on his part, the profits form a constituent element of the contract, and their loss is the natural and proximate result of the breach, and such as was reasonably in the contemplation of the contracting parties; and if the amount can be estimated with such certainty as satisfies the minds of prudent and impartial persons, they are recoverable as damages. *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576; *Hitchcock v. Galveston*, 3 Woods, 287, Fed. Cas. No. 6,534.

And the measure of damages in such case is the difference between the price agreed to be paid and what it would have cost to complete it. *Ryan v. Miller*, 52 Ill. App. 191. Affirming 153 Ill. 138, 38 N. E. 642; *Cincinnati, I. St. L. & C. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706; *Feaster v. Richard Cotton Mills*, 51 S. C. 143, 28 S. E. 301; *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60; 53 L. R. A.

*United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

And not the full contract price. *Birnback v. Hollender*, 29 Misc. 640, 61 N. Y. Supp. 118; *Gallagher v. Hirsh*, 45 App. Div. 467, 61 N. Y. Supp. 609; *Friedlander v. Pugh*, 43 Miss. 111, 5 Am. Rep. 478.

Where the breach of a contract consists in preventing its performance without the fault of the other party, who is willing and able to perform it, the damage consists of two items,—what has already been expended towards performance, less the value of materials on hand, and the profits which would be realized from the performance of the whole contract. *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Hitchcock v. Galveston*, 3 Woods, 287, Fed. Cas. No. 6,534; *Friedlander v. Pugh*, 43 Miss. 111, 5 Am. Rep. 478.

In *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, *supra*, *Beeson v. United States*, 2 Ct. Cl. 249, *infra*, III. b. 4, h, was distinguished upon the ground that the rule stated in that case is only one aspect of the general rule. It is the rule as applicable to a particular case.

And in determining the profits and losses sustained by a contractor on a contract, performance of which is prevented by the other party, the reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted to go on and complete his contract, may be taken into consideration. *Behan v. United States*, 18 Ct. Cl. 687.

And in estimating the cost of doing the work, the care, trouble, risk, and responsibility attending full execution of the contract should be considered, and included in the estimate. *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60; *Cincinnati, I. St. L. & C. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

And the cost of performing a contract requiring the supply of labor and material which must be deducted from the contract price in an action for a breach of the contract by the employer in preventing performance is the market value of the material on hand, and the amount that would have been paid for labor and material in completing the contract, and the value to the contractor of his own time which would have been consumed in completing the contract. *Gibney v. Turner*, 52 Ark. 117, 12 S. W. 201.

So, in estimating profits all merely specula-



amend the prayer of his petition wherein he prays for damages based upon loss of profits as well as upon his expenses and value of services, so as to pray for damages in the alternative, as follows: 'Plaintiff prays for judgment against defendant for damages by loss of profits resulting from said breach in the sum of, to wit, \$24,000, based upon said insurance actually written by the defendant, as hereinbefore alleged, since said breach, and which plaintiff could have written but for said breach, and the renewals upon such insurance, as well as upon the renewals on the insurance written by plaintiff prior to said breach. But if, for any reason, the court should be of the opinion after hearing the evidence that plaintiff is not entitled to judgment for damages based upon the loss of said profits, then he prays that he have judgment for his damages in the sum of, to

wit, \$5,000, based upon the sum paid by him for said contract, to wit, \$1,500; his expenses incurred in preparing to carry out said contract, to wit, \$1,000; and the reasonable value of his services in carrying out the same, as hereinbefore set forth,'—all of which is shown in plaintiff's bill of exceptions. (4) The court erred in sustaining the defendant's second special exception to plaintiff's petition, the exception being as follows: 'Defendant specially excepts to said entire petition because it appears therefrom that the damages claimed are purely speculative, there being no possible way to arrive at such damages, save upon the supposition that certain work would have been in the future performed by him; that this work would have, in turn, secured certain applications; and that these applications would have been such, that the company would

tive and conjectural profits should be excluded. Cincinnati, I. St. L. & C. R. Co. v. Lutes, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. Behan v. United States, 18 Ct. Cl. 687.

The refusal of one party to a contract, however, to permit the other to perform his contract, has been held to be equivalent to a performance for the purpose of maintaining an action upon the contract, and the contract price of the services will be the measure of the recovery, unless the party thus breaking the contract shows that the damages actually sustained were less than the price agreed upon. Nearnas v. Harbert, 25 Mo. 352; Pond v. Wyman, 15 Mo. 175; Park v. Kitchen, 1 Mo. App. 357; Hawley v. Smith, 45 Ind. 183.

But where a party to a contract repudiates it, and refuses longer to be bound by it, if the injured party elects to keep the contract in force for the purpose of recovering future profits, he must allege and prove performance on his part or a legal excuse for nonperformance. Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, 38 N. Y. 773.

And where it appears that the party prevented from performing would upon fully performing have realized no profit, or would in fact have sustained a loss, he is not entitled to recover any sum for the termination of the contract. Doolittle v. McCullough, 12 Ohio St. 260; United States v. Behan, 110 U. S. 333, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

And the rule is the same where it appears that he received an excess over the amount of his expenditures, and there is no proof of any profits which he might have realized as the direct fruits of the contract. McElwee v. Bridgeport Land & Improv. Co. 54 Fed. 627.

#### 1. What amounts to prevention of performance.

While refusal by one party to a contract to make payments in accordance with its provisions justifies the other party in abandoning it, and entitles him to recover for whatever he had done under the contract, unless he has actually been prevented by the other party from completing his contract he cannot recover damages for a loss of profits which he would have made had it been completed. Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Fitzgerald v. Hayward, 50 Mo. 516.

The loss of profits for the unperformed part of a contract cannot be included in the damages recoverable for the breach of the contract by mere nonpayment for the part performed, even 53 L. R. A.

if that prevented further performance. The measure of damages for breach of contract to pay money is the interest on the money only. Bethel v. Salem Improv. Co. 93 Va. 354, 33 L. R. A. 602, 25 S. E. 304.

In the above case Kendall Bank Note Co. v. Sinking Fund Comra. 79 Va. 563, *infra*, III. b, 2, 4, *g*, was distinguished upon the ground that in that case the one party had canceled the contract and forbidden the other party to proceed further in the execution of it, and that therefore he clearly had a right to recover for whatever profits would reasonably accrue upon the contract, there not being a word in the case about failure to pay money.

And Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38, *supra*, II. a, was distinguished upon the ground that the ground of complaint in that case was not the failure to pay for the marble already cut and delivered, but that the defendants refused to receive and pay for any more marble.

Failure which will justify a party in abandoning a contract and at the same time enable him to recover for future profits must go to the very substance of the contract, and must in effect prevent the party who abandons from going on with it. Lake Shore & M. S. R. Co. v. Richards, 40 Ill. App. 560.

And when one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is in legal effect a prevention of performance by the other party which will authorize the recovery of future profits which would have been realized under the contract. Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773.

And the act of a party to a contract in violating some of its substantial provisions so as to deprive the other party of the benefits of the contract, and of manifesting an intention to continue such breaches, authorizes the other party to abandon further performance and sue for profits which he would have earned had the contract been completed, although such breaches did not amount to a physical obstruction or prevention of performance by the other party. *Ibid.*, Overruling, 32 N. E. 402.

And violation of a contract which was to continue for three years with an option to continue five years longer, by refusing to permit its performance during the three years, does not warrant a recovery of profits as damages, which might have been earned during the five years, in the absence of any evidence showing that the option had been converted into a contract, or that there had been an election to

have, in the exercise of its discretion under the contract, accepted such applications.

(5) The court erred in sustaining defendant's fifth special exception to plaintiff's petition, the exception being as follows: 'Defendant specially excepts to said entire petition because, if the acts alleged therein as a breach on the part of this defendant did constitute a breach, then the plaintiff has entirely misconceived the measure of damages in such cases, and fails in law to show any right to recover any of the sums alleged in said petition as damages, or any portion of the same.' (6) The court erred in sustaining defendant's eighth special exception to plaintiff's petition, the exception being as follows: 'Defendant specially excepts to the entire petition because the remedy for the alleged acts on the part of the defendant complained of as a breach is agreed upon in

the contract, and plaintiff had no right to abandon the contract as contemplated therein for such cause, and because such acts as those complained of are not vital, and do not go to the foundation or essence of the contract, and compensation may be made therefor in damages.'"

Argued before *Pardee, McCormick, and Shelby*, Circuit Judges.

*Messrs. Drew Fruit and Leroy A. Smith*, for plaintiff in error:

Where a contract between A and X is discharged by the default of X, A may (a) consider himself exonerated from any further performance which may have been due on his part, and successfully defend an action brought for nonperformance; (b) sue at once upon the contract for such damages as he has sustained by its breach, without being

make the contract operate beyond the three years. *Ramsey v. Holmes Electric Protective Co.* 85 Wis. 174, 55 N. W. 391.

The rule is that prospective profits are recoverable where the breach of contract prevents performance by the other party, and thus deprives him of the opportunity to earn them, or where the breach complained of is the failure to fulfil an obligation, which is a condition precedent to performance by the other party, and upon the fulfilment of which such performance is dependent; or where the conduct of the other party evinces an intention to abandon the contract, and not to be bound by it. But merely making a default in the payment of an instalment of money due on the contract does not entitle the party injured to claim as damages the profits he would have earned had he gone on and completed the contract, where performance by him is not dependent upon such payment or prevented by the nonpayment. *Wharton v. Winch*, 46 N. Y. S. R. 187, 19 N. Y. Supp. 477.

There is a material distinction, however, between the effect of a default in payment of an instalment when it becomes due under a contract arising from mere temporary inability to pay, and a deliberate refusal based upon the asserted invalidity of the contract and the denial of the contractor's right to proceed or to receive any payment thereunder. The former may be a breach, which, though it would permit the contractor to abandon the contract and recover for what had already been done thereunder, would not entitle him to prospective profits. But the latter goes to the root of the contract, and is equivalent to an abandonment of it in its entirety entitling the contractor to recover prospective profits. *Jones v. New York*, 47 App. Div. 39, 62 N. Y. Supp. 284.

### III. Contracts for services.

#### a. Breach by contractor or employee.

##### 1. General rules.

The foregoing general rules are applicable to contracts for services, and should be considered in connection with the cases on the particular subject, such cases merely constituting an application of the general rules to the facts of the particular case.

Thus, where one who contracts for the performance of labor violates his contract through its entire scope, so that the contractor has been deprived of profits which he might have made within the contemplation of the parties 53 L. R. A.

when they made the contract, the contractor should recover his gains prevented as well as losses sustained. But where the employer's breach relates to a minor matter in the contract, and has merely thrown upon the contractor needless expense, he should recover only the damage which he has actually sustained. *Bulkley v. United States*, 7 Ct. Cl. 547.

And where the performance of a special contract requires the furnishing of both material and labor, and the contract is entire and a breach thereof total, loss of such profits as would have accrued from the contract as the direct result of its fulfilment may be recovered in an action for the breach. *Silberstein v. Duluth News-Tribune Co.* 68 Minn. 430, 71 N. W. 622.

And where a contract for the rendition of services during a period of years is entire, and a breach thereof is total, the plaintiff in an action for the breach may recover his whole damages for loss of profits during the whole of the unexpired term, present and prospective, by the loss of his contract, in a single action, and the prospective damages may be established by showing the difference between the contract price and what it would have cost him to perform the work. *Ennis v. Buckeye Pub. Co.* 44 Minn. 105, 46 N. W. 314.

The usual measure of damages for breach of a contract relating to the manufacture of an article or the performance of some specified act is the difference between the price agreed to be paid and what it would have cost the employee to complete it, providing such cost would be less than the contract price. *Watson v. Gray's Harbor Brick Co.* 3 Wash. 283, 28 Pac. 527; *Silberstein v. Duluth News-Tribune Co.* 68 Minn. 430, 71 N. W. 622; *Wood v. Schettler*, 23 Wis. 501.

But where it appears that the party injured would have incurred no further expense had he completed the work, the proper measure would be the price agreed to be paid therefor. *Wood v. Schettler*, 23 Wis. 501.

And where the price for work to be done was indefinite and uncertain, and depended upon changes in plans thereafter to be made by the engineer of the employer calling for more or less work, so that the difference between the contract price and the cost of completion was not fixed and certain or capable of being made certain, it cannot be deemed that such uncertain difference between the contract price and the cost of completion entered into the contemplation of the parties at the time of the contract, as the probable rule of damages in case the contractor should abandon the work so as to warrant its recovery as dam-

obliged to show that such performance has been done or tendered by him; (c) lastly, if he has done all or a portion of that which is promised, so as to have a claim to a money payment for such performance, he may deal with such a claim as due upon a different contract arising upon a promise which is understood from the acceptance of an executed consideration.

Anson, Contr. 2d Am. ed. \*280; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. N. S. 73; *Smith v. Lewis*, 40 Ind. 98; *Reybold v. Voorhees*, 30 Pa. 116; *Dunn v. Daly*, 78 Cal. 640, 21 Pac. 377; *Leopold v. Salkey*, 89 Ill. 417, 31 Am. Rep. 93.

If the contract is entire a breach as to a single material or vital point discharges the whole, relieving the other party from per-

formance, and affording him an immediate right of action to enforce the whole obligation.

7 Am. & Eng. Enc. Law, 2d ed. p. 150; *Haskell v. Mollenry*, 4 Cal. 411; *Clark v. Baker*, 5 Met. 452; 2 Parsons, Contr. \*517; 1 Story, Contr. § 33.

A contract is entire, and not severable, when, by its terms, nature, and purpose, it contemplates and intends that each and all its parts, material provisions, and the consideration, are common to each other and interdependent. Such a contract possesses essential oneness in all material respects.

*Wooten v. Walters*, 110 N. C. 251, 14 S. E. 735, 736; *Thompson v. Conover*, 32 N. J. L. 467.

Abandonment alone would not recompense the aggrieved party for the damages sustained.

*ages. American Surety Co. v. Woods*, 45 C. C. A. 282, 106 Fed. 263.

So, where full performance of a contract for services has been prevented by sickness or death, the contract or agreement of the parties is competent evidence; and when the compensation is so fixed and regulated by the contract that it can be apportioned without injustice to either party, the compensation agreed upon may be taken as that which the party reasonably deserves to receive. But if the contract provides for payments in part by a receipt of a portion of the profits, and the profits to be earned had not, either at the time of making the contract or at the time of its termination by the death of the agent and the accrual of the right of action to his representative, any determinable value, or any existence, they cannot be resorted to as a measure of recovery. *Clark v. Gilbert*, 32 Barb. 576.

## 2. Particular contracts.

### a. For construction or repair of ways, bridges, public works, etc.

The profits accruing to the owner or employer from the construction of ways, bridges, or public works are, perhaps not necessarily, but almost always, the fruits of collateral contracts or enterprises as distinguished from direct fruits of the principal contract. Profits lost from the breach of such contracts therefore are rarely recoverable, as they are too remote and conjectural.

Thus, a loss sustained by a railroad company from a breach of contract by the contractor for the construction of a section of its railroad, arising from its inability to keep its arrangement to carry a large amount of freight over its road, which it could have carried had the road been completed, consists of gains prevented on a collateral contract for carriage of freight, and is not therefore the direct fruit of the contract with the contractor, and cannot be recovered for a breach thereof. *Hunt v. Oregon P. R. Co.* 1 L. R. A. 842, 36 Fed. Rep. 481.

And a subcontractor who contracts to construct a portion of a railroad, the same to be completed within a designated time, is not liable, in case of failure to complete it within the contract time, for a rebate of interest on the total amount of the construction bonds to which the contractor would have been entitled had it not been for such failure to complete the construction of the road, where such private agreement between the contractor and the lessee of the road was not made a part of the 53 L. R. A.

contract with the subcontractor, and the fact that the subcontractor may have known that there was such an agreement raises no presumption that he contracted for such a mode of ascertaining damages for his breach. *Snell v. Cottingham*, 72 Ill. 161.

Nor does such delay authorize a recovery for the breach on the ground that the railroad ran through a wild, uninhabited country, and that it was expected that sawmills would have been established along the line of the road, and that by the use of the road at an earlier day in the transportation of lumber from such mills and otherwise a large profit would have resulted, as such a calculation is too conjectural, uncertain, and vague. *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

And delay beyond the contract time, upon the part of a contractor to complete a contract with a railroad company to construct according to prepared plans certain docks, piers, and warehouses, and to do certain dredging and remove old docks, does not warrant a recovery by the railroad company against the contractor for the amount of the net revenue on the shipment of a large quantity of cotton which it had to decline because the work had not been completed, as such damages would be too remote, conjectural, speculative, and uncertain. *Atlantic & D. R. Co. v. Delaware Constr. Co.* 98 Va. 503, 37 S. E. 13.

And, a railroad company contracting with a contractor for the construction of its railroad, if entitled to recover at all for damages arising from loss of profits during two months which the contractor delayed in completing the road beyond the time specified in the contract, cannot prove the amount of such loss by showing the profits during the corresponding two months of the next ensuing year. *Florida Northern R. Co. v. Southern Supply Co.* 112 Ga. 1, 37 S. E. 130.

So, the failure upon the part of a person contracting with a road company for the construction of a portion of its road to complete it in the time prescribed by the contract does not entitle the company to set up as a counterclaim in an action for the services rendered a claim for the tolls which the road company might have earned had the road been completed in season, as such a claim would be too contingent and speculative to form a basis for damages. *Western Gravel Road Co. v. Cox*, 39 Ind. 260.

And the breach of a contract to construct a levee for the purpose of reclaiming lands from overflow does not entitle the owner of the lands to recover possible profits under a lease of the land executed by him without the con-

*Grand Rapids & B. City R. Co. v. Van Dusen*, 29 Mich. 430; *Gates v. National Bldg. Loan & Protective Union*, 46 Minn. 419, 49 N. W. 232; *DeLoach v. Smith*, 83 Ga. 665, 10 S. E. 436; *Royalton v. Royalton & W. Turnp. Co.* 14 Vt. 311; *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74; *Shaffer v. Lee*, 8 Barb. 412; *Proctor v. Preservalline Mfg. Co.* 21 N. Y. S. R. 885, 4 N. Y. Supp. 286; *Dickinson v. Hart*, 50 N. Y. S. R. 504, 21 N. Y. Supp. 307; *Anvil Min. Co. v. Humble*, 153 U. S. 546, 38 L. ed. 816, 14 Sup. Ct. Rep. 876; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773.

Where the insurance company is in the wrong, and is responsible for the termination of the contract,—having brought about the necessity of ascertaining the amount of damages the other party has suffered,—the doubt,

if any, as to the parties contracting for insurance keeping up their contracts, should be resolved against the insurance company, and the presumption be indulged that these parties will carry out their contracts and make the payments stipulated.

*Hercules Mut. L. Assur. Soc. v. Brinker*, 77 N. Y. 445; *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534; *Ensworth v. New York L. Ins. Co.* Flipp. 92, Fed. Cas. No. 4,496; *Fudickar v. Guardian Mut. L. Ins. Co.* 62 N. Y. 392; *Ætna L. Ins. Co. v. Neesen*, 84 Ind. 348, 43 Am. Rep. 91.

The contract under consideration especially contemplates the making of profits by Wells, and its very nature shows that a breach of it would deprive him of the commissions on future premiums.

The right of a party to recover the profits he would have made in fulfilling a contract

tractor's knowledge after the breach of the contract, as such damages are too remote. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46.

And the measure of damages for breach by a vendor of a water lot of a covenant to blast out the waste-way opposite the lots below the one sold, so as to make it sufficiently deep to carry off the waste water from the machinery on the lot sold, and to so finish all the eyes in the canal or reservoir as to furnish and continue in said canal water in sufficient quantities to propel the machinery placed and erected on the lots sold, is the interest on the investment for the time the machinery was not employed for want of water; or, in case a part only is idle, interest on a like proportion of the investment, and not what the profits would have been had the purchaser been able to employ the whole of his machinery all of the time, as such profits are too speculative to furnish a measure of damages. *Water Lot Co. v. Leonard*, 30 Ga. 560.

So, although profits may be recovered to a certain limit in actions for breach of special agreements or contracts for the construction of public works, such profits must be calculated and based upon the difference between the contract price and the price at which the performance of the work could be procured at the time of the breach. *Gatling v. Newell*, 12 Ind. 118.

And evidence in an action for breach of contract to furnish materials and do the masonry work in the construction of a bridge, estimating the cost of the work at contract prices if completed according to the plans furnished by the chief engineer, and calculating the number of cubic yards of excavation, and multiplying the yards by the price in the contract, and estimating the different sorts of masonry, by calculating each different part of the masonry according to the plans, giving in detail the number of cubic yards in each and deducting from the result the estimated cost of the different kinds of masonry to the contractor, thereby showing a large balance, is legally sufficient to prove a loss of profits growing out of the breach. *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. 964.

**b. For construction or repair of buildings, vessels, etc.**

Buildings usually have a regular established rental value, and there is usually a regular market value for the hire of a vessel. Rental value and ordinary hire therefore, at least in America, are regarded as the more definite, and 53 L. R. A.

a better measure of damages for breach of contract by which one is deprived of the use of the buildings, vessels, etc., and is selected as such rather than lost profits, except under special and peculiar circumstances.

Thus, unreasonable delay on the part of a contractor for the building of a house or other building in completing his contract only entitles the owner to damages equal to the rental value of the premises during the period of delay. *Korf v. Lull*, 70 Ill. 420; *Ruff v. Rinaldo*, 55 N. Y. 664; *Harwood v. Tappan*, 2 Speers, L. 536; *Dengler v. Auer*, 55 Mo. App. 548.

And evidence of conjectural loss to the owner's business by the delay to obtain the building, and for the loss of a contract to lease one of the stores therein, is not admissible in an action for delay. *Harwood v. Tappan*, 2 Speers, L. 536.

And one for whom a building was erected under a building contract cannot recoup, in an action for money due for work done thereunder, for rents and profits of the building, lost by delay in the performance of the contract, where it does not appear, either that the owner wished or expected to use the building himself, or that he might or could have rented it to anyone during the period of delay. *Wagner v. Corkhill*, 40 Barb. 176.

So, damages against the owner of a store for failure to complete it before the time of the commencement of a lease thereof cannot be computed upon any estimate of probable profits. *Ratkowski v. Masolowski*, 57 Ill. App. 526.

And where a contract is entered into by an owner of a large tract of land, desirous of improving the same by the erection of houses thereon and thereby increasing its value, for the sale of a number of lots thereof, the purchaser to erect houses of a designated character upon the lots purchased, and the vendor to pay certain rates and taxes and put in the curb and street pavement, which he fails to do, and the curbing and paving are done by the city and paid for by the purchaser, the vendor is not entitled, in a suit by the purchaser against him for recovery of the amount which he is thus obliged to pay, to counterclaim for damages suffered by reason of the purchaser's failure to build the house, on the theory that he had lost the consequent increase in value of his property, as such damages are too speculative, and not such as arise naturally from the breach. *McConaghy v. Pemberton*, 168 Pa. 121, 81 Atl. 996.

But the measure of damages in an action by a lot owner against one who agreed to build a building to be paid for in instalments, the

depends solely upon the fault of the other party to it, and the plaintiff's ability to show that the profits claimed were reasonably certain to have been realized but for the wrongful act complained of.

1 *Sutherland, Damages*, § 63; *Anvil Min. Co. v. Humble*, 153 U. S. 546, 38 L. ed. 816, 14 Sup. Ct. Rep. 876; *Hitchcock v. Supreme Tent, K. of M.* 100 Mich. 40, 58 N. W. 640; *Mueller v. Bethesda Mineral Spring Co.* 88 Mich. 390, 60 N. W. 319; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Pittsburg Gauge Co. v. Ashton Valve Co.* 184 Pa. 36, 39 Atl. 223; *Taylor Mfg. Co. v. Hatcher*, 3 L. R. A. 587, 39 Fed. 440; *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291; *Blair v. Laflin*, 127 Mass. 518; *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; *Niagara F.*

*Ins. Co. v. Greene*, 77 Ind. 590; *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609; *Hoy v. Grenoble*, 34 Pa. 10, 75 Am. Dec. 628; *Richmond v. Dubuque & S. City R. Co.* 40 Iowa, 264; *Dickinson v. Hart*, 60 N. Y. S. R. 504, 21 N. Y. Supp. 307; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773; *Royalton v. Royalton & W. Turnp. Co.* 14 Vt. 311; *Amos v. Oakley*, 131 Mass. 413; *Grand Rapids & B. City R. Co. v. Van Dusen*, 29 Mich. 430.

Even if the court should hold that Wells cannot recover damages based upon loss of profits, he ought at least to be allowed to recover the \$1,500 paid for the contract, and his actual expenses in preparing to carry out the contract, together with reasonable compensation for his time.

*United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; 1 *Sutherland*,

foundation of which gave way and the building fell to the ground during its construction through the fault of the contractor, after he had received two instalments, is the difference between what it would have cost the owner to construct such a building as that provided for in the contract, and the amount which he would have to pay the contractor to complete the building according to contract, together with loss of rents and profits which he would probably have received, for such reasonable time beyond the time at which the building should have been completed as it would have taken the contractor to complete it, crediting the contractor with the materials in the structure at the time of its fall, as they had become a part of the realty, and with work done in digging for the foundation, and for such materials as had been put into the building by him to the extent that they reduced the cost of completing the building. *Savage v. Glenn*, 10 Or. 440.

So, breach of a contract upon the part of a contractor to move a hotel from one town to another entitles the owner of the building to recover of the contractor, where the contractor had been paid for removing the building, only the necessary expense of removing it, and does not authorize a recovery for prospective profits which he would possibly have gained if the building had been moved, as such profits would be too remote, uncertain, and speculative to be recoverable. *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Pac. 717.

And a breach of contract to build and complete, ready for use, an ice-making plant within a specified time, does not entitle the party injured to recover profits that could have been made had the plant been completed when promised, as such an estimate is purely conjectural. *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519.

Likewise, the measure of damages for breach of a contract to construct a flouring mill, or to do all the mill-wright work necessary in the construction by delay or otherwise, is the cost necessary to complete the work, and not the profits which would have been made by the mill during the time the alterations were being made (*Wade v. Haycock*, 25 Pa. 382; *John Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N. W. 930; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Holmes v. Boydston*, 1 Neb. 357), such damages being too speculative and contingent for recovery.

And delay in the performance of a contract to have an oat-meal mill ready to start at a designated time authorizes the party injured to recover the rental value of the mill during the 53 L. R. A.

period of delay; but while the cost of the mill, the depreciation or otherwise of its machinery while in operation, and the profits that could be made by the mill are proper to be considered in arriving at the rental value, neither constitutes the measure of damages. *Novelty Iron Works v. Capital City Oat-meal Co.* 88 Iowa, 524, 55 N. W. 518.

And the measure of damages for breach, by a lessor of a mill, of a covenant to alter the mill so that it should have four runs of stone instead of two, by making the improvements so that one run of stone is useless, is the value of the use of the one run of stone, which by reason of his breach the tenant was unable to enjoy, but does not include speculative damages, such as the loss of profits which he might have suffered in consequence of not having the use of the one run of stone. *Green v. Mann*, 11 Ill. 618.

And the improper execution of a contract for building a flume does not entitle the party injured to damages by way of loss of profits from his inability to use the mill, the building of which was delayed by the improper construction of the flume. *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. 704.

In the above case, *Hadley v. Baxendale*, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 C. L. Rep. 517, *infra*, VI. b. 2, was distinguished upon the ground that there the mill had been completed, and had been in operation, and was probably a well-known manufacturing establishment of the neighborhood, in which capital was actually invested.

In *Davis v. Talcott*, 14 Barb. 611, however, it was held that failure to perform a contract for furnishing and placing the machinery of a mill, and breach of a contract for furnishing machinery efficient in strength, construction, and workmanship, causing a further delay, entitle the party injured to recover such sum as would be sufficient to put the machinery in the condition contemplated by the contract, and also such sum as the mill would have earned during the time it was necessarily delayed, in consequence of the delay and the breakage and defects in the machinery, in estimating which the jury should take the fair, ordinary earnings of the mill after deducting expenses of running it, thereby arriving at the net profits; and that a charge authorizing such a recovery does not authorize the recovery of speculative damages.

And *Clifford v. Richardson*, 18 Vt. 620, holds that violation of a contract by a millwright to put the necessary machinery into a mill within reasonable time in a good, workmanlike manner, by unreasonable delay and by putting it

Damages, p. 97; *Niagara F. Ins. Co. v. Greene*, 77 Ind. 594.

We had the right to pray for alternative relief.

*United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Mitchell v. Sheppard*, 13 Tex. 487; *Fant v. Andrews* (Tex. Civ. App.) 46 S. W. 909.

**Mr. W. B. Gano** for defendant in error.

**McCormick**, Circuit Judge, delivered the opinion of the court:

The rulings of the trial court, and the errors assigned thereon, present substantially two questions: (1) Can the plaintiff join in one action for damages for breach of the contract a claim for the loss of anticipated profits with the claim to recover his losses for actual outlay and expenditures? (2) Are the anticipated profits for the loss of

in so unskillfully that it was of little or no value to the miller, entitles the miller to recover, not only for the amount paid by him for repairing and altering the machinery, but also for the benefit which the mill would have been to him if the contract had been properly executed, from the time it might have been thus executed until the necessary alterations could be made, as the loss of the use of the mill is a consequence which should have been anticipated in case of failure to fulfil the contract. And that the opinion of competent witnesses, as to the amount of work which the mill would have performed during the time taken to repair and alter its machinery so as to conform to the contract therefor, is admissible in evidence as a basis for estimating damages which the miller would be entitled to recover for breach of contract upon the part of a millwright.

So, the measure of damages for neglect to perform a contract for repairs upon a vessel is the rent or price which would have been paid for the charter of the vessel during the period of delay, and not the probable profits of the vessel during such time. *Rogers v. Beard*, 36 Barb. 31.

And where a contract is entered into for the repair of a boat for a trading voyage, and the boat is carried away by a freshet and lost before repairs are made, the measure of damages for breach of the contract to repair is the cost of the repairs, and not the anticipated profits of the voyage. *Hendrick v. Stewart*, 1 Overt. 476.

And delay in the completion of additions and repairs to a steamboat warrants a recovery for, not what it would have cost the party causing the delay, but the ordinary hire of such a boat for the time, and for the cost of repairs and of replacing defective machinery, with the hire or rent of the boat for the time necessary to make such repairs or replacement; but the owner cannot recover what the jury might believe the boat could have earned during the time, making allowance for expenses of running, insurance, and wear and tear on the boat. *Brown v. Foster*, 51 Pa. 165.

So, failure of a party contracting with another to build and deliver a boat hull on a stated date, to deliver the same until two months after the time specified, entitles the party injured to recover the actual loss sustained on account of the failure to comply with the contract, but the loss of the probable profits of the boat during the two months constitute no part of the damages. *Taylor v. Maguire*, 13 Mo. 517, 12 Mo. 313.

And a person contracting for the construc-

tion of a steamboat is entitled to recoup, in an action for the recovery of the contract price, for damages sustained from defects in the boat and its machinery, necessitating expense in procuring repairs and in towing the boat to a proper place for undergoing repairs and in supplying defects so as to make her conform to the contract, but not for loss of profits resulting from delay occasioned by such defects. *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250.

In England, however, the rule with reference to vessels would seem to be different. Thus, the earnings of a vessel during the time she was detained through breach of a contract to furnish a new brass liner to her propeller shaft and a brass stern brush, by furnishing articles not constructed or fitted on in a workmanlike manner, in consequence of which they became useless, are not too remote for recovery in an action for the breach, in the absence of objection on the ground of want of proof that she would have been actually employed during such time. *Wilson v. General Iron Screw Co.* 47 L. J. Q. B. N. S. 239, 37 L. T. N. S. 789.

So, the measure of damages suffered by a steam packet company for breach of a contract with a ship-building company to make certain repairs upon a vessel owned by the packet company within a given time, after which and before the completion of the contract the ship-building company was wound up on petition of a creditor, and the repairs were not therefore completed within the stipulated time, is the net profits which the packet company might have made if the contract had been completed in time. *Re Trent & H. Ship-Building Co.* 38 L. J. Ch. N. S. 38, L. R. 4 Ch. 112, 19 L. T. N. S. 465, 17 Week. Rep. 181.

#### c. Logging and lumber contracts.

Logging and lumbering in their various phases constitute a business which has been carried on so extensively, particularly in the United States, that the cost and profits of any particular enterprise are no longer a matter of conjecture or speculation, but can be estimated with such certainty as to warrant the use of profits lost as a measure of damages in actions for breach of lumbering contracts, though of course profits expected to arise out of collateral contracts or enterprises are not included.

Thus, the difference between the value of logs in a boom with the boom charges, the cost of getting the logs to the mill, and the cost of manufacturing added, and the value of the manufactured lumber, is not a matter of speculation or conjecture, which cannot be recovered

faith of the contract, including a fair allowance for his own time and services. "Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. . . . If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged, at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services). . . . At least, it does not lie in the mouth of the party in fault to say this

unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract. . . . The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth by way of petition a plain statement of the facts, without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to, if within the fair scope of the claim as exhibited by the facts set forth in the petition."

In the case of *Dennis v. Maasfield*, 10 Al-

in an action for violation of contract, in wrongfully neglecting to release them from the boom and bringing them to the mill, but is as certain as the value of personal property and the cost of labor or manufacturing can be. *Mississippi & R. River Boom Co. v. Prince*, 84 Minn. 71, 24 N. W. 344.

And breach of an agreement on the part of a logger to drive to the Mississippi river all logs belonging to the other contracting party on the Platt river bearing certain marks, consisting of a failure upon the part of the logger to drive all the logs, whereby the owner was prevented from performing a contract with a lumber company to supply it with lumber, which purpose was known at the time the original contract was entered into, entitles the owner to recover of the logger for any loss of profits directly traceable to such breach, which would be the difference between the market value of the logs at the time they should have been run, and the contract price he would have received if they had been driven in time to enable him to deliver them under his contract. *Day v. Gravel*, 72 Minn. 159, 75 N. W. 1.

And a contract between an owner of timber land and another, by which he agreed to let the other have all the pine timber on his land suitable for cut lumber, the other agreeing to saw the same into lumber, and sell it, engaging exclusively in that enterprise until accomplished, and to pay the owner annually one fifth of the gross proceeds of the lumber sold, collected by him, which was broken by the refusal of the contractor to saw all the lumber on the owner's land, warrants a recovery by the owner of damages for the continued and prospective failure of performance, to be assessed upon the basis of value at the time of the breach, the measure of the recovery being the profits which would have accrued to him from a full performance, which is to be ascertained by deducting the value of the timber left unsawed from one fifth of the value of the timber which it would have made. *Fall v. McRee*, 36 Ala. 61.

So, the measure of damages in an action by the owner of a pile driver against one contracting to furnish piles for his use, for delay, is the amount of the actual profits he was prevented from earning with his machine by the delay complained of. *Boston v. Henderson*, 92 Mich. 606, 52 N. W. 1020.

But failure to perform an agreement to skid, haul, and deliver all the merchantable white-pine logs upon a certain tract of land does not entitle the mill owner with whom the contract was made to recover for lost gains and profits due to the fact that he was thereby compelled

to shut down his sawmill and keep a large crew of men idle, and unable to put the lumber upon the market, and was compelled to cancel numerous contracts and orders, as such damages are purely speculative, and such a claim cannot be recouped against a claim for services in cutting the logs. *Maltby v. Plummer*, 71 Mich. 578, 40 N. W. 3.

And the profits of one dealer in lumber for a particular period would not be a fair criterion of the profits of another, and cannot be given in evidence in an action by the latter for the purpose of showing what profits he might have made during that period but for a breach of contract for which he was suing. *Somers v. Wright*, 115 Mass. 298.

Whether a mill owner would or would not have been able to make a profit from a contract with another to stock his mill so as to warrant a recovery of profits in an action for breach of the contract, is a question for the jury to determine, where the question is disputed. *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. 976.

#### d. For general service or labor.

The profits accruing to the employer from contracts for general services or labor, like those from more particular and important contracts, such as for the construction of ways, bridges, and public works, are usually the fruits of collateral undertakings or enterprises, the former constituting steps leading to the latter. The profits of such undertakings and enterprises therefore are distinctly collateral, and too remote and conjectural for recovery in an action against an employee for breach of a contract for services or labor, though where such profits are certain and not contingent they may be taken out of the region of remoteness by distinct notice of the object to be attained so as to warrant a recovery.

Thus, failure to comply with the terms of an agreement to repair and put in good order certain machinery does not authorize a recovery for prospective gains to be made from the use of the machinery, unless there should be shown outstanding contracts to be performed by the machinery to be furnished; and where it only appears that the person for whom it was being repaired was deprived of the use of his still for two months, during which time he might and would have manufactured large quantities of alcohol, from which he would have derived great gains, the elements of damage are too prospective and remote. *Frazer v. Smith*, 60 Ill. 145.

And the gains which the owner of a cotton

len, 138, which presented a question closely analogous to the one we are now discussing, it is said in the opinion by the chief justice: "The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract. Indeed, his right to recover anything—as well that which was earned before as that which would have been earned if he had not been discharged—depends on the question whether he has performed his part of the contract. A party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action."

The second question presents more difficulty. We quote again from *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup.

factory would have derived from the use thereof had he not been prevented from using it by a breach of contract to repair machinery thereof are too contingent and speculative to be recovered in an action for the breach of such contract. *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 410, 85 Am. Dec. 602.

And breach of an agreement to build a machine for casting metals and deliver it at a specified time does not warrant a recovery of damages for gains or profits which the injured party might have made by reason of the machine casting metal faster than it was cast by previous processes. *New York Smelting & Ref. Co. v. Lieb*, 16 Jones & S. 508.

Nor does breach of contract to repair a cotton tie punch entitle the party injured to recover the difference between what he would have made upon stock on hand if the punch had been repaired within the contract time, so as to prevent delay, and what he made on such stock after the delay caused by the breach after he had procured a new punch, as such damages would be in the nature of speculative profits. *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484.

So, the measure of damages for breach by a boiler constructor of an agreement to manufacture a steam boiler, the manufacturer knowing exactly where it was to go, what work it was expected to do, and what pressure it must bear, by so carelessly and negligently constructing it that it was not able to do the work and exploded injuring the purchaser's mill, is the amount of money required to put the mill and machinery, including the boiler, in as good condition as they were in before the explosion, with interest, which sum would be regarded as the full equivalent of all incidental damages, such as the loss of profits and the like. *Erie City Iron Works v. Barber*, 102 Pa. 156.

And violation of an agreement to build a steam engine with boilers, etc., and deliver it on a fixed day, whereby delay of one week occurred, causing the loss of the use of certain machinery for the sawing and planing of lumber which the steam engine was intended to drive, entitles the party injured to recover what would have been a fair price to pay for the use of the engine and machinery in view of all the hazardous chances of the business, but does not entitle him to measure his damages by estimating what he might have earned by the use of the engine and his other machinery had the contract been complied with. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

Nor can the defendants in an action for a stipulated monthly compensation for furnishing certain steam power recoup for damages

Ct. Rep. 81: "The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought, a recovery for outlay is included, and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits."

It is clear that the plaintiff and the defendant, in entering into the contract which is made the basis of this action, each had in contemplation, not only the outlay of expenses and personal service to be contributed by the plaintiff, but, and equally, the earning of profits from the per cent on the premiums to be allowed the plaintiff as his sole compensation for his expenditures and service. As was said in the case of *Dennis v.*

caused by the fact that they had made contracts with various persons to sell them goods, which might have been manufactured by them under the contract to furnish power, but which they had been unable to fulfil by reason of the failure to furnish such power. *Hornor v. Wood*, 16 Barb. 386.

And the measure of damages for failure to perform an agreement to furnish sufficient water power to run and operate the machinery of a certain grist mill is the difference between the rental value of the mill and machinery with the power contracted for and its rental value with the power actually furnished, and does not include gains prevented or losses sustained in the business of the mill. *Witherbee v. Meyer*, 155 N. Y. 446, 60 N. E. 58.

In the above case, *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, *infra*, III. b. 4, was distinguished, explained, and limited, the court saying that the damages measured in that case were not only within the contemplation of the parties, but were more definite and certain than would be possible by any other method of ascertainment, and that the case was in no wise intended to encroach upon the rule of damages applicable to cases of this character, by which is afforded a more certain and definite method of measuring damages; and that its doctrine must be limited in its application to cases that come fairly within it.

In *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638, however, it was held that breach of a covenant to furnish a specified quantity of water power to propel a mill used in manufacturing flour entitles the covenantee to recover as damages profits which he would have made in the manufacture of the flour at the mill, but which he was prevented from making by the breach; but the amount must not be left to speculation or conjecture, but must be proved with reasonable certainty.

So, a drayman contracting to haul all the cotton intended for a certain cotton press at a fixed price per bale, who fails to comply with his contract, is liable for the increased price which the owners of the press may have to give for hauling the cotton, but he is not liable for the loss of profits which the press might have made by compressing cotton which the owners failed to get because, as they alleged, of his not complying with his contract. *Reading v. Donovan*, 6 La. Ann. 491.

And an enhancement in value of oyster grounds which would follow the execution of a contract for their preparation and planting with oysters, coming from the adaptation of the ground to oyster culture during the spawn-



*Maxfield*, 10 Allen, 138: "These earnings or profits were therefore within the direct contemplation of the parties when the contract was entered into. They are undoubtedly in their nature contingent and speculative, and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership that the profits of the contemplated business were uncertain, contingent, and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or, in an action on a policy of insurance on profits, would it be a valid defense, in the event of loss, to say that no damages could be claimed

or proved, because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is that in such cases the parties, having by their contract adopted a contingent, uncertain, and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits, or a share of them, no recovery can be had on such a contract in a

ing season about to open, would be a speculation on the chances of catching a set and raising a profitable crop, and such enhancement should not be allowed as damages in an action for breach of contract to prepare and plant a crop of oysters on such lands, as too remote for consideration and too uncertain. *Lewis v. Hartford Dredging Co.* 68 Conn. 221, 35 Atl. 1127.

But where, in an action for breach of contract to prepare and plant a specified tract with oysters, it appeared that the plaintiff owned large quantities of oyster grounds and an extensive plant of shops, docks, and steamers, and that, in the prosecution of the oyster business, a certain area of oyster ground is planted each year that successive crops may be matured and marketed or sold as seed oysters, and that these special circumstances were known or ought to have been known to the defendant before the execution of the contract, if the plaintiff can show that the failure to plant the whole of the tract in question so disarranged the ordinary and natural succession of his crops, or otherwise disturbed his ordinary and natural course of business with respect to his other property that he suffered special damages as a probable and direct result which both parties ought, in reason, to have foreseen, a recovery for such special damages may be allowed. *Ibid.*

And evidence as to the present value of a lemon orchard supposing it to be of the age of four and a half years is admissible, and instructions on that subject are not erroneous in an action for a breach of contract to plant such an orchard, in which the plaintiff was to have an interest in the income and profits that might be derived from the sale of the land or its products, and in the increase in value of the land from the improvements or otherwise. *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62.

In the above case *Rhodes v. Baird*, 16 Ohio St. 573, *infra*, X. b, was distinguished on the ground that the contract there sued upon was essentially different, but it was said that if it was there intended to hold that deprivation of future profits can in no instance be a ground for damages the case is in that respect not in accord with the current of authority.

So, damages for delay in making an abstract of title of lands arising upon the theory that if it had been made in time the person for whom it was made would have been able to borrow money on his property, and would have been able with such money to purchase other lands for which he had been negotiating, which latter lands subsequently increased in value, are too remote, and cannot 53 L. R. A.

be set up as a counterclaim in an action for services in making the abstract. *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659.

And the unskilful performance of the labor of dressing two pairs of mill stones so that they would not answer the purpose designed does not authorize a recovery for the loss of profits of the mill in which they were to be used, in the absence of any special contract as to the character of the work, or of evidence of any special facts brought to the notice of the contractor to show that his contract was made in view of the profits to be derived from the mill. *Fleming v. Beck*, 48 Pa. 309.

And a mortgagor cannot recoup the breach of an agreement by the mortgagee to furnish a mule with which to cultivate the mortgaged premises, and prove the quantity of cotton and corn which his land would ordinarily make with ordinary cultivation, for the purpose of showing the damage suffered by him in consequence of a breach of contract in an action brought by the mortgagee against him for the recovery of personal property *in specie* under the mortgage. *Harper v. Weeks*, 89 Ala. 577, 8 So. 39.

Nor is the fact that there was a \$450 audience in a theater when it was dismissed, and that there were people in the foyer who might have purchased tickets had the performance proceeded, sufficient to warrant a recovery for the loss of future profits in an action brought by an actress against a theater manager for breach of a contract to play her a week's engagement. *Cutting v. Miner*, 30 App. Div. 457, 52 N. Y. Supp. 288.

And a master of a whaling ship, who violates material orders and instructions of his employers by abandoning a voyage and employing the vessel and crew for his own benefit, is liable to his employer for the reasonable expense of bringing the vessel home, and for reasonable damages for breaking up the voyage; but conjectural or possible profits of a whaling voyage cannot be taken into consideration by the jury in estimating such damages. *Brown v. Smith*, 12 Cush. 366.

The rule of damages for delay in loading a vessel beyond the time stipulated for in her charter, however, is the probable net earnings of the vessel during the period of her detention. But inquiry as to the probable earnings during a subsequent period is inadmissible, and nothing can be recovered upon the theory that had she been loaded and unloaded as agreed, she might have received another cargo and delivered it before the expiration of her insurance. *Huron Barge Co. v. Turner*, 79 Fed. 109.

court of law,—a proposition which is manifestly absurd.”

In the case of *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, in which claim for damages for loss of profits by the wrongful dissolution of a partnership was sought, the judge who delivered the opinion of the court said: “The object of commercial partnership is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party, it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the

common grounds, and the amount of profits lost one of the common measures of the damages to be given upon a breach of contract.”

In *Etna L. Ins. Co. v. Neesen*, 84 Ind. 347, 43 Am. Rep. 91, it was held that, in a suit by an agent against an insurance company for damages resulting from his wrongful discharge during the existence of the contract, his recovery is not restricted merely to commissions on premiums collected prior to his dismissal, but may include the probable value of the renewals on policies obtained by him, upon which future premiums would, in the ordinary course of business, be received by the insurance company.

In *Hitchcock v. Supreme Tent, K. of M.* 100 Mich. 40, 68 N. W. 640, on a trial of an action against a mutual benefit society for breach of contract, the plaintiff showed that he was employed by the defendant to estab-

And a contract between a resident of a city and a lecturer, by which the lecturer agreed to visit the other's city and deliver a lecture for a certain sum, the resident to have the money received for admissions, constitutes a purchase by the resident of the profits to be realized from the delivery of the lecture, and in case of the breach of the contract by the lecturer, where the evidence tended to prove that if the lecturer had performed the agreement on his part the resident would have realized a profit from the sale of admission tickets, a verdict not to exceed the amount of profit thus indicated will be sustained, though the evidence as to the amount of profits lost was doubtful and uncertain. *Savery v. Ingersoll*, 46 Hun, 176.

And profits may be recovered as damages for breach of a contract for mining ore where they are not uncertain or remote, and were obviously within the intent and mutual understanding of both parties when the contract was made. *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876.

And profits are recoverable as damages for a breach of contract for the excavation of earth, where it specifies with great particularity the price to be paid, and there is but little difficulty in determining the cost of doing the work, the difference between the two constituting the profits. *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60.

But proof in an action for breach of contract, of the loss of a sub-contract occasioned thereby which involved earth excavation, solid and loose rock excavation, ditching, rubble masonry, range masonry, embankment, brick work, and other kinds of work, for each of which there was a stipulated price, that the solid rock excavation standing by itself would have yielded a profit, is not sufficient to warrant the allowance of damages for loss of the sub-contract, in the absence of anything to show that the other kinds of work might not have involved a loss equal or greater in amount than the profit on that work. *Lentz v. Choteau*, 42 Pa. 435.

So, before a recovery can be had for loss of profits for breach of a contract for advertising, the amount of loss sustained must be shown with reasonable accuracy. *Drumm Seed & Floral Co. v. J. Horace McFarland Co.* (Tex. Civ. App.) 30 S. W. 93.

And failure on the part of a newspaper publisher, through mistake or accident and without fault, to insert and publish a notice of sale according to contract, entitles the other party to the contract to recover back the advertising fee he had paid, but does not authorize a re-

covery of damages measured by the difference between the sale under the advertisement and a fair price. *Elsenlohr v. Swain*, 35 Pa. 107, 78 Am. Dec. 328.

And breach of a contract to publish a notice of the intention of a liquor dealer to apply to the proper board for a license, whereby the liquor dealer was compelled to suspend business for a period, entitles him to a consideration of the fact that his business property was rendered useless during such period, but the mere speculative profits which he might have realized during such period are not a proper basis for the estimation of damages. *Glass v. Garber*, 55 Ind. 336.

The damages suffered by the breach of a contract to insert an advertisement in a newspaper and distribute and post copies thereof consist, first, of the contract price, and second, of a deprivation of the advantages or profits which the person injured would have realized as a result of the advertisement if it had been published; and the first is fixed, certain, and proximate, and recoverable for the breach, but the second is speculative and remote, and incapable of being estimated or made the subject of a recovery. *Tribune Co. v. Bradshaw*, 20 Ill. App. 17.

And the measure of damages under a counterclaim for failure to perform a contract to furnish engravings and a large amount of printing and bills and pictorial cuts for advertising a show, interposed in an action for the printing done, is the difference between what the defendant was to have paid for the printing under the contract and what he had to pay to effect the same amount of advertising so far as was practicable by other means, but he cannot be allowed compensation for loss of profits at the show. *Great Western Printing Co. v. Tucker*, 73 Iowa, 755, 34 N. W. 205.

And the fact that there may have been a demand for books agreed to be bound had they been ready at the time they were to be completed by the contract for the binding is not sufficient to warrant a recovery for delay in the binding, and evidence of damages sustained on account of the failure to complete the books within the time agreed, growing out of such demand, is inadmissible; but if the party for whom the work was to be done had made sales of books, and suffered a loss of profits thereon in consequence of the failure of the binder to complete the work and have the books ready for delivery within the time specified, evidence of such fact is competent for the consideration of the jury. *Hill v. Parsons*, 110 Ill. 107.

lish lodges in an exclusive territory, at his own expense, and what his proportion of the membership fees and *per capita* dues would have been, had he established the lodges established by defendant in his territory during the unexpired term for which he was employed, and the cost of like work he had already done. Held, that the question of his damages should have been submitted to the jury. In the opinion the court says: "In case of a breach by plaintiff, defendant could perform the work, and recover as damages the difference between the price agreed upon and the cost of completion. In case of a breach by defendant, the profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment. There is no presumption, le-

gal or otherwise, that the plaintiff could not have completed the work. The defendant was satisfied with the success of the plaintiff. It is a fair presumption that he would have succeeded. It is a fair inference from the evidence that the defendant's officers broke the contract because of this success, and the belief that they could secure the accomplishment of the work cheaper, which they in fact did. The defendant took advantage of the work which the plaintiff had done, and completed it. The defendant may not now say, 'It is true, I completed the work, but there is no certainty you could.' . . . It has been demonstrated, not only that the work could be, but that it has been, done. It is a fair inference that it could have been done as well by the plaintiff as by the defendant. One element of damage is established by the contract, and the evidence from the defend-

#### a. For services as agent or attorney.

The fact that an agent or attorney himself manages the enterprise engaged in, and of necessity has knowledge of its purpose and probable fruits, together with the elements of violated trust and confidence which enter into breaches of contract by an agent or attorney, takes such breaches of contract out of the principle governing in case of a breach by a contractor or servant, and usually renders the agent or attorney responsible for breach of contract for the loss of the profits of the undertaking or enterprise engaged in, though the rule would probably be different with reference to profits of other related enterprises of the principal with which the agent or attorney had nothing to do.

Thus, where a single investment of money is ordered on a specific article, and such article subsequently acquires great additional value, the additional value cannot fairly be denominated the result of an extravagant calculation of imaginary profits, and the agent, failing to obey his principal's directions in making the investment, is not merely responsible for the money so misapplied, with legal interest, but is accountable for the article into which it ought to have been converted. *Short v. Skipwith*, 1 Brock. 103, Fed. Cas. No. 12,809.

And an agent directed to invest the proceeds of a shipment of goods in certain quantities, in marble tiles and in wrapping paper, who violates his instructions by investing the whole in wrapping paper, is liable where a heavy loss was sustained on the sale of the paper, and, had the marble tiles been shipped as ordered, there would have been a considerable profit in the transaction, for the amount of the profits lost, and the actual value of the tiles themselves at the place of shipment affords a reasonable standard for the estimate of damages. *Bell v. Cunningham*, 8 Pet. 69, 7 L. ed. 606, Affirming 5 Mason, 161, Fed. Cas. No. 3,479.

And an agent directed by his principal to purchase for him a certain description of opium of merchants abroad, who purchased and shipped a different kind without informing the principal that he could not buy the opium required, is liable to the principal for the damages suffered by reason of his breach of duty, subject to the rule that such damage must not be too remote; and this would include, where the price had advanced, the profit which the principal would have made from such advance, and also a sum which he was compelled to pay by way of damages to a purchaser to whom he had resold a portion thereof, supposing it was of the quality ordered; and such recovery is 53 L. R. A.

not objectionable on the ground that it is in fact a loss of profit which he seeks to recover, as it is a case of agent and principal, and not vendor and purchaser. *Cassaboglou v. Gibbs*, 1 L. R. 9 Q. B. Div. 220, 51 L. J. Q. B. N. S. 593, 47 L. T. N. S. 98, 46 J. P. 568, Affirmed in L. R. 11 Q. B. Div. 797, 52 L. J. Q. B. N. S. 538, 48 L. T. N. S. 850, 32 Week. Rep. 138.

So, violation of duty by an agent under an agreement to procure a sum of money or obtain a cash credit to the same extent at a bank in a certain place and open a bank account in his own name with the capital, to be used in honoring and retiring cash orders of his principal, by absconding from that place while he had in his hands a sum in cash belonging to the principal and goods to a large amount, and failing to pay cash orders drawn by the principal upon him, by reason of which the business of the principal at that place was suspended, and the bank withdrew accommodation which it had previously been in the habit of making, entitles the principal to recover of the agent for the loss of such business and accommodation, as well as for the injury caused by the loss of credit, and by the loss of employment as commission agent in Ireland of an Australian mercantile firm, which had yielded a substantial income on account thereof, such damages not being too remote and flowing naturally from the default. *Boyd v. Fitt*, 14 Ir. C. L. Rep. 43, 11 L. T. N. S. 280.

Likewise, in *Ryder v. Thayer*, 3 La. Ann. 149, a recovery against an agent for failing to ship goods which he was directed to ship by his principal was limited to the loss sustained by the principal, and to the profits of which he had been deprived, which were the immediate and direct consequences of the breach of the contract. But the question in the case was as to whether or not exemplary damages should be imposed.

Breach of a contract, however, by which one party was to establish and conduct a business in another city at his own expense, and the other was to furnish him with certain goods, does not entitle the former to recover the profits of the business and at the same time charge the other party with the expense incurred in establishing it. *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015.

#### b. Breach by employer or owner.

##### 1. General rules.

Where a party is to perform labor from which profits would arise as the direct result of the work done at the contract price, such

ant's own books, *viz.*, the amount agreed to be paid, and the benefits reaped by it. The only other element is the cost of doing the work, which, deducted from the amount to be paid, would establish the profits. The expense of what plaintiff did is some evidence upon which to base a judgment of the expense of doing the rest of the work. If that be the only evidence as to the cost, and plaintiff can establish by experience that it is more difficult and expensive to accomplish the first part of the work than the last part, defendant cannot complain if the jury take that as a basis to determine the cost. On the contrary, such a basis would be favorable to the defendant; and, if this were the only basis, we think, under the circumstances of this case, it was sufficient to justify a submission of the case to the jury. He who breaks his contract may not deny to the

injured party the fair inferences to be drawn from the part performed."

In *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534, the action was to recover damages for breach of a contract by the provisions of which the plaintiff agreed to work exclusively for the insurance company for the term of five years, and also bound himself to work the territory with a full corps of energetic and reliable agents. He had all the authority of a general agent in soliciting insurance and collecting premiums. As a compensation for his services and expenditures, he was to have a certain per cent on premiums, as specified in the contract. The plaintiff was only permitted to conduct his agency about half the time agreed on by the stipulation; the defendant having voluntarily sold and transferred the whole of its business to another company, thereby discontinuing its business

profits may be recovered in an action for the breach of the contract. *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828; *Atkinson v. Morse*, 63 Mich. 276, 29 N. W. 711; *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302; *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908. The profit which would thus arise is the direct fruit and result of the contract broken, and its proximate result.

And the general rule of damages a party to such a contract would be entitled to recover where he was ready and willing to perform it would be the difference between the contract price of the work and what it was reasonably worth to perform it in accordance with the contract, or, in other words, the profits on the contract had he performed it. *Kreamer v. Irwin*, 46 Neb. 827, 65 N. W. 885; *Hammond v. Beeson*, 112 Mo. 190, 15 S. W. 1000, 20 S. W. 474; *Royalton v. Royalton & W. Turnp. Co.* 14 Vt. 311.

If such profits can be ascertained with a reasonable degree of certainty. *Hammond v. Beeson*, 112 Mo. 190, 15 S. W. 1000, 20 S. W. 474.

Where a contract for services is specific and definite in all respects fixing the amount of work and the price, it is contemplated that the person contracting to do the work shall make profits, and that the hirer is to be benefited by the work, and the profits lost constitute the legitimate measure of damages for breach of the contract by the employer. *Hitchcock v. Supreme Tent, K. of M.* 100 Mich. 40, 58 N. W. 640.

The difference between the cost of doing the work under a contract and the price to be paid for it is allowed as damages for breach of the contract, because such difference is the inducement and real consideration which causes the contractor to enter into the contract. It is for this that he expends his time, exercises his skill, uses his capital, and assumes the risks which attend the enterprise. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 344, 14 L. ed. 173.

And where one breaks a contract which the other party has partly performed, and the violator then performs the work himself, from which he reaps the profits which the other party might have made, he cannot escape liability for damages if such other party can show the profits made while he was executing it, and the benefits which would have been received from its subsequent completion. *Hitchcock v. Supreme Tent, K. of M.* 100 Mich. 40, 58 N. W. 640.

The amount of profits to be allowed for breach of a contract for the performance of la- 53 L. R. A.

bor and of services by the employer, however, when the contract is not completed at the time of the breach, must be determined by the jury according to the circumstances of the case and the subject-matter of the contract varying with the time required for its completion. *Cederberg v. Robison*, 100 Cal. 94, 34 Pac. 625.

And if a contract for the performance of services is nearly completed, the difference between the contract price and original outlay and cost of performance would be more controlling in determining the amount of damages than when the contractor had only entered upon the performance of the contract, since in the former case the cost of completing the work could be readily ascertained, whereas in the other case the uncertainty of such cost and the risk to be encountered would vary with the time required for its completion. *Ibid.*

So, one who contracts with another to do certain work, and makes a subcontract with a third person for certain materials which he is required to furnish under the original contract, after which the original contract is abandoned by the other party to it, is entitled to recover for such breach an amount sufficient to cover his liability to the owner with whom he contracted for materials as well as profits. *Smith v. Flanders*, 129 Mass. 322.

And a provision in a contract for services, that whenever the quantity of work shall in any respect be increased or diminished below the amounts exhibited at the time of letting the contract, the employee will perform the work at the price stipulated, and make no claim for damages in consequence of such increase or diminution, does not authorize the employer to destroy the contract, but simply provides for the case of a change of plan of the work, and does not prevent the employee from recovering for loss of profits in case of the termination of the contract by the act of the employer. *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

But the breach by the employer of a contract of employment to do certain work for a specified time entitles the employee to recover the profits he would have got out of the work, and nothing else. He cannot recover special wages for the time contracted for. *Nixon v. Myers*, 141 Pa. 477, 21 Atl. 670.

And he must not receive when the work is not done the same amount he would have received had the contract been fully performed; and to arrive at such profits reasonable outlays and expenses must be deducted from the contract price. *Porter v. Burkett*, 65 Tex. 383; *Hambly v. Delaware, M. & V. R. Co.* 21 Fed. 541.

Nor can he assume the contract price as the

and depriving itself of the power to keep and perform its part of the contract. The court held that the inability of the defendant to continue its business was no excuse for its breach of the contract with the plaintiff, who could recover such damage as was done him by the breach. In the trial court he had been allowed to show how much he had realized during the existence of the contract, and the estimate in that verdict seems to have been placed upon the past actual earnings, together with the testimony of actuaries as to what probably would be the value of the renewals on policies already obtained. With reference to the admissibility and value of this testimony the court, in its opinion, says: "A custom or usage has sprung up and exists with insurance companies by which adjustments are made as to the value and renewals of policies for any

given length of time. By the use of statistical tables and comparisons, a remarkable degree of accuracy is obtained; and, where a connection ceases between an agent and the company, it is the only mode of ascertaining or adjusting the agent's interest. The calculation by the actuary has been reduced to scientific principles, and it must be resorted to, else there would be a failure of justice, on one hand, or, on the other, the damages would be purely speculative."

Touching a further feature in the case, we find this language in the opinion: "The plaintiff was permitted to show the amount of his collections from time to time from July 1, 1869, to March 1, 1872, and the amount of his commissions during that time, both in the aggregate and per month, on the average. These commissions were all paid, and it is evident from the amount of the ver-

true value of the work necessary to complete the whole job, and recover the proportion which the work done will bear to the whole job, as that would be allowing indirectly a recovery for speculative profits. *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 879.

He can only recover damages for the breach of the contract, which will consist of his outlay already incurred and of the profits which he would have realized had he been permitted to complete the work, or, in place of outlay when the compensation for the services is divisible, he may recover compensation for the services already performed, and damages for being prevented from completing the contract. *Hambly v. Delaware*, M. & V. R. Co. 21 Fed. 541; *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

And the defendant in an action for a breach of such a contract should be permitted to prove what it would have cost him to do the work. *Warren Chemical Mfg. Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908.

And where no evidence of general damage is given in an action for recovery of profits for breach of a contract of hiring, and no special damages are claimed, the plaintiff is entitled upon proof of the breach to recover nominal damages only. *Breen v. Fairbank*, 35 Mo. App. 212.

In *Webster v. Wade*, 19 Cal. 291, 79 Am. Dec. 218, however, it was held that where a contract for service is made for a fixed period, and the employer discharges the servant before its termination without good cause, he is still liable, and the servant may recover the stipulated wages.

So, the profits must have been certain, and not contingent, speculative, or remote. *Porter v. Burkett*, 65 Tex. 383.

And the damages for breach by the employer of a contract for the employment of a person in a particular business as long as the latter may elect to serve, consisting of the supposed loss of the profits of the business between the time of the discharge and the time of trial, are not recoverable in an action for the breach, where the employee never elected as to the duration of the period of service, as the obligation violated is too uncertain to warrant a recovery. *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862.

And persons contracting to perform labor, who elect to abandon the further execution of the contract when an option to do so is tendered them by the other party, have no claims for profits which might have been earned by a completion of the contract. *Skinner v. Dayton*, 19 Johns. 513, 10 Am. Dec. 288. 53 L. R. A.

And a government contractor who fails to perform the work contracted for within the stipulated time, and whose contract is terminated by the officer in charge for that reason, cannot recover from the government the difference between the price at which he was to do the work and the lower price at which it was relet, as in such case the government does not resume control of the work for his benefit, but for its own. *Quinn v. United States*, 99 U. S. 30, 25 L. ed. 269.

So, a government contract which has been annulled and canceled by the deliberate act of the parties furnishes no basis for the allowance of damages for the loss of prospective profits for the breach thereof, though it was afterwards treated by the Secretary of War as subsisting. *De Groot v. United States*, 1 Ct. Cl. 97.

And the surety on the bond of a contractor for the construction of work on a public improvement, who assumed the contract upon the failure of the contractor and entered upon the execution thereof, but was afterwards compelled to discontinue by notification from the authorized officer, can recover nothing on account of prospective profits, where, on account of the peculiarity of the work, it is impossible to determine whether or not he would have made any profits beyond his expenditures, had he been permitted to go on with the work. *Behan v. United States*, 18 Ct. Cl. 687.

A statute authorizing the state board of audit to hear all private claims and accounts against the state with certain exceptions, and to determine on the justice and amount thereof, and to allow such sums as it shall consider should equitably be paid by the state to the claimants, subjects the state to liability for prospective profits of a contract for services broken by it, whether it would otherwise be liable or not. *Danolds v. New York*, 89 N. Y. 36, 42 Am. Rep. 277.

See also *Christian County v. Overholt*, 18 Ill. 223, *infra*, III. b, 4, c.

## 2. Effect of preventing performance.

The general rules as to the effect of the prevention by one party of the performance of a contract by the other party, set forth *supra*, II. i, apply with particular force to prevention by an employer of performance of a contract for services by an employee or contractor.

Thus, a party contracting for the performance of services can recover for prospective profits of the contract when he is prevented from going on by being ordered to desist from the work by the other party, or by the omission of the other party to perform some condition

dict that the jury must have considered the commission on premiums for the above-named period as a fair criterion of what plaintiff would have earned in the future had the contract not been broken. Without some other evidence of the probable amount of the business, these damages would be too much of a speculative character. The new business might depend on various circumstances, and be affected by numerous contingencies; and these should be shown, as entering into the computation of damages."

In *Mueller v. Bethesda Mineral Spring Co.* 88 Mich. 390, 50 N. W. 319, it was held that where the plaintiff had been constituted the defendant's sole agent for the sale of its mineral water for the period of one year, within a defined territory, and before the year expired the agency was transferred to another, the plaintiff's measure of damages was the

profits he might have realized if defendant had not breached its contract, and that, in arriving at the amount of plaintiff's damage, proof of the actual sales of water by the new agent during the plaintiff's unexpired term would not be speculative. In this connection it is said in the opinion: "While it may be true that Mueller would not have disposed of as much of the article as this firm did, yet the amount of their sales, while not conclusive upon defendant, was competent evidence to go to the jury upon the question of plaintiff's damages. It would have been proper to draw out upon cross-examination what special effort had been made by this firm to introduce and push this commodity, but the sales for the season named may have been greater than for the previous season, because of a demand created by what Mueller did, rather than by any special effort by this

precedent to its further prosecution. *Kendall Bank Note Co. v. Sinking Fund Comrs.* 79 Va. 568; *Goodrich v. Hubbard*, 51 Mich. 63, 16 N. W. 232; *Roberts v. Drehmer*, 41 Neb. 308, 59 N. W. 911; *Elizabethtown & P. R. Co. v. Pottinger*, 10 Bush, 185; *Dibol v. Minott*, 9 Iowa, 408; *Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177; *Chamberlin v. Scott*, 33 Vt. 80.

Where by contract a party is to perform labor from which a profit is to spring as the direct result of work done at the contract price, and he is prevented from earning this profit by the wrongful act of the other party, the loss of the profit is a direct and natural result which the law will presume to follow the breach of the contract. *Burrell v. New York & S. S. Salt Co.* 14 Mich. 84; *Elizabethtown & P. R. Co. v. Pottinger*, 10 Bush, 185.

Where a contract for service is executory, one party has the power to stop performance on the part of the other party by an explicit direction to that effect; but he subjects himself by so doing to such damages as will compensate the other party for being stopped. *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

And if the performance of services has been arrested by the act or omission of the employer, the employee will have his election to treat the contract as rescinded and recover on a *quantum meruit* the value of his labor, or he may sue upon the agreement, and recover for the work completed according to the contract and the loss in profits or otherwise which he sustained by interruption. *Jones v. Judd*, 4 N. Y. 414; *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379.

And in such case he may sue upon the contract and recover the price agreed to be paid for the work already performed, and declare in different counts for damages sustained by reason of the breach of the contract, and recover as profits whatever the proofs show would have been realized from the unfinished work. *Danforth v. Tennessee & C. R. Co.* 93 Ala. 614, 11 So. 60.

And he is entitled to recover profits without special allegations in his declaration, as the consideration of profits cannot be separated from the circumstances under which the work was done. *Burrell v. New York & S. S. Salt Co.* 14 Mich. 84.

And the plaintiff in an action for breach of a written contract of employment is entitled, after answer, to amend his complaint by setting up a collateral oral contract between the parties, which is terminated by his discharge from employment before the time agreed upon, causing the loss of certain profits which would have

been made under the contract and incidental profits under the employment, such loss of profits being in the nature of consequential damages. *Wells v. Law* (Cal.) 38 Pac. 523.

And in each case the measure of damages is the difference between the price agreed to be paid for the work, and what it would have cost him to complete it. *Myers v. York & C. R. Co.* 2 Curt. C. C. 28, Fed. Cas. No. 9,997; *George v. Cahawba & M. R. Co.* 8 Ala. 234; *Wallace v. Tumlin*, 42 Ga. 462; *Morgan v. Heffer*, 68 Me. 131; *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Birnack v. Hollender*, 29 Misc. 640, 61 N. Y. Supp. 118; *Gabriel v. Akinsville Pressed Brick Co.* 57 Mo. App. 620; *Park v. Kitchen*, 1 Mo. App. 357; *Gulce v. Crenshaw*, 60 Tex. 344; *Porter v. Burkett*, 65 Tex. 333; *Gleason v. United States*, 33 Ct. Cl. 65.

Making reasonable deductions for the less time engaged and for release from the care, trouble, risk, and responsibility attending a full execution. *Gleason v. United States*, 33 Ct. Cl. 65.

Or such proportion of the entire price as the fair cost of the work done bears to the fair cost of the whole work, together with such profits for the work not done as he would have realized by doing it. *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *Chamberlin v. Scott*, 33 Vt. 80.

Or, if he chooses to waive the contract and sue in general assumpsit for work and labor, then his measure of damages will be a reasonable compensation for the work performed. *Chamberlin v. Scott*, 33 Vt. 80.

The general rule that the future profits which might have accrued upon the performance of a contract cannot be allowed in estimating damages for its breach does not apply, where, under the contract, labor is to be performed from which profit is to spring, as the direct result of work to be done at a stipulated price, and one party is prevented from earning such profits by the wrongful act of the others. *Stresau v. Fideili*, 1 Tex. App. Civ. Cas. (White & W.) § 847, p. 487.

And a party to a contract may recover in an action for a breach thereof, not only the profits which he can show he would have made from the performance of the work thereunder if he had been allowed to do it, but also for a loss resulting from delay induced by the misconduct of the other party to the contract. *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. 525.

And if the cost of doing the work has fallen in the mean time, he may recover the difference to his advantage. *Goodrich v. Hubbard*, 51 Mich. 63, 16 N. W. 232.

And there is no valid distinction between the

firm. Here was a commodity of which defendant was the sole proprietor, and for which Mueller was made sole agent. All of this commodity reaching the territory named came from defendant directly to Mueller, and through his agency. The agency of the firm of Bassett & L'Hommedieu succeeded that of Mueller. They took it up where he left off, and continued it for the five months for which he was to enjoy its fruits. Proof as to the amount actually sold by them for that five months cannot be said to be speculative."

The case of *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, bears so close an analogy to the case at bar, and the authority of that court is so high, as to justify our quoting from the opinion at considerable length. "This action was brought to recover damages for

wrongful termination of a contract and an unlawful diminution of the quantity of the work stipulated to be performed under it, on the question of the right to recover profits as damages for the breach. *Harvey v. United States*, 8 Ct. Cl. 501.

And it has been held that in actions upon contract for services rendered, where the amount of compensation is fixed by its terms, such sum is prima facie the measure of damages when the defendant refuses to permit a performance on the part of the plaintiff, and such refusal is to be taken as an equivalent to a performance for the purpose of maintaining the action. *Steinberg v. Gebhardt*, 41 Mo. 520.

But see *Porter v. Burkett*, 65 Tex. 383; *Hambly v. Delaware, M. & V. R. Co.* 21 Fed. 541, and *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379,—*supra*, III. b. 1.

The contractor cannot, however, after being forbidden to go on and complete the contract, recover the contract price as such. *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

And speculative and fanciful profits cannot be recovered in an action upon a contract broken by a refusal to permit the work of performance to continue, but profits which it is proved the party would have made are recoverable. *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 560; *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379.

But where, in estimating the profits of a contract for work to be done and materials furnished, the completion of which is prevented by the employer, the profits to be realized cannot in the nature of things be proved with absolute certainty, no greater degree of proof is required in such cases than in other civil actions. *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. 964.

So, the right to recover as damages the prospective profits of a contract does not arise out of every breach of a contract for performance of service, but is dependent upon that which operates as a denial of the right to proceed to completion of the work contracted for. *Moore v. Taylor*, 42 Hun, 45.

And subcontracts are not to be taken as evidence of the profits lost, but they are to be arrived at by taking the market value at the time of the breach, and, if there be no market value, then by an inquiry into the cost of materials, the expense of transportation, and the amount and value of labor required. *Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177.

And the damages in an action for breach of an agreement of employment upon an annual salary by notice from employer to employee 53 L. R. A.

the breach of an agreement made in the city of New York in February, 1878, which is set forth in the complaint as follows: "That if the plaintiffs shall succeed in placing (that is to say, selling) fifty of the defendant's sewing machines to one firm or party in the Republic of Mexico during the next trip of their agent to that country, then about to be made, they, the plaintiffs, for every fifty machines so sold, shall have the sole agency for the sale of the defendant's sewing machines in that locality and its vicinity in that Republic; and the defendant should furnish to the plaintiffs machines at the lowest net gold prices." The defendant denied the agreement, but the jury found it substantially as alleged, and it is conceded that we must assume here that such an agreement was made. The plaintiffs at once entered upon the performance of the agreement, purchased a sam-

ple to quilt are to be assessed upon the principle of indemnity for the loss sustained by reason of not being employed and paid according to the contract. *Revere v. Boston Copper Co.* 15 Pick. 351.

Under a statute providing that the proprietor has a right to cancel at pleasure the bargain he has made, even in case the work has already been commenced, by paying the undertaker for the expenses and labor already incurred and such damages as the nature of the case may require, the allowance of the profits which the undertaker might have made by completing the work is authorized. *Forrest v. Caldwell*, 5 La. Ann. 220.

### 3. What constitutes prevention of performance.

The general rules with relation to what constitutes prevention of performance, set forth *supra*, II. i, apply to prevention by the employer of contracts for services.

Thus, a contract of employment is terminated so as to entitle the contractor to recover profits he would have made had he been allowed to complete the work, where the employer prevents or prohibits the completion of the work, the contractor being ready and willing to complete it. *Cox v. McLaughlin*, 54 Cal. 605.

But the mere neglect of an employer to pay money as it became due under a contract of employment is not such a prevention of performance of the contract as to terminate it, and entitle the contractor to recover as damages the profits he would have made had he been allowed to complete the work. *Ibid.*; *Moore v. Taylor*, 42 Hun, 45.

Although it may be a breach which would permit him to abandon the work and recover for that already done, it would not enable him to recover for profits which he would have made had he proceeded in the performance of the contract to completion. *Moore v. Taylor*, 42 Hun, 45.

The conduct which will justify a party in abandoning a contract, and entitle him to recover, not only for the work he had done, but for the profits he can prove he would have made had the contract gone on, must be such as in effect prevents the performance of the contract, and indicates an intention not to fulfil, and such as affects the very substance of the contract; and it should appear that the act was deliberately done, and not the result of something inadvertently overlooked. *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 560.

Continued and repeated defaults in payment according to the provisions of a contract, how-

ple machine of the defendant, caused their agent to be instructed in its mechanism and management, and then sent him to Mexico. After reaching there he sold fifty machines to one Mead, of San Luis Potosi, on his promise to Mead that he should be the general agent of the defendant for that locality and its vicinity. The order for the fifty machines was sent to the defendant and filled by it, and those machines were forwarded to Mexico and paid for. Shortly thereafter plaintiffs' agent made another sale of fifty machines for another locality in Mexico, and an order for those machines was sent to the defendant, which it absolutely refused to fill. Plaintiff's agent procured another order for one machine, and sent that to the defendant, which it also refused to fill; and then it refused to fill any further orders from the plaintiffs or

their agents, and absolutely refused to perform and repudiated its agreement. Upon the trial of the action the plaintiffs made various offers of evidence to show the value of their contract with the defendant, the most of which were excluded. In his charge to the jury the judge held, as matter of law, that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given; and, the plaintiffs' profits having been shown to be \$4 on a machine, their recovery was thus limited to \$204. They excepted to the rule of damages thus laid down, and the sole question for our determination is What, upon the facts of this case, was the proper rule of damages? Were the plaintiffs confined to the damages suffered by them in consequence of the refusal of the defendant to fill the two orders for fifty-one machines, or were they entitled

ever, justifies the contractor in abandoning the work before its completion, and abandonment in such case does not prevent him from recovering as damages the profits on the uncompleted portion of the contract. *Grand Rapids & B. C. R. Co. v. Van Dusen*, 29 Mich. 431.

And a party contracting to perform services for another, who is wantonly or carelessly interfered with or hindered and prevented in the performance of the services by the other to such an extent as to render the performance difficult and greatly decrease the profits which he would otherwise have made, is at liberty to treat the contract as broken, and desist from any further effort to perform, and may recover as damages the profits which he would have received through full performance, such an abandonment of the contract not being technically a rescission which would prevent a recovery of damages for nonperformance. *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876.

And where a contractor in good faith enters upon the performance of a contract and incurs expenses, the employer having notice of that fact, and the employer, either by an order or by negligently failing to perform an essential part of the contract to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work, it will be implied that all loss necessarily occasioned by such suspension, of which the employer was at the time notified, should fall upon him; and the contractor may in such case recover, in addition to the contract price, all his actual damages occasioned by such delay, including injuries to tools and interest on moneys invested in materials for the period of delay. *Louisville & N. R. Co. v. Hollerbach*, 105 Ind. 137, 5 N. E. 28.

But where a contractor has been allowed to perform under his contract work agreed to be done by him, and has received the contract price therefor, but has been unreasonably hindered and delayed in its performance by the fault of the other party, he cannot recover as damages for such hindrance and delay the profits that that he might have made in his business or calling on other work if he had not been so delayed. *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. 168.

A provision in a contract for services that in case the execution of the contract shall be suspended by the employer for any cause no claim for prospective profits or work done shall be made or allowed, does not contemplate the entire abrogation or repudiation of the contract, or prevent a recovery for profits of the contract 53 L. R. A.

in case of such repudiation. *Danolds v. State*, 89 N. Y. 30, 42 Am. Rep. 277.

And under a provision in a contract for services between a state and a contractor, that in the event of the suspension of the work contracted for by reason of the legislature failing to make the necessary appropriations the state will direct the superintendent and engineer to make up an estimate and account of the time of such suspension, and present them to the commissioners, who shall review them, and, when correct and satisfactory, proceed to pay the same if in funds, up to the time of the suspension, an entire repudiation of the contract is not a suspension, and the employee is not prevented thereby from recovering for profits lost through such repudiation. *Ibid*.

And the fact that an appropriation for an improvement is exhausted, while it justifies the officer in charge of the improvement in stopping the work of a contractor thereon, does not constitute a defense in an action brought by him for breach of the contract, and prevent a recovery of the profits he would have made had he been permitted to complete the contract. *Ferris v. United States*, 27 Ct. Cl. 542.

See also *William Wharton, Jr. & Co. v. Winch*, 140 N. Y. 287, 35 N. E. 589; *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502, *infra*, III. b, 4, a.

#### 4. Particular contracts.

##### a. For railway construction.

What a contractor for railway construction would make by way of excess of the amount to be paid over the cost of construction is a direct fruit of the contract, and is always recoverable in an action for breach by the employer whether it be the company or a general contractor, if it be not contingent or uncertain. But what might have been made from other contracts or enterprises is collateral, and not recoverable.

Thus, the future gain or profit lost to a contractor for the construction or grading of a railroad or a section of a railroad by refusal of the railroad company to allow him to proceed and complete the work is a proper element of damages for consideration in an action for the breach. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 344, 14 L. ed. 173; *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

The term "profit" in this connection means the gain which the contractor would have made if he had been permitted to complete his contract, which would be the difference between the cost of doing the work and the price to be



also to recover the damages which they sustained by a total breach of the agreement on the part of the defendant? The judge limited the damages, as stated in his charge, because any further allowance of damages for the breach of the agreement would, as he claimed, be merely speculative and imaginary. It is frequently difficult to apply the rules of damages, and to determine how far and when opinion evidence may be received to prove the amount of damages, and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be, not merely speculative, possible, and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so

remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof; and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount

paid for it. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 344, 14 L. ed. 173.

And a cause of action for breach by a railroad company of a contract for the construction of a section of its road accrues immediately on the breach, and suit may be brought at once, and witnesses are required to estimate the cost of labor and material at that date for the purpose of determining the cost of construction in estimating the profits which would have been made if the contract had been completed. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

And evidence in an action for breach of a contract for the construction of a railroad which the contractors were prevented from completing by the conduct of the railroad company, in which it was shown that a part of the work contracted for had been completed, and that such part was of substantially the same character as the rest, as to the cost of doing such part of the work, is competent and admissible in estimating the profits which the contractors would have made had they been allowed to carry out the contract. *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502.

And the damages would be such sum as the testimony reasonably satisfies the jury that the contractors would have realized as profits by the completion of the contract. *Danforth v. Tennessee & C. River R. Co.* 99 Ala. 331, 13 So. 51.

And in determining the cost of completing a section of a railroad with a view to establishing the profits to be recovered for breach by the railroad of the contract for construction, if some of the facts to be considered are not susceptible of direct and positive proof, resort can be had to the opinion and judgment of men shown to have information and experience qualifying them to testify as to such matters. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

But the measure of damages for a breach of contract on the part of a railroad company for the performance of the work of railway construction which had been contracted to subcontractors is not the difference between the amount the contractor was to receive on his contract and the amount he was to pay to his subcontractors, and evidence as to the amount to be paid to subcontractors in an action for the breach is inadmissible. *Story v. New York & H. R. Co.* 6 N. Y. 90, 6 Barb. 419.

Though the fact that contractors for the construction of a railroad intended to perform the work through subcontractors, and had made arrangements to that end, does not render inadmissible, in an action for a breach, evidence as to the cost of a part of the work contracted

for which had already been performed as constituting a necessary factor in estimating the profits, which the contractors would have made had they been allowed to carry out the contract,—especially where the subcontracts had not been entered into by reason of the breach of the original contract. *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502.

In the above case, however, it was held that the measure of damages in an action for a breach of contract for the construction of a railroad which the contractor intended to perform through subcontractors, is the difference between the price the company had agreed to pay for the work and what it would have cost the contractors to have had the work done by subcontractors, affected, it may be, to some extent by the consideration that, as the work was not done at all, the contractors were relieved from the care, responsibility, and expenditure of time involved in looking to the subcontractors.

So, a subcontractor having a contract with a railway contractor to do the grading on a section of a railroad, who is prevented from completing the work by the railroad company under a power reserved in its contract with the contractor, is entitled to recover of the contractor the difference between the cost of doing the work and the price agreed to be paid for it, and any other direct damage he sustained from the breach. *Smith v. O'Donnell*, 8 Lea, 468; *Morey v. King*, 49 Vt. 304; *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. 168; *Porter v. Burkett*, 65 Tex. 383.

And proof of the loss of profits is admissible. *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. 168.

And a railroad contractor agreeing with another railroad contractor to grade 5 miles of railroad, but who was unable to perform the work because the railroad company had not fixed the grade, is entitled to recover of the other contractor for the loss of profits, if any, which he could have realized by a performance of the contract, and also for the reasonable value of the services of teams and workmen while idle, and the necessary incidental expenses, where he was ready to begin work at the specified time, and was kept in idleness by reason of the promise of the other party to have the grade fixed so that he could proceed. *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474.

And the plaintiff in an action brought by a subcontractor against a contractor for the recovery of the profits of his contract for the construction of a section of a railroad which he was prevented from performing, may be permitted to testify as to the amount of the work

of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to de-

termine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors. . . . [The judge then reviews and cites a number of reported cases, and thereafter proceeds with his opinion.] It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right, under their agreement, to establish agencies for the sale of defendant's machines anywhere in Mexico where they could sell fifty machines. An agency, when thus established, was to be exclusive, and was to have

to be done and the profit he would have made, and as to the amount of work remaining undone, and as to the cost of completion with his facilities; and his evidence is not rendered incompetent by his admission that he does not know, and cannot positively state, the exact amount of excavation remaining to be done. *Smith v. O'Donnell*, 8 Lea, 468.

And one who engages to do designated work upon a designated portion of a railroad at a specified price, and who enters upon the performance of the contract, but is compelled by the other party to leave the work, may elect to treat the contract as still existing and binding upon the other party, and recover for the work performed at the contract price, and for all damages incurred in consequence of the discontinuance of the contract; or, where but a small portion of the work contracted for has been done, and that which was done was in such an unfinished condition as to be incapable of measurement and of having its price ascertained under the contract, he may treat the contract as rescinded from the beginning, and recover upon a *quantum meruit* the true value of the labor performed by him without regard to the contract price. *Derby v. Johnson*, 21 Vt. 17.

And proof that a railway contractor stopped the work of a subcontractor in November, when it was alleged in the special account that the work was stopped in June of that year, is not an error available to the defendants in an action for the breach, as it operates to their benefit in lessening the amount of unperformed work, and so lessened the amount of profits that the plaintiff lost by the termination of the contract. *Morey v. Kling*, 49 Vt. 304.

So, a street-car company which cancels a contract for the construction of a power house and car barn is liable to the contractor for loss of profits caused by the breach, and evidence in an action therefor by a contractor of experience, skill, and responsibility, as to the difference between the cost of completing the contract and the bid made therefor, is admissible. *Jenkins v. Charleston Street R. Co.* 38 S. C. 373, 38 S. E. 703.

But the measure of damages in an action for breach by a railroad company of a contract with a contractor for the construction of a section of its road, consisting of the difference between what it would cost to complete the work as stipulated in the contract and the price to be paid, is not the sole guide to be considered. The cause of action accrues immediately on the breach, and the contractor is relieved from all anxiety, trouble, and labor about its completion, and he has to

make no additional outlay, and allowance should be made for these things in determining the amount of real loss. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

And the contingencies of bad weather, sickness, accidents, and the like must be taken into consideration in estimating profits as damages in an action by a contractor against a railroad company for breach of contract to construct a railroad, though the contract was intended to be performed through subcontractors, where no subcontracts had in fact been entered into. *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502.

And no recovery can be had for profits which would have resulted from other work which might have been done during the period of delay. *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. 168.

Nor can a sum of money which might upon certain contingencies have been made or saved by one who contracted to construct a railroad be recovered as damages in an action for a breach upon the part of the railroad company. *Wright v. Petrie, Smedes & M. Ch.* 282.

And an instruction in an action by a contractor against a railroad company for breach of contract for the construction of a railroad by preventing the contractor from completing the contract, that the plaintiff cannot recover profits unless the jury believes from the evidence that the profits claimed are certain both in their nature and with respect to the cause from which they proceed, is improper, as the word "certain" has many shades of meaning in law, and reasonable certainty is sufficient to warrant a verdict. *Danforth v. Tennessee & C. River R. Co.* 99 Ala. 331, 13 So. 51.

And an instruction that profits which would certainly have been realized but for the defendant's default are recoverable, and those which are speculative, contingent, probable, or remote are not recoverable, is faulty from the improper use of the word "probable," as probability is enough to found a verdict on if it is supported by sufficient testimony to reasonably convince, though mere probability by itself is not sufficient. *Ibid.*

And where there is evidence to show the profits the plaintiffs would have realized from the performance of the contract through subcontractors had they been allowed to proceed in that way with the work, instructions are improper when based upon the idea that no evidence was adduced to show the amount of profits the plaintiffs would have made, and hence that no data were furnished the jury upon which to assess damages as profits. *Tenne-*

some permanency. It could not be broken up at the will of the defendant, without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or, in other words, the damage caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited. There are some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice in such a case. The agent whom plaintiffs sent to Mexico was apparently intelligent, capable, and well acquainted with Mexico. Machines could be delivered there

for about \$30 per machine, and could then be sold at retail for about \$125. The profit of the plaintiffs on each machine was about \$4. Plaintiffs' agents readily made sales of one hundred and one machines, and were about to make other sales. One of defendant's agents subsequently sold in a single city twenty machines in six months, at \$125 each. The plaintiffs had established two agencies, and to the value of such agencies, at least, they were entitled. Mead, who had one of the agencies, testified that he had made arrangements with several parties to sell the machines; that he had all the facilities for carrying on an extensive and profitable business, and was well acquainted with the country. The population of several of the Mexican cities in which plaintiffs' agent was engaged in establishing agencies was shown. From all these and other facts proved, it

see & C. R. Co. v. Danforth, 112 Ala. 80, 20 So. 502.

So, if in an action for breach by the employer of a contract for railway construction, it is found that there would have been no profits in the performance of the contract, there can be no recovery for expenses for preparing for the contract, as such expenses must be considered in arriving at the profits. *Hawley v. Corey*, 9 Utah, 175, 33 Pac. 696.

And a railroad company having a contract with a contractor for the construction of a part of its road is not in all cases bound to wait until it is too late to have it completed within the desired time for the contractor to demonstrate his inability to complete it, on peril of paying him all the profits to be realized from performance as stipulated, if it can be shown beyond question that he was unable to complete it; and this is especially the case where the contractor cannot respond in damages for a breach on his part. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

But where the contract gives the company full control over the progress of the work, and enables it to terminate it in a month's time if the contractor shall fail for any cause to make satisfactory progress, evidence in an action for the breach of the contract by the railroad company, tending to prove the insolvency of the contractor at the date of the contract, and also at the time when it was annulled, is not admissible as going to show that he would have been unable to complete the contract, and that therefore his loss of profits was attributable in part at least to his own inability to fulfil the contract, and not altogether to its breach by the railroad company. *Ibid*.

Mere failure of a contractor for the construction of a street railway, however, to make punctual payment to a subcontractor of an instalment due according to the provisions of the contract is not such a breach of the entire contract as will permit the subcontractor to refuse to proceed further under the contract, and recover damages for the profits which he would have earned had the contract been fully performed on his part. *William Wharton, Jr. & Co. v. Winch*, 140 N. Y. 287, 35 N. E. 589.

But failure of a railroad company to make payments stipulated for in a contract with a contractor for the construction of a railroad, and a negative reply to the contractor's question whether he should continue the work, prevent the contractor in a legal sense from carrying out and performing the contract so as to entitle him to recover unearned profits. *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502.  
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#### *b. Elevator and storage contracts.*

The owner of an elevator is entitled to recover for breach of a contract by a railroad company, by which the elevator company was to receive, store, handle, and deliver all grain received by the cars of the railroad company not otherwise consigned, at a designated price per bushel, not only for loss of profits which would have resulted had grain been delivered to them as provided for in the contract, but also for loss of profits resulting from being deprived of the storage of grain as stipulated. *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422, 26 Iowa, 199.

And the difficulty of ascertaining the amount of damages does not prevent such recovery. *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 264.

And where it appears that, in order to handle grain actually furnished it from other sources, the elevator company was required to, and did, have hands and power employed by which it could without further expense also have handled the grain contracted to be furnished, it may recover the full price of the grain refused it. *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 199.

And a contract by which one party was to operate the elevator of another and receive one half a cent per bushel for all grain transferred from cars to vessels, with a right of termination by either party upon ninety days' notice, is definite, and contemplates a transfer of such grain as is received by the owner, which is a railroad company, in the usual course of business; and where the railroad company terminates the contract without giving the required notice, and the number of bushels of grain transferred through the elevator during the succeeding ninety days can be shown, the profits arising therefrom may be recovered in an action for a breach of the contract. *Dykema v. Minneapolis, St. P. & S. Ste M. R. Co.* 101 Mich. 47, 59 N. W. 447.

And the fact that in the course of business grain had been left in store, from which profits resulted, is sufficient, in an action for breach of a contract between a railroad company and an elevator company, providing for the handling and storing of all grain received by the railroad company not otherwise consigned, to support the conclusion that in the further prosecution of the same business, if both parties comply with their contract, profits will result on storage. *Richmond v. Dubuque & S. C. R. Co.* 40 Iowa, 264.

A contract between a railroad company and an elevator owner, that the company should

cannot be doubted that the plaintiffs suffered damages to at least several hundred dollars, and they should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury, with proper instructions; and their verdict, not based upon mere speculation and possibilities, but upon the facts and circumstances proved, would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will admit."

From the nature of the case, the language of the contract, and all the dealings of the parties, it is clear that the provision naming ten years from the date of the original contract, and afterwards extending it to ten years from the 23d of March, 1896, is of the

essence of the contract. It is equally apparent, from the same premises, that the provision which stipulated that the defendant company should not appoint other agents within the manager's territory, unless he neglected or refused to thoroughly develop and work the same, is likewise of the essence of the contract between these parties. It follows, therefore, that if the proof supports the plaintiff's allegation as to his faithful performance of his covenants in the contract up to December —, 1896, the action of the defendant at that date in employing other agents and agencies to work the territory assigned to the plaintiff was a breach of the contract on the part of the defendant which rendered the defendant liable for such damages as directly resulted therefrom. Assuming that the alleged breach of the contract is supported by the proof, the plaintiff

gives the elevator owner all the weighing and transferring of grain which it was in its power to give, and that it should not make use of the weights obtained by it from the elevator company for any other purpose than billing the property to its destination, is broken, and its performance upon the part of the elevator owner prevented by the railroad company, so as to authorize the elevator owner to recover for future profits, where the railroad company claimed and exercised the right to give the elevator owner for weight and transfer only such grain as it saw fit, and transferred the weights obtained from him to others, thereby making a profit therefrom for other purposes than for billing the property to its destination, and replied, in answer to protest, that there was not anything to arbitrate, and refused the claim for weights used for other purposes than for billing to destination upon the ground that it did not appear for what purpose such weights were used, or how the number of cars on which it claimed such weights were given, was arrived at. *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 560.

#### *c. For construction of buildings.*

The profits of a contractor for the construction of a building are not collateral, and therefore are not subject to objection for remoteness. But they may be conjectural or uncertain, in which case they are not recoverable.

Thus, a builder engaged in constructing a building, who is prevented by his employer from completing the work, may recover such damages as he may have sustained by being thus prevented from fulfilling his contract. *Western v. Sharp*, 14 B. Mon. 177.

And he is entitled to prove, in an action therefor, the profits of which he was deprived by the termination of the contract. *Wisner v. Barber*, 10 Or. 343; *Moore v. Howard*, 18 La. Ann. 635; *Alphin v. Working*, 132 Ill. 484, 24 N. E. 54, affirming 32 Ill. App. 178; *Von Dorn v. Mengedohrt*, 41 Neb. 525, 59 N. W. 800; *Singleton v. Wilson*, 85 Tenn. 344, 2 S. W. 801.

While one who has contracted for the erection of a house upon his lands has a right to stop work on the building, by so doing he commits a breach of the contract and incurs a liability to pay damages resulting therefrom, which damages would include compensation for the labor done and materials furnished, and such further sum as might, upon legal principles, be assessed for the breach of the contract. *Black v. Woodrow*, 39 Md. 194.

And the measure of damages in respect to a building contract, where performance has

been prevented by the fault of the owner, is the value of the contract, which is the difference between the price agreed to be paid and the cost of performance. *Singleton v. Wilson*, 85 Tenn. 344, 2 S. W. 801; *Schelle v. Klein*, 89 Mich. 376, 50 N. W. 857; *Jewett v. Wilmot*, 51 Neb. 700, 71 N. W. 775; *Boyd v. Melghan*, 48 N. J. L. 404, 4 Atl. 778; *Feaster v. Richmond Cotton Mills*, 51 S. C. 143, 28 S. E. 801; *Fairfield v. Jeffreys*, 68 Ind. 578.

And a breach of a contract by which a contractor agreed to perform certain work according to plans and specifications, and furnish certain materials for the construction of a building, by refusal of the owner to proceed with the contract after a portion of the material had been furnished, entitles the contractor to recover, not only the profits he would have made by the performance of the contract, but also for expenditures made in preparing to do the work. *O'Connell v. Main & T. Streets Hotel Co.* 90 Cal. 513, 27 Pac. 378.

Thus, breach of a contract for laying a designated quantity of brick, and furnishing the sand, lime, and scaffolding in the construction of a building, by refusal upon the part of the owner to permit the contractor to execute it, entitles the contractor to recover the profit which is the full measure of his probable gain if he had been permitted to complete the contract. *Brandt v. Schuchmann*, 60 Mo. App. 70.

And the rule of damages as an abstract proposition for breach by the United States of a contract to furnish materials and erect buildings for the use of the United States, work under which was suspended by the contractor on account of such breach, is a sum necessary to place the contractor in the same condition in which he would have been had he been allowed to proceed without interference. *United States v. Smith*, 94 U. S. 214, 24 L. ed. 115.

And contractors for the erection of a court house and jail for a county, who are dismissed by the county commissioners shortly after the work is commenced, are entitled to recover compensation for the work done and the materials procured at the time of the dismissal, and to damages covering the profits on the work had it been completed, which are to be ascertained by estimating the cost of the materials under the contract and the expense of construction. *Cook v. Hamilton County Comrs.* 6 McLean, 612, Fed. Cas. No. 3,158.

And breach of a contract between the occupant of a farm and another, by which the occupant was to erect certain stalls and structures on the farm, and the other was to furnish certain horses to be kept thereon at an agreed price per month, by failure to furnish

having elected to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services; and it does not lie in the mouth of the defendant to say that he has not been damaged at least to that amount, unless it can show that the expenses which the plaintiff incurred were extravagant and unnecessary for the purpose of carrying out the contract. On reason and authority, we are of opinion that the plaintiff may, as he does, seek to recover for loss of profits. The law no more than equity will endure the thought that it was in the contemplation of the defendant that the plaintiff should work for naught; and, as the contract expressly provides that he shall get no compensation other than the speci-

fied rate of per cent on the first and subsequent premiums on the policies of insurance issued, it was necessarily in the contemplation of the parties that a breach of the contract upon the part of the defendant would inflict upon the plaintiff this loss of profits. As the recitals in the judgment plainly show, the case went off in the circuit court substantially on the demurrer to the petition. The record of the judgment indicates that probably no testimony was offered by either party, and, if testimony was in fact heard, it is certain that the judge did not reach a consideration of it, because the case, as it was made in the pleadings, did not, according to his view thereof, present a cause of action. It is likely that his oral announcement in passing on exception 7 so clearly indicated to the parties that the issues made by the exceptions would, in the court's judg-

such horses, warrants a recovery of the profit that the occupant of the farm lost by reason of the failure to furnish the horses from the time of the refusal to do so until the expiration of his lease, which was the period named in the contract. *West v. Moser*, 49 Mo. App. 201.

So, refusal upon the part of a contractor to permit a subcontractor, who had contracted with him to make necessary excavations for a building, to execute such work or any part thereof, entitles the subcontractor to recover the difference between the contract price and the actual cost of the undertaking, such damages not being special, but the direct and necessary result of the breach. *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. 582.

And one who contracted to furnish granite for use in the construction of the library of Congress, and who was stopped by act of Congress while successfully prosecuting the work, is entitled to recover upon the portion of the contract remaining unperformed the difference between the contract price and the loss from not completing the contract engagement, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution. *Stout, Hall & Bangs v. United States*, 27 Ct. Cl. 385.

And one who contracted with the United States to furnish and fix in place certain iron work and materials for the new postoffice then about to be erected in New York, who was first interrupted in the execution of the contract by a change of plans, and afterwards the work was ordered to be suspended and finally entirely stopped, is entitled to recover his gains prevented as well as his losses sustained, including interest on capital invested in materials and moneys withheld, as well as extra expenses to which he was put by being compelled to proceed with out-door work in winter. *Kellogg Bridge Co. v. United States*, 15 Ct. Cl. 208.

And the verdict of a jury in an action for the recovery of profits for being prevented from executing a building contract, founded upon the testimony of the plaintiff that he would have made a sum stated on the job if permitted to complete it, will not be disturbed as unsupported by evidence, though it was opposed by the testimony of a number of the defendant's witnesses. *Brandt v. Schuchmann*, 60 Mo. App. 70.

A builder whose contract for the erection of a building has been canceled by the owner, however, is not entitled to recover the amount he was to receive for the entire service necessary to complete the building. *Moore v. How-*  
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*ard*, 13 La. Ann. 635; *Chamberlin v. McCallister*, 6 Dana, 352.

And the estimated profits of architects under an agreement by which they were engaged to prepare and complete plans, details, and specifications for a house to be erected, and to obtain estimates therefor and let contracts for the same, which the owner terminated, cannot be allowed as damages for the breach, in the absence of a finding as to the amount or sum agreed to be paid under the contract, or of any specific or exact data from which the sum to be paid can be determined with accuracy and certainty. *Fuller v. Craig*, 10 N. Y. S. R. 108.

And the loss of the contractor's time is not a proper element of damages. *Singleton v. Wilson*, 85 Tenn. 344, 2 S. W. 801.

And the measure of damages for breach by the owner of a contract for the erection of a building cannot be held to be the difference between the amount he was to receive and that which he was to pay under sub-contracts he had made for the building materials, in the absence of evidence as to the value of labor and materials at the time, and as to the solvency of the subcontractors, and whether they would have been able to comply with their obligations or to indemnify the contractor if they did not, where the action was brought before the expiration of the time for the fulfillment of the contract, and there was no market value at that time and place for the services and materials. *Seaton v. Second Municipality*, 3 La. Ann. 44.

So, the profits which a builder might have realized on a contract for erecting a large number of houses if he had been permitted to go on and complete the construction of five houses, which he was prevented from doing by the owner, cannot be recovered in an action for the breach, where it appears that upon the houses completed and sold no profits had been realized above a bonus provided for in the contract to be paid the builder, and it appears that, so far as the five houses not built were concerned, the bonus was unearned and incalculable. And the profits which the builder might have earned on the five houses are too conjectural and speculative for recovery where the contract included twenty-two houses and but five had been sold, and four were held to secure advances, leaving the other thirteen unsold, and it does not appear whether the five which were not built would have been sold if erected, or what they would have brought if sold. *Lanahan v. Weaver*, 79 Md. 413, 29 Atl. 1036.

And where a contract for the construction of a part of a building according to plans and specifications is entered into, the contractor of

ment, conclude the plaintiff's right to recover, that it induced the parties to make and file the stipulation waiving a jury on that trial. It appearing so distinctly that the judge did not reach such a consideration of the case as required or permitted him to pass on the issues of fact made by the pleadings, we have to assume, as his action does assume, that all the allegations of the plaintiff with reference to his performance of the contract and the defendant's breach thereof are true. This being so, the plaintiff is entitled to recover the value of his contract at the time of the breach. The parties, having contracted in contemplation of the plaintiff making profits to compensate him for his outlay and personal service, have themselves stipulated the standard for fixing such profits on the work contracted to be done; thus leaving as the only uncertain element in the

investigation the amount of work actually done, or which the plaintiff with reasonable probability might and would have done but for the breach of the contract by the defendant.

This inquiry in this case has two branches: First, to find the amount of profit which the plaintiff, under the stipulations of the contract, is entitled to receive on all premiums subsequent to the premium for the first year on the policies actually written through the agency of the plaintiff and his employees prior to the date of the breach of the contract by the defendant. It is evident that all the schemes of insurance referred to in the contract to be offered to the public contemplated the keeping of the policies alive by payments made from time to time subsequent to the first year's premium. Between the parties to the contract, the pre-

fering to build any additional partitions or floors at a designated rate, which contract is repudiated by the owner, who afterwards changes his plans, necessitating additional floors and partitions, the contractor is entitled to recover for the profits which he could have made by doing the work according to the plans and specifications, but he cannot recover for the profits which he could have made on the additional work of constructing the additional floors and partitions afterwards decided upon by the owner. *Swanson v. Andrus* (Minn.) 86 N. W. 465.

So, a contract between the owner of a large flouring mill and another by which the other was to build cooper shops in connection with the mill and make barrels therein for one year, pursuant to which the contractor erected a shop when the whole enterprise was abandoned by the mill owner, does not authorize the contractor to recover of the mill owner the profits which he might have realized upon the manufacture of barrels for the year. *Doud, Sons & Co. v. Duluth Mill. Co.* 55 Minn. 53, 56 N. W. 463.

And where the architect of a building changes the plan thereof in compliance with the terms of the contract between the owner and the contractor for driving piles, by determining not to have the piles driven but to have the work done in another manner, and the contractor receives notice of such change, he cannot recover for profits for piling omitted in pursuance of such change, and the contract and a bid made by the contractor for the work after the change are admissible in evidence for the purpose of showing notice to the contractor of the change of the plan of work. *St. Louis Bridge & Iron Co. v. St. Louis Brewing Assn.* 129 Mo. 343, 31 S. W. 785.

When a contract for the erection of a building is broken by the owner before the arrival of the time for full performance, however, and the contractor sues for damages before the expiration of that time, the market value at the time of the breach is to govern, and where there is none, the question involves a minute inquiry into the cost of materials, the expense of procuring and transporting them to the place of delivery, the amount of labor required in putting up the building, and the value of the wages of laborers and mechanics, the whole to be assessed at the time of the breach of the contract. *Seaton v. Second Municipality*, 3 La. Ann. 44.

And the price of materials furnished under a contract for the erection of a court house and jail, which was broken by the dismissal of the contractors shortly after the work com-

menced, and the price of labor, should be estimated as of the time when the contractor was discharged from the work, in ascertaining the cost of construction and profits in estimating damages. *Cook v. Hamilton County Comrs.* 6 McLean, 612, Fed. Cas. No. 3,158.

So, failure of a county to pay an instalment of the contract price for the erection of a court house at the time stipulated therefor, and the refusal of the county judge to accept the work, do not authorize the contractor to abandon the contract and recover such profits as he might have made had he completed the work. He can only recover for prospective profits, where he has been prevented from going on, either by some affirmative act or by being ordered to desist from further work, or by omission to perform some condition precedent to the further prosecution, as to furnish or do something necessary to its further progress. *Christian County v. Overholt*, 18 Ill. 223.

A contract to build a milldam, the person for whom it was to be built to furnish all the materials, which was broken by his failure to do so, is a building contract under which the builder would have to hire hands and pay them out of the price he was to receive, and the measure of damages for the breach thereof would be the difference between the price agreed to be paid and the cost of performance. *Singleton v. Wilson*, 85 Tenn. 344, 2 S. W. 801.

But where persons contracting with another for the construction of an elevator fail to have the foundations ready for its erection at the time the other is required to commence work for its construction, the contractor has the option of refusing to commence the work until the foundations are actually ready, or to commence and prosecute it relying upon the covenants of the contract to recover the loss of gains or profits arising from such breach, and the act of the contractor in commencing work shortly after the receipt of notice to commence does not constitute a waiver of the breach which will prevent an action for such damages, where he protested against the notice, and claimed that it was given in violation of the contract, but proceeded under the solicitations of the engineer of the other party without waiving any right secured under the contract. *Mansfield v. New York C. & H. R. R. Co.* 102 N. Y. 205, 6 N. E. 386.

*d. For construction or repair of bridges, roads, or streets.*

Here, as in the other classes of cases of this character, the loss of profits are the direct re-

sumption is that the policies would be kept alive and these subsequent payments—"renewal premiums," as they are called—would be received by the defendant company. The conduct of that company in breaching the contract entitles the plaintiff to this presumption, and puts upon the defendant the burden of showing the contrary, if it exists, and the extent to which it does exist. So all uncertainty is eliminated from this branch of the plaintiff's claim for loss of profits. As to the other branch, assuming, as we must for the present do, that the defendant breached the contract as alleged in the petition, entered the territory allotted to the plaintiff, and has through other agents and agencies since the date of the breach written a large amount of other insurance, such as the contract between the parties contemplated would be obtained by and through

the action of the plaintiff and his sub-agents, the amount of such insurance so taken and carried by the defendant up to the time of the trial may be exactly shown by the testimony of the managing agents of the defendant, or by its books, or by both, which at this day the plaintiff has a right to call for and demand as well in an action at law as formerly in a suit in equity. There can be, therefore, no substantial difficulty in arriving at this amount, at least with substantial accuracy; and, the amount having been found, the terms of the contract between the parties fix the standard for measuring the interest which the plaintiff would have had therein, had he been permitted to do the work as his contract contemplated. Whether he could, and with reasonable probability would, have done all or a definite portion of this work, had the defendant not breached

suit of the contract broken, and the only question is as to their contingency or uncertainty.

Thus, breach of a contract for the construction of a bridge after the performance had been entered upon, by notice by the employer that it would not be performed, authorizes a recovery by the contractor of the difference between the cost of doing the work and what the contractor was to receive for it, making a reasonable deduction for the less time engaged, and for the release from the care, trouble, risk, and responsibility attending a full performance. *Insley v. Shepard*, 81 Fed. 869; *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. 964.

And the wrongful prevention of the continuance of the work of a contract for the construction of the stone abutments and piers of a bridge, providing that in case the bridge company annulled the contract and discontinued the work at any time the contractors were to be entitled to payment in full for all the materials delivered and work done at the bridge site or elsewhere, and the company was to be obliged and entitled to take immediate charge of all the contractors' tools and working plant in use on the work at the time at a fair valuation, entitles the contractors to recover the value of such part of their tools and plant as were in use at the time, not already paid for, the value of the material thus on hand or ready for delivery, the reasonable value of unestimated work done at that time, together with whatever profits it may be shown could have been made if the contractors had been permitted to complete the work. *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 11 S. W. 18, 957.

And the fact that plans for a bridge were subject to alteration at the will of its chief engineer, and that such alterations might essentially change the quantity of work to be done and the profit of doing it, does not disentitle the contractor to recover profits estimated according to the plans agreed upon, for breach of contract in preventing him from completing the work,—especially where it does not appear that such alterations were liable to occur. *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. 964.

And the rule of damages for breach of a contract to build the masonry of piers and abutments of a bridge, the United States to locate the piers and abutments and furnish the plans, execution of which was suspended to enable a newly appointed officer in charge to determine the location of the bridge and adopt a general plan for its erection, is precisely the same *pro tanto* as in cases where the defendants wrongfully put an end to the fulfilment of the con-

tract, which is the difference between the cost of doing the work and the price to be paid for it. *Harvey v. United States*, 8 Ct. Cl. 501.

So, one who contracts for the driving of certain piles for bridges, the performance of which the other party refuses to permit, may recover by way of damages the difference between the contract price and the amount which it would have cost him to perform the contract. And in estimating the cost of the performance of a contract, an allowance must be made for every item of cost and expense necessarily attending a full compliance, excluding all such, however, as are merely speculative and conjectural. *Cincinnati, I. St. L. & C. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706.

But in *Harvey v. United States*, 18 Ct. Cl. 470, it was held that an allowance, in a common-law action in the court of claims, to contractors for the erection of the piers of a bridge, of their full profits on a certain portion of the work, without taking into consideration the losses they might have suffered in doing the rest, which they were prevented from doing, including a finding for stone which were never put into the wall by the claimants, is an allowance for profits which cannot be recovered back, where it was paid to the contractors under a judgment not appealed from and reversed; and that fact may be taken into consideration in a subsequent action before the same court, sitting as a court of equity, when asked under the mandate of the higher court to award the claimants a further sum for the same thing.

So, breach of contract between a construction company and a contractor to build a road with gravel between stated points, by stopping him in the performance of his work, warrants a recovery of the difference between the amount which would have been paid for the work when completed at the contract price, and what it would have cost the contractor to complete it. *Bush v. Baltimore & C. Constr. Co.* 88 Md. 665, 41 Atl. 1092.

And a contract by a contractor with a city to grade a street, under which he was to receive a designated price per year for cutting and excavating, and was also entitled to the earth taken out, is a contract to do certain work to be paid for partly in money and partly in material; and where the city refuses to permit him to take the material, he is entitled to recover its value, which would be measured by what he had been obliged to pay in the market for similar material to take the place of that withheld from him, such damages not being remote or speculative, and not including the profits of the contract in which he pro-

the contract, is a proper subject for the finding of a jury on the proof that may be offered as to the means which the plaintiff had organized and was using for the efficient prosecution of this work, compared with the means and effort which the defendant has used in its accomplishment of the work so done by it in the territory allotted to the plaintiff. He is not necessarily, or even probably, entitled to receive the full specified rate of per cent on the first year's and subsequent premiums paid and to be paid on policies so issued by the defendant through its other agents and agencies; for some deduction must necessarily be made on account of the fact that he could incur no current expenses, nor render any personal service, in the procurement of this insurance thus obtained by the defendant through its other agents and agencies. The condition of the

business in Texas at the time of the breach; the means that had been used and were being used by the plaintiff to work the territory allotted to him; the machinery which he had organized for the purpose of that work; the reasonable cost of its continued operation; the extent of the territory allotted to him; the number of persons therein who were fit subjects for such insurance as the defendant proposed to write; the reasonable relative proportion of cost for the first year of organizing the business and putting it in operation, to the cost of continuing its conduct during the subsequent years; the machinery actually used by the defendant after it entered the territory allotted to the plaintiff, and its success, through the use of this machinery and the agencies it established, in obtaining applicants for insurance and holders for its policies,—should all be

posed to use the gravel. *McManus v. Philadelphia*, 195 Pa. 304, 45 Atl. 1053.

So, one who contracts with a city to construct certain sidewalks, and is prevented by the city from performing and completing his contract, is entitled to recover the difference between the contract price and what it would have actually cost to have completed the contract. *Toledo v. Libble*, 19 Ohio C. C. 705, Appx.; *Devlin v. New York*, 4 Misc. 106, 24 N. Y. Supp. 116.

And the act of a city in preventing a contractor from doing any more work under a contract with him for cleaning the streets of the city, provided for by law, and rescinding the contract, entitles him to recover for the profits and advantages which would have inured to him as the direct and immediate fruits of the contract had he been permitted to perform the same. *Devlin v. New York*, 63 N. Y. 8.

To which should be added the amount of profits which the contractor would have derived from the sale of ashes, garbage, etc. *Devlin v. New York*, 4 Misc. 106, 24 N. Y. Supp. 116.

A contractor for the construction of certain sidewalks, however, who takes his contract at a price at which there is no profit, loses nothing by the action of the city in abandoning the contract and preventing his performance, and can therefore recover nothing; but if the contract price exceeds what it would cost to complete the work, the excess would be the measure of his damages. *Toledo v. Libble*, 19 Ohio C. C. 705, Appx.

And the agents of a city in entering into a contract with a contractor for the cleaning of its streets, and agreeing to the price set for the work, are deemed to have in mind only the actual and fair cost of the work to the party by whom it should be performed, and the profits to which the contractor would be entitled upon that basis, and these are all that can be recovered in an action for a breach of the contract. Any incidental advantages which the contractor could secure by favorable contracts, for parts of the work, cannot be availed of as damages for the breach. *Devlin v. New York*, 63 N. Y. 8.

And the future profits of a contract with the city to clean and repair certain streets for two years, broken by failure to pay for the work according to contract, is too vague for recovery as damages in an action for the breach. *Bergen v. New Orleans*, 35 La. Ann. 523.

And the damages in an action by a contractor for breach by a city of a contract with it for cleaning its streets, which is the difference between the amount which the city agreed to

pay, to which should be added the amount of profits the contractor would have derived from the sale of ashes, garbage, etc., and the actual cost to be incurred in completing the work remaining unperformed, cannot be established by the estimate of witnesses and their opinion as to the value of the contract and the probable amount of profits which it would have yielded to the contractor during the unexpired time, as such evidence is entirely speculative. *Devlin v. New York*, 4 Misc. 106, 24 N. Y. Supp. 116.

#### *c. For grading, excavating, dredging, etc.*

The rule that the profits are direct and recoverable unless they are contingent or uncertain also applies to contracts of this class.

Thus, under a contract by which one party was to do certain grading at a specified price per yard, when the number of yards and the expense of performing the labor can be ascertained with almost exact certainty, the profits can be ascertained with sufficient accuracy to fix them as the measure of damages for breach of the contract. *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474.

And breach upon the part of the employer of a contract for the regulating and grading of the latter's land for the excavation and removal of earth and rock therefrom and the erection of a culvert thereon, by preventing the contractor from fully performing the work, entitles the contractor to recover the difference between the actual cost of the work and the sum which the employer had agreed to pay therefor. *Riley v. Black*, 1 Misc. 288, 20 N. Y. Supp. 695.

And one who contracts to excavate and cut a passageway through a bar that crosses the main channel of a river, and proceeds with the execution of his contract, when the bar is cut away by a freshet, when the other party refuses payment, is entitled to recover, not the gross contract price for the residue of the work, but the fair and reasonable profit which he would have made by excavating the residue over and above the expense to him of making such excavation. *Thompson v. Georgetown*, 1 Hayw. & H. 226, Fed. Cas. No. 13,955.

So, under a contract made with the United States for the excavation of earth in enlarging the basin of a canal, under which the contractor was to be paid a designated price per yard and have the material excavated, such material becomes a part of the consideration therefor; and where the contractor is prevented from the completion of the work without fault on his part he is entitled to recover for the loss of



given to the jury, under the proper instructions of the court, that the panel of twelve reasonable men, in the effort to do justice between the parties, may find, from a full consideration of the relations of the parties, and their respective relations to the work, as shown by the proof, the reasonable amount of damage that the plaintiff has suffered by the defendant's breach of the contract. This indication of the elements of proof to be admitted in the case is not, and is not intended to be, exhaustive. Other kindred matter may and doubtless will be offered. The subject is not one for what is technically called "expert testimony." Witnesses should not be permitted to give what may properly be called "opinion evidence" as to the value of the contract at the date of its breach. Where, however, witnesses have had actual experience in the transac-

tion of such business, their testimony as to the particulars and result of that experience is not necessarily "opinion evidence," within the meaning of the term as here used, but may be direct evidence to a substantial fact bearing directly upon the issues here involved,—as, for instance, the showing of the reasonable expectancy of continuing in force a definite proportion of the amount of insurance issued on the various schemes or classes of insurance contemplated in the contract between these parties to have been issued by the defendant. The aggregate amount of damage, if any, found by the jury on both branches of this inquiry, must exceed the amount of the plaintiff's outlay of capital and personal service, as hereinbefore indicated, in order to show any recoverable profits lost to the plaintiff; for if that outlay was made in good faith, and is not

profits he would have made on the excavated material had he been permitted to complete the work under the contract, though the annulment of the contract prevented a loss on the work of excavation. *Gleason v. United States*, 33 Ct. Cl. 65.

And a breach by the government of a contract for the excavation of earth and rock in the bottom of the side channel of the Mississippi river which forms Rock Island, by which the United States was bound to erect a cofferdam sufficient to exclude the water above from entering the area of excavation, by failure to erect the dam until the season within which the work was to be done was more than half gone, renders the United States liable for such profits as the contractor might have made had the dam been completed, and had he been enabled to go on and perform his work. *Skelsey v. United States*, 23 Ct. Cl. 61.

But a contractor under a contract for excavation at a designated price per cubic yard, who proceeds to do the least expensive part of the work, and is fully paid for all done at the contract price, is not entitled to recover from the other party to the contract for terminating the contract and not permitting him to complete it, where, if he had terminated it, the more expensive character of the work would have made the contract as a whole a losing one, as he could only recover the amount he had lost by the breach of contract. *Doolittle v. McCullough*, 12 Ohio St. 360.

So, where a contract is made with the state to complete a section of a canal, and its full performance is prevented by authority of the state, the contractor is entitled to recover for the work performed at the contract price; but if there is no breach of agreement by either party, he cannot recover profits. *Jones v. Judd*, 4 N. Y. 414.

And one who contracts to dredge and remove a certain amount of material from a canal for the improvement thereof, and who is hindered and delayed in the performance of the work by the other party, and finally the work is stopped two months before the expiration of the time within which it is to be completed, is entitled to recover all profits he might have made on the contract, and is not confined to two fifths of the unfinished work on the theory that his recovery must be restricted to the two months that remained of the twelve, where several months of the delay in the performance of the contract was through the fault of or by the consent of the United States, so that he would have been entitled to five months to finish the contract, and it would have been possible 53 E. R. A.

to have completed it within that time. *Ferris v. United States*, 27 Ct. Cl. 542.

So, the measure of damages for breach by the employer of a contract for the drilling of a well on his premises to a depth sufficient to furnish plenty of water, and to put a good pump therein, at a designated price per foot for the digging and for the casing, by refusal to permit completion after part performance, is the damages suffered, not to exceed compensation for the work already performed and profits to be made under the contract, and not the balance of the contract price. *Roberts v. Drehmer*, 41 Neb. 306, 59 N. W. 911; *Watson v. Gray's Harbor Brick Co.* 8 Wash. 283, 28 Pac. 527.

And in such case the expense of preparation for the work cannot be included. *Watson v. Gray's Harbor Brick Co.* 8 Wash. 283, 28 Pac. 527.

But profits which might have been made on the unfinished portion of a well by the digger cannot be recovered in an action for breach of the contract for digging it, where the defendant had reserved the right to terminate the contract at any stage of the work, and work ceased by reason of the collapse of casing supplied by the defendant, it not appearing that the bad casings were supplied for the purpose of evading the contract. *McPherson v. San Joaquin County (Cal.)* 56 Pac. 802.

And one who entered into a contract to drill and sink a well for another to the satisfaction of the latter, furnishing the necessary material, and to be paid at a certain rate per foot, it being agreed that nothing was to be paid until a sufficient supply of water was obtained and the well completed, after which and before the completion of the well he was wrongfully driven by the other party from the premises and compelled to abandon the contract, is entitled to recover at the designated rate per foot for the number of feet actually drilled and sunk only, the general rule as to the measure of damages, that the contractor is entitled to recover the difference between the contract price and the amount which it would have cost him to complete the contract work, not applying, as it would be a matter of speculation as to what depth he would have to go to obtain sufficient water. *Olson v. Nonenmacher*, 63 Minn. 425, 65 N. W. 642.

#### f. Logging and lumber contracts.

The profits to be derived by the lumberman from logging and lumber contracts are not only proximate and direct, but also peculiarly cer-

shown by the defendant to have been extravagant and unnecessary for the purpose of carrying out the contract, it must be recoverable in any event. Assuming, as we have said we must for the purpose of this hearing, that the proof will support the allegations of the petition in reference to the breach of the contract by the defendant, unless the loss of profits as found by the jury shall exceed this amount for outlay and personal service, the plaintiff can make no further recovery on the basis of loss of profits. If, however, the jury find that by the breach of the contract the plaintiff has suffered loss of profits to an amount in excess of the amount that the proof shows he is entitled to recover for outlay of personal service and expenses, he may, in addition thereto, recover such excess of damages so incurred and found by the jury on account of his loss of

profits. Of course, if the proof does not support the plaintiff's allegations as to his performance of the covenants binding him in the contract, then no breach thereof by the defendant has been shown, and the plaintiff can have no recovery in this action.

We are of opinion that the views we have here expressed are supported by the cases of high authority which we have partially reviewed in the foregoing opinion, and the many citations of other precedents to which the cases we have reviewed refer, many of which we have carefully examined.

Our decision is, therefore, that the *judgment of the Circuit Court is reversed*, and the cause remanded to that court, with directions to it to award the plaintiff a new trial, and thereafter to proceed according to law, and in conformity to the views expressed in this opinion.

tain owing to the facility and accuracy with which the cost of execution may be estimated.

Thus, a party contracting to cut, haul, and deliver all the merchantable cedar on a designated tract of land, who is prevented by the other party from performing the whole contract, may recover damages for loss of profits he would have made had he not been prevented from performing. *Atkinson v. Morse*, 68 Mich. 276, 29 N. W. 711; *Goodrich v. Hubbard*, 51 Mich. 63, 16 N. W. 232.

And the measure of damages for breach of an agreement to cut and haul timber at a stipulated price, violated by the person for whom it was to be cut and hauled, is the difference between the stipulated price and the cost of doing the work, together with compensation for any incidental loss that could be reasonably anticipated by the parties as likely to result from the breach. *Hutt v. Hickey*, 67 N. H. 411, 29 Atl. 456; *Brent v. Parker*, 23 Fla. 200, 1 So. 780; *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378; *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477; *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979.

As there is no particular element of uncertainty regarding the profits the lumberman would have realized from the performance of the contract. *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378; *Goodrich v. Hubbard*, 51 Mich. 63, 16 N. W. 232.

In *Goodrich v. Hubbard*, 51 Mich. 63, 16 N. W. 232, *supra*, *Masterton v. Brooklyn*, 7 Hill, 72, 42 Am. Dec. 38, *supra*, II. g., was distinguished upon the ground that in that case the injured party elected to consider the contract broken before the time for full performance had expired, and the claim was for breach of a contract running for a period of five years, of which about one year and a half only had expired, and the jury had no certain data upon which to estimate the profits of the remaining three years and a half, while in the present case there are certain data for estimating the damages.

So, one who enters into a contract to haul logs, the owner agreeing to have all roads used in the hauling open and in condition at a designated time, which hauling is prevented by failure to furnish the roads as agreed, is entitled to recover as damages at least the amount of profits which he would have realized had he not been thus precluded from performing his contract. *Corbett v. Anderson*, 85 Wis. 218, 54 N. W. 727.

And one who contracts with a miller to go on certain lands, haul, drive, and deliver a designated quantity of logs within a specified time at his mill, the miller to furnish the con-

tractor with feed, hay, and provisions as often as the same should be needed for men and teams, which contract is broken by failure and neglect of the miller to furnish the same in sufficient quantities to enable the men and teams to work continuously, is entitled to recover of the miller the contract price of the logs actually cut and delivered, the extra expense of delivering such logs by reason of the miller's failure to furnish supplies beyond the contract price, if supplies had been furnished according to the contract, and the difference between the contract price and the actual cost to the contractor of putting in the logs not delivered. *Salvo v. Duncan*, 49 Wis. 151, 4 N. W. 1074.

And one who contracts with a land owner to lumber a tract of land, which contract is broken by the owner by selling the portion of land from which the contractor's profits would be made, is not required to go on and lumber the other portion of the land at a loss; but he can recover profits under the whole contract. *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477.

So, one who contracts to cut and put a large quantity of logs in a river, performance of which contract is prevented by the other party, is entitled to the contract price less the sum it would cost to put the timber in the river where it was to be delivered, the recovery being proximate, and not speculative, profits. *Williams v. Crosby Lumber Co.* 118 N. C. 928, 24 S. E. 800.

And the measure of damages for the breach by the owner of a contract for floating and delivery of logs is the contract price less the cost of carrying it out, the cost including the value of the party's own service, in addition to the outlay of money on his part necessary to carry out the stipulations of his agreement. *Long v. McCauley* (Tex.) 3 S. W. 689.

And the proper measure of damages for breach, by the owner of logs, of a contract for towing them, by preventing the performance of the contract, is the difference between the contract price and what it would have cost to tow them. *Pevy v. Schulenburg & B. Lumber Co.* 33 Minn. 45, 21 N. W. 644; *Glasple v. Glasow*, 28 Minn. 158, 9 N. W. 669.

Together with any sums he had necessarily expended before he knew of the other party's refusal to abide by the contract in making preparations to perform it. *Glasple v. Glasow*, 28 Minn. 158, 9 N. W. 669.

And where this rule cannot be applied from the peculiar nature of the contract, he may in a proper case recover damages for preparatory work done by him, as a preliminary necessary

to the performance of his contract. *Breut v. Parker*, 23 Fla. 200, 1 So. 780.

And breach of a contract to furnish, in a boom for sawing, all the logs in a designated lot, and which should come down into the boom during the sawing season, entitles the party injured to such actual damages as he can show he sustained as the necessary consequence of nonperformance of the agreement; but no speculative damages can be allowed. *Petrie v. Lane*, 58 Mich. 527, 25 N. W. 504.

But one who contracts to drive certain logs into a boom and land them, who is prevented by the other contracting party from fully performing, cannot recover the whole of the agreed price when he did not do all the work. He is only entitled to the profits. *Glaspie v. Glasgow*, 28 Minn. 158, 9 N. W. 869.

So, profits which would arise from an undertaking to provide logs and bolts at a mill, and to pay a certain price for the services in manufacturing them into lumber, are not so speculative as to preclude a recovery therefor in an action for breach of the undertaking. *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. 976.

And failure to furnish a quantity of logs under a contract with mill owners to saw them at a designated price per thousand warrants a recovery by the mill owners for the profit they would have realized had they been permitted to perform the work, which is ascertained by taking the difference between the contract price and the cost of doing the work. *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408; *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. 88; *Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177; *Blood v. Herring*, 22 Ky. L. Rep. 1725, 61 S. W. 273.

And the right to recover the difference between the contract price of the work to be done and the reasonable cost of the work at the usual and ordinary price, for breach of a contract to furnish a designated number of saw logs to be sawed at a designated price, consisting of failure to pay for lumber sawed and to deliver a portion of the logs, is not affected by the fact that the plaintiff sold his mill after he was notified by the defendant that he would pay for no more sawing and deliver no more logs, or by the fact that he made a subcontract with some other person to saw the logs that might be delivered. *Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177.

And testimony in an action for breach of a contract to furnish a designated quantity of logs to be sawed at a mill as to the capacity of the mill for sawing lumber, and tending to show the length of time it would have taken to saw the logs contracted for, and as to the daily expense of operating the mill in performing the work, is such that the jury can safely and justly estimate the damage without entering into the field of speculation and conjecture. *Leonard v. Beaudry*, 80 Mich. 163, 45 N. W. 66.

So, one who contracts with a mill owner to operate a mill, hiring his own help, and to cut shingles out of timber which the mill owner is to furnish at a designated price, is entitled, on breach of the contract by the mill owner, to the profits which he might have made by cutting timber up to the capacity of the mill for the given time, as there is no element of uncertainty in such profit. *Fell v. Newberry*, 106 Mich. 542, 64 N. W. 474.

In the above case it was said that it may be difficult to reconcile the case of *Talcott v. Crippen*, 52 Mich. 633, 18 N. W. 892, *infra*, with *Leonard v. Beaudry*, 68 Mich. 322, 36 N. W. 88, *supra*, but in so far as the two cases conflict, the latter, it must be held, has overruled the former.

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And the actual loss for violation of a contract between a lumber company and a contractor by which the lumber company was to furnish certain machinery and the contractor was to manufacture a designated quantity of lumber, occasioned by a failure on the part of the lumber company to furnish machinery suitable for the work, whereby the contractor was prevented from manufacturing the quantity he otherwise would, would be the profits which the contractor could have made upon a completed performance of the contract; and such profits would consist of the contract price for the lumber which he was prevented from manufacturing, less the expense which would have accrued in manufacturing it over and above the amount necessarily expended in manufacturing the amount actually manufactured. *Winans v. Sierra Lumber Co.* 66 Cal. 61, 4 Pac. 932.

Failure to deliver logs under a sawing contract, however, does not entitle the owner of the saw mill, as a matter of law, to recover the profits upon all the logs mentioned in the contract independent of any fact or thing showing actual damages. *Petrie v. Lane*, 67 Mich. 454, 35 N. W. 70.

#### g. For mechanical work.

The measure of damages against a party who has employed another to do certain mechanical work at an agreed price, and who has countermanded his directions and forbidden the further execution of the work after it has been commenced, is not the whole amount agreed to be paid, but a just recompense for such injury as the party employed has sustained on account of the breach of the agreement; and such damages would include a recompense for the labor done and materials used, and such further damages as might upon legal principles be assessed for the breach. *Clark v. Marsiglla*, 1 Denio, 817, 43 Am. Dec. 670.

Thus, breach of a contract to furnish stock for the manufacture of certain lathes, and to pay for finishing the lathes, by failure to furnish stock, so that a part of the lathes were not finished, authorizes the manufacturer to recover such sum for damages as he would have realized in profits if the contract had been fully performed. *Fox v. Harding*, 7 Cush. 516.

And refusal by one party to furnish the other party with wire, pursuant to a contract by which the owner was to manufacture barb wire for the other from wire furnished by him, entitles the injured contractor to recover the difference between the contract price and the cost of doing the work. *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.* 100 Mo. 325, 13 S. W. 503.

And one who contracts to manufacture for another a designated number of straw cutters, and is prevented by the other party to the contract from completing them, is not entitled to recover for the value or price of his materials or labor, but for damages for being prevented from completing the machines; and where unfinished machines are left on his hands, whatever they are worth to him should be considered in estimating the damages. *Allen v. Thrall*, 36 Vt. 711.

So, one who constructs seven iron meerchaums according to plans and specifications under a contract for the construction of twenty-seven meerchaums, after which he is prohibited from going on with the contract by the other party, is entitled to recover the damages sustained by the refusal of the other party to take the whole number agreed upon. *Underhill v. North American Kerosene Gaslight Co.* 36 Barb. 354.

And the measure of damages for breach by the employer of a contract to make certain alterations in a steam engine, payment to be made only in case of the attainment of a certain result, would be the difference between the cost and the price agreed to be paid, if the nature, extent, and probable cost of the alterations contemplated were known; but in the absence of evidence on that point judgment for the full contract price should be given. *Coffee v. Meiggs*, 9 Cal. 364.

And where a contract is entered into by the commissioners of a sinking fund of a state with a bank-note engraving company for the engraving and printing of certain bonds, coupons, and certificates provided for by law, and the sinking-fund commissioners afterwards revoke the contract and return to the bank-note company the notes already engraved, the company is entitled to recover, if at all, for the amount of the actual damages sustained; and in ascertaining such actual damages the jury should allow a fair and reasonable compensation for all work and labor performed and materials used, and the repayment of all moneys expended in the execution and performance of the contract, and for any profits which would have been realized if the bank-note company had been permitted to execute the contract according to the terms agreed upon, with interest, in the discretion of the jury. *Kendall Bank Note Co. v. Sinking Fund Comrs.* 79 Va. 563.

So, the measure of damages for failure of one party to a contract to deliver corn to be ground in the other's mill as agreed is the difference between the cost of grinding and the contract price, and the burden rests with the defendant to prove any matter which might go in reduction of such damages. *Oldham v. Kerchner*, 81 N. C. 430, 79 N. C. 106, 28 Am. Rep. 302.

And the measure of damages for breach by an employer of a contract with a brick maker for making and burning a large quantity of brick at an agreed price, by refusal to permit the completion of the contract, is the difference between the contract price for the work to be done and the reasonable cost of the work at the usual and ordinary price, and evidence in an action for the breach, tending to show the value of the alleged contract if it had been completed, is admissible, even in the absence of allegations of special damages. *Hadley v. Prather*, 64 Ind. 137.

And refusal by one party to a contract for the manufacture of a specified number of tons of phosphate to permit the other party to manufacture it, the manufacturer being at all times prepared to go on with and complete the contract, warrants a recovery upon his part of the difference between the cost of manufacturing according to the contract and the price agreed to be paid therefor in the contract. *Eckernode v. Chemical Co.* 55 Md. 51.

So, the measure of damages for refusal of one party to permit the other party to complete the performance of a contract to do the press work for, and fold and paste, a semi-monthly publication for a period of years is the value of the contract to the plaintiff, to be ascertained by ascertaining the cost of the work and deducting it from the entire contract price. *Ennis v. Buckeye Pub. Co.* 44 Minn. 104, 46 N. W. 314.

The value of the use of machinery involves profit, however, and a party is not entitled in an action for damages for breach of contract for the loss of profits unless the act complained of has deprived him of an opportunity to earn them; and he cannot recover for such use unless it appears that he was necessarily deprived 53 L. R. A.

of the use of his machinery elsewhere. *Boston v. Henderson*, 92 Mich. 606, 52 N. W. 1020.

And the damages suffered by one who entered into a contract with the United States government for the manufacture of mail locks under which the government was bound to furnish him with work during the life of his patent, which he assigned to the government in consideration of being employed to make the locks and for the purpose of securing the United States in the exclusive right to use such locks for the safety of the mails, which contract was annulled by the United States after he had prepared for its performance, arises from the fact of the refusal to employ him, and remuneration for the use of the patent must be found in the profits growing out of the contract; and no damages can be allowed for the subsequent use by the United States of such patent. *Nock v. United States*, 2 Ct. Cl. 451.

#### *b. For services or labor generally.*

Contracts for general services and labor fall within the rule applicable to contracts for services of a more special character, the employee's profits arising therefrom being the direct fruit thereof and recoverable unless too contingent or uncertain.

Thus, breach of a contract to deliver a designated number of hogs to be slaughtered between specified periods authorizes the person to whom they were to be delivered to recover the net profits of slaughtering the hogs over the expense of slaughtering at customary prices, where he shows that he was at all times ready and willing to slaughter them according to his undertaking. *Thompson v. Jackson*, 14 B. Mon. 114; *Floyd v. United States*, 2 Ct. Cl. 429.

So, one who contracts to harvest a large number of acres of grain at a designated price per acre, who is prevented from completing the contract after a part of it has been harvested, cannot recover the whole contract price for that portion of the work completed by him, and also his outlay and cost of performance; but, in addition to the expenses incurred by him for outlay and the cost of performance, he should be allowed the reasonable value of his own services, and of the use of the property as a part of the damages sustained by him, and also a portion of the profits which he would have made under the contract. *Cederberg v. Robison*, 100 Cal. 94, 34 Pac. 625.

And the rule of damages for breach of contract for doing a specific work for a specified price, as for the pulling of stumps and putting them into a fence and clearing the land, performance of which is prevented by the owner, is the profit which the contractor would have realized had he been permitted to perform the work, and not the difference between the contract price and the sum the contractor actually received from other employment during the time he would have been employed in completing the work. *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1.

But breach by the owner of a contract by which he placed in the possession and management of another certain stock for one year, agreeing that for his services he should receive a stated interest in kind in the cattle and their increase, and that if, at the expiration of the first year, he desired to continue the employment upon the same terms he might do so, by the termination of the contract at the end of the first year, does not entitle the party injured to recover for what he supposed his interest in the stock would have been up to the date of the trial, including his interest in the expected increase, as such a recovery would include speculative, imaginary, and hypotheti-

cal profits, which are too remote to be the basis of a legitimate claim. *Couch v. Parker*, 1 Tex. App. Civ. Cas. (White & W.) § 437, p. 193.

So, one who entered into a contract with another to devote his entire time and attention for one year to the performance of the duties of general superintendent of the other's works, including the appointment of agents to sell the goods manufactured, and was to receive, not only a fixed salary, but also a certain commission on the gross amount of all sales made, is entitled to recover, for a breach of the contract at the end of about ten months, the commissions on all sales made during the year, though not payable until after the action was brought. *Blair v. Laffin*, 127 Mass. 518.

And where a party entered into a contract with the owners of the main building in the New Orleans exposition grounds to take down the trusses and spars at \$5 each, and the owner, while the contractor was at work within the building, stripped it of sheathing, rafters, purlines, and braces, so that the trusses and spars fell, some of which killed two of the contractor's employees and wounded another, the contractor was justified in quitting the work and abandoning the contract, and is entitled to recover of the owner of the building, as damages, the profits which he would have earned had the contract been completed and carried out. *Lynch v. Sellers*, 41 La. Ann. 375, 5 L. R. A. 682, 6 So. 581.

And the master of a fishing vessel, employed for the season to be paid at a rate based upon the number of fish caught, and discharged after a few weeks' service, is entitled to recover for the discharge the amount based upon the contract rate measured by the actual catch of fish by that vessel during the season, less the amount already received by him. *Fee v. Orient Fertilizing Co.* 36 Fed. 509.

But a ship master's proportion of a bounty on a voyage of a vessel and crew according to the laws of the United States, though perhaps admissible in evidence in an action for breach of contract on the part of the owners to employ him, in connection with other evidence to assist the jury in estimating the value of the voyage for which he was employed, is in no just sense a distinct element of damage, and refusal of the court to so instruct is not error. *Eldredge v. Smith*, 13 Allen, 140.

And one who contracts to take charge of a park for the purpose of supplying visitors with soda water, lemonade, ice-cream, luncheon, and other refreshments, and of employing a band of music for visitors desiring to dance, and of collecting of the dancers a fee, and who is entitled under the contract to any profits he may make from sales to visitors, who, after being put in possession, is forcibly ejected by the other party to the contract, is entitled to recover the expenses incurred by him in his preparation to perform the contract; but the anticipated profits are too speculative to admit of clear and direct proof, and therefore are not recoverable. *O'Connell v. Rosso*, 56 Ark. 603, 20 S. W. 531.

So, the damages recoverable for breach by a boarder of a contract for rooms and board are the profits which the other party to the contract would have made if the boarder had kept his contract. *Lydecker v. Valentine*, 71 Hun, 194, 24 N. Y. Supp. 567; *Crane v. Powell*, 46 N. Y. S. R. 668, 19 N. Y. Supp. 220.

And a boarding-house keeper, having a contract with a boarder for three months' use of rooms and board for himself and family, which agreement is violated by the boarder leaving at the end of two months, is entitled to recover the contract price for the remaining month, the contract being entire, and there having been 53 L. R. A.

other boarders served at a common table, and no evidence separating the value of the boarding from the use of the rooms. *Fiegl v. Latour*, 81\* Pa. 448.

But generally all that a boarding-house keeper can recover of a boarder who had agreed to board with his family for one year, and left before the year expired without sufficient reason, would be the profit which she would have made if the boarder had performed his contract; she cannot recover the full amount agreed to be paid for the board. *Wetmore v. Jaffray*, 9 Hun, 143; *Haggin v. Price*, 8 Dana, 48; *Wilson v. Martin*, 1 Denio, 602.

And the boarding-house keeper would not be at liberty to refuse the rooms to other lodgers, leaving them idle, and then recover against the boarder for the use and occupation. *Wilson v. Martin*, 1 Denio, 602; *Crane v. Powell*, 46 N. Y. S. R. 668, 19 N. Y. Supp. 220.

Breach of a contract of hiring of rooms and board, however, in which it was agreed that no deduction should be made in case of absence, broken by the hirer leaving the rooms, authorizes a recovery on the part of the lessor of the rooms of the full contract price agreed to be paid, and not merely the profits which he would have made had the lessee carried out his contract, as in such case the contract price agreed upon becomes the proper measure of damages. *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. 501.

So, the profits of a mining contract broken by the mine owner by preventing the miner from performing the contract are not open to the objection of uncertainty or of remoteness, where the testimony in the action for the breach shows the cost of mining each ton of ore and the amount of ore remaining to be mined within the terms of the contract at the time the work stopped and the cost of taking out that which had been mined, and the condition of the mine as it was left, though the cost of mining the remaining ore might differ from mining the ore already taken out, and though there was no mathematical certainty as to the amount of ore remaining. *Anvil Min. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876.

And a direction by a mine owner to a party engaged in mining under a mining contract made with him, to quit, is a sufficient breach of the contract to authorize the miner to recover the profits which he might have made had he not been prevented from completing the contract. It is not necessary that he should have been forcibly removed from the mine. *Ibid.*

And a subcontractor agreeing with a contractor for the construction of a tunnel to sink a shaft in the tunnel, who is prevented from completing the work by the contractor, is entitled to recover from the contractor for breach of contract any profit which he might have derived from the contract had he completed it. *McAndrews v. Tippett*, 39 N. J. L. 105.

So, one who contracts with a railroad company to supply it with water at a particular station for a designated period, and who prepares to carry out the contract, but is prevented from doing so by refusal of the railroad company to proceed with it, is entitled to recover therefor the whole amount to be paid for the services, less what would have been his expenses in performing the contract. *Wallace v. Tumlin*, 42 Ga. 462.

And such a contractor is not bound to sell the property provided for the purpose of carrying out the contract, but may retain it and recover damages from the railroad company equal to the difference between the cost of such prop-

erty and its present market value. *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264.

So, breach of a contract to take the output of ice of a manufacturing company and to deliver it to the company's customers at stipulated rates warrants a recovery of the contract price for the work, deducting therefrom the cost of performing it, the contract being an executory one. *Baker Transfer Co. v. Merchants' Refrigerator & Ice Mfg. Co.* 12 App. Div. 260, 42 N. Y. Supp. 76.

And a surveyor contracting with the United States for the survey of certain lands in the Delaware reservation, who is notified that the contract is canceled after he has performed one third of the work, is not confined to the contract price for work done, but may recover as damages the profits he would have made if allowed to complete the work, or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. *McKee v. United States*, 1 Ct. Cl. 336.

But breach of a covenant in a conveyance of a mill to keep one half of the milldam in repair, by refusal to aid in rebuilding it after injury by a freshet, entitles the party injured to recover one half of the actual expense incurred in repairing the dam, but not to damages for any loss of profits in business in consequence of the neglect to seasonably aid in making the repairs. *Thompson v. Shattuck*, 2 Met. 615.

So, the measure of damages for breach of a contract of hire of the plaintiff's horse and wagon, for the use of which part of the plaintiff's time and services were contracted for as a mere incident, is the profit which he would have made if permitted to perform the contract. *Breen v. N. K. Fairbank & Co.* 35 Mo. App. 212.

And a contract by which one was to furnish the horses of another with feed and his driver with board, and to perform other services, no part of which was required, either expressly or by implication, to be rendered in person, for which the other party was to pay at stated times and for a certain period a stipulated sum, is not a contract for personal services, for a discharge from which the injured party could recover the amount of compensation agreed upon for the entire term, but is a contract for work to be performed or materials furnished, the measure of damages for breach of which would be a *pro rata* compensation for the time during which it had been performed, and the profits which would have been made during the remainder of the contract. *Ramey v. Holcombe*, 21 Ala. 567.

And while the plaintiff in an action for breach by a city of a contract for furnishing cables, conduits, and trenching under its streets for the use of telephone, telegraph, and electric-light and other wires, the ordinance for which was reconsidered on the day the contract was accepted, cannot recover the profits he had been prevented from making, unless they are shown to be the direct and immediate fruits of the contract, he should have an opportunity of making such proof as he can as to such profits and as to their direct and immediate character. *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140.

#### 4. For real-estate, insurance, and loan agencies.

The fact that the employee is an agent whose compensation is to be in the form of a commission does not affect the rule that the profits of the contract of agency, consisting in such case of his commissions less the cost of earn-

ing them, are the direct fruits of the contract, and are recoverable for its breach by the employer unless contingent or uncertain. It is to be observed, however, with reference to all kinds of agencies in which the compensation is by commission, that future commissions are frequently regarded as too contingent and uncertain to warrant a recovery, and are always so regarded when their realization depends upon the continuance of a business of an uncertain and fluctuating nature.

Thus, the measure of damages upon the revocation of an agency to sell land, by the owner himself making the sale within the time which was to be allowed the agent to make it, is the profit which would have resulted to the agent had he been allowed to complete the contract, where the recovery would not be greater than the agent's compensation would be. *Green v. Cole* (Mo.) 24 S. W. 1058; *Alexander v. Breeden*, 14 B. Mon. 154; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 318.

In such case the agent is not confined in his recovery to a *quantum meruit* for services, but is entitled to his commission on what he might have sold the property for. *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 318.

And the measure of damages for breach of a contract, by which a land owner employed an agent to survey and replat a tract of land in small tracts or lots and put it into condition to sell and to sell it, agreeing to pay him out of the proceeds of sale one half of what was received over and above the sum of \$30,000, by terminating the agency, and the owner himself selling the property, is the profit, if any, which it appears from the evidence would have resulted to the agent had he been allowed to complete his contract; and where the owner sold the land for \$50,000 the agent would be entitled to recover one half of the difference. *Green v. Cole*, 127 Mo. 587, 30 S. W. 135.

So, breach of an agreement relating to the purchase of timber lands, contemplating that the timber is to be cut by the purchaser, and that the agent's commissions for service in connection with the purchase shall be in part measured with reference to the question whether the land shall be found to produce a designated number of feet of logs, authorizes a recovery by the agent against the purchaser for commissions, where it appears that the lands did produce more than the designated quantity, and a complaint setting forth such facts is sufficient. *Lathrop v. O'Brien*, 44 Minn. 15, 46 N. W. 147.

And an allegation in a petition in an action for a breach by the principal of a contract appointing an agent to solicit, sell, and contract for the sale of real estate belonging to the principal, that the agent's profits upon the land which he had contracted to sell would have amounted to a designated sum had he been permitted to perfect the sale thereof, is good as against a general demurrer; but if excepted to because of its want of particularity the exception would be sustained, but the agent would be allowed to amend by specifying the particular transaction out of which such damages resulted. *Johnson v. Cherokee Land & Iron Co.* 82 Tex. 338, 18 S. W. 476.

And an instruction in an action for the loss of an agency by a breach of contract by which one party agreed to permit the other to sell its mills and mining property and to execute such papers as were necessary for that purpose, by refusal to execute papers, that the jury should not take into consideration possible profits lost or the loss of commissions, is erroneous, where there was evidence from which the jury might have inferred that their undertaking would have proved successful, and

the sale would have been made but for the owner's conduct in refusing to sign papers. *Ban-satnye v. Florence Mill. & Min. Co.* 77 Hun, 289, 28 N. Y. Supp. 334.

But an allegation in an action for breach by the principal of a contract appointing an agent to solicit, sell, and contract for the sale of real estate belonging to the principal, that streets had been constructed and the grounds beautified, and that manufactories of all kinds were in contemplation and being constructed, and that a large number of people were going daily to the place for the purpose of buying property, and that if the agency had not been revoked the agent would have sold many million dollars' worth of property during the time the contract was to run, and that his profits would have amounted to a designated sum, is too indefinite, and is not good under general demurrer. *Johnson v. Cherokee Land & Iron Co.* 32 Tex. 338, 18 S. W. 476.

So, the wrongful discharge of an agent by an insurance company during the existence of the contract of agency entitles him to recover, not only for commissions on premiums collected prior to his dismissal, but also for commissions on the probable value of renewals on policies obtained by him upon which future premiums might be expected, in the ordinary course of business, to be received by the company. *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91; *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534. And see *WELLS V. NATIONAL LIFE ASSO.*

The right of an insurance company to discharge an agent at any time does not exonerate it from liability, where he was engaged for a particular time, for commissions on premiums collected prior to the dismissal and upon future premiums, which would in the ordinary course of business be received by the company from the work of the agent. *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

And damages in an action for breach of contract, consisting of wrongfully terminating an agency, are not rendered excessive by the fact that they are made up of profits or gains, where they are not remote or merely speculative. *Niagara F. Ins. Co. v. Greene*, 77 Ind. 594.

And evidence in an action against the Supreme Tent Knights of the Maccabees, brought by one employed by it, to organize subordinate tents at a designated price per tent, which contract was broken by the supreme tent after he had performed part of the work, showing the profits made on the contract while he was engaged in the work, and that the first labor starting the enterprise was more expensive than that which followed, and as to the number of tents organized after breach of the contract, together with the number of members in each tent both before and after the breach, is sufficient in an action for the breach to justify the jury in determining the profits which might have been made, but which were lost to him by the violation of the contract. *Hitchcock v. Supreme Tent, K. of M.* 100 Mich. 40, 58 N. W. 640.

But an agent of an insurance company, wrongfully discharged before the expiration of the period provided for in the contract of agency, cannot recover in an action for the breach for commissions which he might have received under his contract from premiums on policies which he might have obtained subsequent to the time of his removal. *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

And an estimate of probable earnings of an insurance agent after the breach of contract on the part of the insurance company by terminating the agency before the time limited in the contract therefor, derived from proof of the amount of his collections and commissions be-

fore the breach without other proof, would be too speculative to be admissible in an action for the breach for the purpose of determining the amount of his loss. *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534.

The fact, however, that the number of insurance policies which will be renewed in the future cannot be ascertained with absolute certainty furnishes no ground for rejecting claims for commissions on renewals in an action by an agent for damages for a discharge before the expiration of the period of his agency. *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

And where the amount due an agent wrongfully discharged by an insurance company upon renewals of policies obtained by him can be ascertained by the use of life or actuary tables, it is not too remote or uncertain to be recoverable as damages for the breach of the contract of agency. *Ibid.*

And witnesses shown to be skilled in matters of insurance, and to be familiar with the values of renewals of policies, may be allowed to state the value of the contract of an agent wrongfully discharged, where he was entitled to commissions on premiums paid, and on probable renewals. *Ibid.*

And the testimony of actuaries as to what would probably be the value of renewals on insurance policies already obtained is admissible in evidence to be considered in arriving at the amount the agent had lost by the company's breach of contract. *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534.

And the fact that a question asked an expert witness as to the value of renewals of insurance policies was so broad as to allow room for speculation as to what future business the agent would have probably secured furnishes no ground for reversal, where the court stated to the jury that evidence had been given in respect to policies of insurance which the agent might have obtained subsequent to the time of his renewal, and directed them to consider only his interest in such policies as were actually in force at the time of his removal from the agency. *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

So, while breach of a contract on the part of the principal, by which an agent is given the exclusive right to make loans in certain counties on commission, by making loans through others, does not entitle the agent to recover compensation for making loans not mentioned by the terms of the contract, he is entitled to recover what he would have earned had the contract not been broken, provided he is able to show the amount with reasonable certainty. *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 578.

#### *j. Contracts with salesmen and for other agencies.*

When the compensation of an agent is dependent upon the success of his efforts in procuring a contract for his principal, and his subsequent performance of the work, the principal will not be permitted to stimulate his efforts with the promise of reward, and, when the contract is obtained and compensation assured, terminate the agency for the sole purpose of securing to himself the agent's profits. *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908.

And it has been held that a traveling salesman paid, by the terms of his contract, for his services by a percentage on the amount of his sales, who is prevented by the wrongful act of his employer from completing his contract, is entitled to recover of the employer the

amount he would have made on his sales, had he been permitted to complete his contract. *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125; *Re Patent Floor Cloth Co.* 41 L. J. Ch. N. S. 476, 26 L. T. N. S. 487.

And that a planter who, for a good consideration, engages to ship his crops of certain years to a factor, and violates his engagement, will be held liable to the factor for commissions on such crops. *Haven v. Hudson*, 12 La. Ann. 660.

And one who contracts with a company engaged in manufacturing engines to find purchasers for its engines, in consideration of commissions on the price realized, expenses to be borne by himself, who orders engines, which are delayed by the company so long that the purchaser declines to receive them, and the sales are lost, is entitled to recover, not his commissions as such, but damages measured by them, as such commissions would have accrued to him had the company performed its contract. *Stevenson v. Morris Mach. Works*, 69 Miss. 232, 13 So. 834.

The prevailing rule, however, would seem to be that a salesman or an agent wrongfully discharged would be entitled to recover, not the commissions he would have made, but the value of his contract, which would be estimated, if the evidence is sufficient, upon his probable commission or gains and profits.

This rule was held specifically in *Pittsburg Gauge Co. v. Ashton Valve Co.* 184 Pa. 36, 39 Atl. 223.

And in *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, and *Rice v. Caudle*, 71 Ga. 605, it was held that losses sustained and gains prevented are proper elements of damage in an action for breach of an agreement conferring a sole agency for the sale of specified articles in a designated locality.

So, the measure of damages in an action by an agent for the sale of mineral water, against his principal for taking away the agency in violation of the contract, is the profit which the agent might have realized if the contract had been performed, and evidence as to the amount of sales made by the agent appointed to succeed him, though not conclusive, is competent to go to the jury upon the question of damages. *Mueller v. Bethesda Mineral Spring Co.* 88 Mich. 390, 50 N. W. 319.

And the damages suffered from breach of a contract by which one party was to make all shipments of cotton to New Orleans during the season, to the other party, which should amount at least to 200 bales, by refusal of the shipper to ship to the other party more than 200 bales, and by shipping to other parties after that quantity had been shipped, would be the profit which would have been made from handling the cotton; and where the commissions of a cotton factor are all profit, or rather earnings for attention, skill, and judgment, the whole amount of commissions can be recovered. *Moore v. Lawrence*, 16 Fed. 87.

So, evidence relating to the business done under the contract, as to business done by another agent appointed after the breach, is competent on the question of the value of the contract. *Pittsburg Gauge Co. v. Ashton Valve Co.* 184 Pa. 36, 39 Atl. 223; *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.

And as tending to show that there was a market for the commodity to be sold at that place, and that the agent could have done a profitable business if the agreement had not been broken. *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.  
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And the wrongful discharge of a traveling salesman, whose agreed compensation was a certain per cent on all goods sold, warrants a recovery for the contract percentage on what goods he might have sold had he continued in the employment until the expiration of the contract term, where it appears that he had worked for such employer in the same business over a large part of the territory covered by his contract for several years before the year in question, and the evidence shows the total sales for the year in question up to the time of discharge, and for the previous year. *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785.

And a plaintiff in an action setting up his discharge by the defendants from their employment, and his expulsion from the office, which he had held at their instance and request, and refusal to recognize his authority to act for them under such an agreement, or pay advances made by him, and that at the time of the breach aforesaid he was doing a large and profitable business for the defendants, and earning large commissions for himself therein, is entitled to recover for the loss of profits which he would have realized, and evidence as to the amount of orders obtained by him and executed by the defendants while in their employ is admissible under the rule which allows past profits to be proved as a basis for the estimation of probable profits. *Alfaro v. Davidson*, 8 Jones & S. 87.

And where a traveling salesman is wrongfully discharged three months before his time expires, proof that he had been a traveling salesman for the same employer for the two preceding years, and as to his sales for the three months preceding the discharge, and as to the number of his regular customers and his average sales and the condition of the markets, is sufficient to enable the jury, in an action for the breach, to approximate the amount of goods he would have sold during the three months after the discharge, for the purpose of determining what he would have made if not discharged. *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125.

But the opinions of witnesses as to the value of an agreement for an exclusive agency, and the profits which it or any agency established in pursuance of it could produce, and as to the damages realized from its breach and the amount of business that could have been done under the agency, are inadmissible in an action for a breach of the contract. *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.

Though the contrary was held in *Washburn v. Hubbard*, 6 Lans. 11.

In *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, *supra*, *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, *infra*, X. g. was criticised, the court saying that it had no means of knowing that the views therein expressed by Judge Woodruff, as to proof of damages by the estimate of witnesses, were coincided in by his associates, and that they were not necessary to the decision of the case; and the court in the case at bar was not prepared to assent to them.

A traveling salesman, however, who is prevented by his employer from completing his contract, is not entitled to recover for the value of his monthly services as salesman in general, for the unexpired time. *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125.

And the rule has been laid down, and extensively acted upon, that earned profits only can be recovered; and the extent of the sales made by an agent is admissible in an action brought by him against his principal for breach of the



contract of agency, by which he was employed to sell the principal's products, as tending to furnish a basis for fixing his compensation for services rendered, but not as affording a guide for ascertaining future or prospective profits. *Union Refining Co. v. Barton*, 77 Ala. 148; *Washburn v. Hubbard*, 6 Lans. 11.

The theory of this rule probably is that in the particular instances in which it was applied the future profits were too contingent, speculative, and uncertain.

Thus, a traveling salesman employed to sell goods upon commission and to pay his own expenses, who is wrongfully discharged before the expiration of his term, is entitled to the same compensation for the remainder of the term that he would have realized if he had continued in the employment, and no more, and his measure of damages would be the contract commission upon the sale of goods which would have been effected by him so far as they were accepted and shipped by his employer, less the amount of the expenses incurred in procuring orders. *Wiley v. California Hosiery Co. (Cal.)* 32 Pac. 522.

And breach of contract on the part of a manufacturer by failing to fill orders from agents and wrongfully terminating the agency entitles the agent only to a recovery of commissions on sales actually made; and refusal to permit testimony in an action for the breach as to hotel bills, traveling expenses, time spent in canvassing, and profits on goods ordered but not delivered, is not error. *Bates v. Diamond Crystal Salt Co.* 86 Neb. 900, 55 N. W. 258; *D. M. Osborne & Co. v. Stassen*, 25 Kan. 738.

And where one party purchased the property of another used in carrying on the business of a shirt and collar factory, and the vendor, in consideration for the sale, agreed to furnish the vendee orders for goods to be manufactured within a year to the amount of \$30,000, and to furnish materials and pay 10 per cent beyond the cost of materials and all expenses of manufacturing, and the vendor failed to supply such orders, supplying only a limited amount, the purchaser is entitled to recover as damages the percentage specified on the amount which the orders fell short of the \$30,000, but the 10 per cent which the purchaser was to receive is to be included as part of the expense of manufacturing, thus reducing the percentage 10 per cent thereon. *Cramer v. Metz*, 57 N. Y. 659.

So, a person employed under a salary, with a further provision that he should receive a commission on the excess of a certain quantity of goods sold in a year, cannot claim and recover commissions on the goods he might have sold if allowed to remain in the employment for the full year, as damages for breach of the contract, as they are too speculative and conjectural. *Stern v. Rosenheim*, 67 Md. 503, 10 Atl. 221, 307.

And one who employs a traveling salesman to sell his goods upon commission, and afterwards wrongfully discharges him, cannot be held liable to the salesman for profits he might have realized in serving others, when such extra services did not enter into the contract between the parties; and cannot be held liable for prospective sales, by the salesman, of gloves during the remainder of the term of employment, which the salesman carried for another party as a side line, which he was unable to sell because of the termination of his employment. *Wiley v. California Hosiery Co. (Cal.)* 32 Pac. 522.

And profits will not be allowed for breach of contract of employment of a traveling salesman, where the amount of his commissions depended, not merely on the number and amount

of sales he might make, but also on the proportional quantity of the two classes of goods he sold, his commissions being different on each, and the number and amount of sales depending on the state of trade, the demand for such goods, their suitability to the different markets, the fluctuations of business, the skill, energy, and industry with which he prosecuted the business, the time employed in effecting different sales, and upon the acceptance of sales by his employers, as the profits in such case would be probable, speculative, and conjectural. *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28.

And breach by a coal company of a contract to appoint a person its exclusive agent for a designated vicinity for the sale of a particular kind of coal upon specified terms and conditions entitles the agent to recover of the coal company, as damages, the expenses properly incurred and paid out in preparing for the execution of the contract, but not the net profits he would have made on the sale of the coal, where it does not appear whether the terms and conditions of the contract would have been complied with, as such damages would be uncertain and speculative. *Allison v. Tennessee Coal, Iron & R. Co. (Tenn. Ch. App.)* 46 S. W. 348.

In the above case, *Smith v. O'Donnell*, 8 Lea. 408, *supra*, III. b. 4, a, was distinguished upon the ground that the word "profits" is there used as marking the difference to a contractor between the cost to him of doing the work and the price to be paid for it, the court being careful to distinguish between such a case and profits contingent upon future bargains or stipulations or states of the market.

Nor can the profits which might be conjectured as the probable results of a canvasser's labors be recovered as damages in an action for breach of a contract to solicit advertising patronage for hotel-register books for a period of years, as such profits are purely speculative. *Hair v. Barnes*, 26 Ill. App. 580.

And the damages which a broker can recover for a breach of contract for the purchase of a quantity of iron is the difference between the contract price and the value of the goods at the market at the time and place of delivery, and commissions on a resale thereof cannot be recovered where the contract of sale was completed before the vendor was informed of any resale. *Andrews v. Himrod*, 37 Ill. App. 124.

And while a broker employed by the directors of a public company to dispose of the shares therein upon an agreement that he was to receive £100 down and £400 more when all the shares were allotted, is entitled to recover, where, by the subsequent act of the directors without any default on his part, the company was wound up before all the shares were disposed of, for the amount which he lost by their wrongful act, where both parties appear to have acted in perfect good faith a recovery for such sum as the jury or the court substituted for it shall deem reasonable should be sustained. *Inchbald v. Western Neigherry Coffee, Tea & C. Co.* 17 C. B. N. S. 733, 34 L. J. C. P. N. S. 15, 10 Jur. N. S. 1129.

#### k. Between attorney and client.

An attorney whose contract of employment is broken by the client before the services are completed would seem to be entitled to recover for the profits he would have made if the contract had not been broken, if they were not contingent or uncertain, and if he used due care, skill, and diligence; though when the service is performed in full, or there is no mode of ascertaining the damages, the full contract price would probably be allowed.

Thus, while the general rule as to the measure of damages for a breach of contract is that the actual loss sustained will consist of the value of the services rendered, and the damages sustained by the refusal to allow performance of the rest of the contract, where the contract is one for legal services broken by a settlement of the claim by the client so that there is no mode left of ascertaining the damage, the measure to be adopted is the price agreed to be paid. *Baldwin v. Bennett*, 4 Cal. 393.

And an attorney under a special contract for legal services for a percentage of the recovery, who holds himself continually ready to serve when wrongfully prevented by the client from rendering the services, can claim the whole compensation agreed upon, subject to abatement for such expenses as would in the natural course of events have been incurred by him if the services had been continued. *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49.

But a firm of lawyers who contracted with a client to carry on a case and to receive as compensation \$100 certain, and \$100 more if they won the case, is entitled to recover upon settlement of the case by the client, not the whole amount of the contingent fee, but such damage by way of compensation for their time and trouble and attention as they are reasonably worth, and also for any loss or injury which may have been sustained, the whole not exceeding the entire amount stipulated for. *Poitsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 413.

And where a solicitor and promoter of a company for making a ferry, erecting gas works, etc., entered into an agreement with a landowner for the purchase of premises, including a ferry, the vendor agreeing to furnish an abstract of title within a designated time, showing good title, after which the company was provisionally registered by the solicitor as its promoter, and the abstract when produced showed the existence of encumbrances upon the property, in consequence of which the association could not proceed with its object and was finally dissolved, the solicitor is entitled to recover from the vendor the cost of preparing, stamping, and entering into the agreement, and the expense of investigating the title and endeavoring to procure a good title, and to procure a conveyance thereof, but not for the expense of preparing the deed of settlement and registering it, or of otherwise proceeding to act before ascertaining whether the vendor could or could not complete his contract, or for the profits he would have derived from being employed as solicitor by the association, or for the loss of profits from the granting of the lease and establishment of the association, or for any advantage which he might have derived from his time and labor bestowed in the formation of the association. *Hanslip v. Padwick*, 5 Exch. 615, 19 L. J. Exch. N. S. 372.

#### *1. For compensation based on share of profits.*

The cases here considered are not partnership cases, but cases for the recovery of compensation for services to be paid for by fixing the amount at a proportionate share of the profits of the business. Partnership cases are omitted because the profits of a partnership are not recovered as damages, but rather as the property of the injured partner in the hands of the other. In cases of compensation for services, based upon a share of the profits of a business, however, the recovery is for damages for breach of contract measured by the profits. But while the profits are the measure of damages in such cases, it is to be noted that no recovery can be had if they are conjectural, contingent, or uncertain.

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Thus, if it appears, in an action for breach of contract from which a share of the profits of a business would have accrued, that while the business continued profits were made, and the amount of such profits is shown, and that evidence is followed up by such proof as would warrant the court in concluding that a further prosecution of the business would result substantially in the same way, the proof of the amount actually received is competent, and furnishes a basis upon which subsequent profits may be calculated. *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901.

And an agent under an agreement with his principal to prosecute specified enterprises, the agent to receive no compensation for services except a share of the profits arising therefrom, who renders services and expends money and is then discharged by the principal without excuse or reason, is entitled to recover such compensation or damages as would be equal in amount to his share of the profits which would have resulted from a full performance. *Durkee v. Gunn*, 41 Kan. 496, 21 Pac. 637; *Beck v. West*, 87 Ala. 213, 6 So. 70; *Dennis v. Maxfield*, 10 Allen, 138; *Singer Mfg. Co. v. Potts*, 59 Minn. 240, 61 N. W. 23; *Wiggins v. Graham*, 51 Mo. 17; *Goldman v. Wolff*, 6 Mo. App. 490; *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

So, where a contract is entered into between a principal and agent under which a large quantity of lands is to be purchased in the name of the principal, the agent to take the care and agency of such lands and make no charge for commissions, diligence, skill, or personal services, and after the principal is paid his original investment and 10 per cent interest thereon from the proceeds of the sales of the lands the agent is to have half of the residue for his services, and is to be the sole agent for the sale of the lands for a designated term, and the principal dies leaving a will by which he devises the lands to certain other persons making no provision for carrying out the contract,—the death of the principal revokes the authority of the agent, thereby rendering it impossible for him to sell the lands within the time limited, and such revocation entitles the agent to recover such compensation in damages as will be equal in amount to his share of the profits which would have resulted had the lands been sold by him. *Hawley v. Smith*, 45 Ind. 183.

And the measure of damages suffered by one who, having erected a mill upon the land of another, contracted with him to continue to keep the mill in good order, and receive for his services one third of the toll arising from running the same, and have the privilege of ginning his cotton and threshing his grain free, which is broken by an unauthorized sale by the owner of the land, is not the value of the labor of the injured party on the mill at the time of the sale, but the value of one third of the toll with the privilege of ginning his cotton and threshing his grain toll free, less the value of the services necessary on his part to keep the mill and machinery in running order. *Lecroy v. Wiggins*, 31 Ala. 13.

And the books of a merchant, kept by his clerk, are proper evidence on either side in an action by the clerk against the merchant for breach of contract, by which the merchant was to pay him one third of the net profits of the business as compensation, to show the amount of profits of the business; but where the books had been kept by the clerk and he had the management of the business, the merchant would have the right to prove that false and fraudulent entries had been made on the books

by the clerk, showing profits that did not really exist. *Wiggins v. Graham*, 51 Mo. 17.

So, sales of compressed yeast, made by an employer under a contract with an employee, by which he was to be paid by a certain percentage of the profits for a stated period, though not in themselves a true indication of sales which would be likely to be made after a breach of the contract on the part of the employer, by preventing the employee from continuing, may be taken into consideration by the jury in an action for the breach, with other evidence showing the probability of the increase or decrease of the business, as affected by competition, fluctuation of freight, or other cause, for the purpose of determining the amount actually lost by the employee by the breach of the contract. *Goldman v. Wolf*, 6 Mo. App. 490.

Where the special damages alleged in an action for breach of contract, however, would be a share of the profits or of the value of wheat raised, there should be deducted from such amount the reasonable value of the labor which the plaintiff would have been required to perform in sowing and harvesting the crop. *Lindley v. Dempsey*, 45 Ind. 246.

And in estimating the profits under an assignment of a patent containing an agreement that the assignor should have the beneficial enjoyment of one tenth of all the profits that might be derived by the assignee from the use or employment of the invention, where the use of the patent covers the entire business, the total sales of the product of the business are taken, and from these are deducted all legitimate costs and charges of the manufacture and sale. *Curry v. Charles Warner Co.* 2 Marv. (Del.) 98, 42 Atl. 425.

And to entitle a traveling salesman to recover profits on agreements for later sales, not completed at the time of the breach of the contract giving him half the profits on sales effected through his agency, the negotiations must have proceeded so far that it can be ascertained with certainty that the sales will be made, and their extent. Mere expectancy, doubtful offers, or other vague or indefinite assurances of intention to purchase, without expression of quantity or value, are speculative, and not recoverable. *Beck v. West*, 87 Ala. 213, 6 So. 70.

And he cannot recover for the loss of commissions he would have earned if permitted to continue in the service, or for loss of credit caused by the discharge, or for money expended in preparation for the work. *Beck v. West*, 91 Ala. 312, 9 So. 199.

And breach of a contract, by the terms of which the defendant was to furnish ice at an agreed price, and the plaintiffs were to make sales, and the profits were to be equally divided, entitles the plaintiff to recover one half of the profits upon the ice actually delivered, but not one half of the profits of ice sold whether delivered or not. *Hall v. Stewart*, 58 I wa, 681, 12 N. W. 741.

So, while, under an agreement upon the part of a theater manager to furnish a theater for a designated number of performances, and take in consideration therefor 50 per cent of the gross receipts realized from performances, which is broken by failure to furnish the theater, the profits are not sufficiently susceptible of proof to be recoverable, expenses incurred in the preparation to provide the performance should be allowed. *Bernstein v. Meech*, 180 N. Y. 354, 29 N. E. 255, affirming 54 Hun, 634, 8 N. Y. Supp. 944.

Where, however, the profits are entirely speculative and uncertain, and there are other elements in the case from which the damages may

be estimated with greater certainty, these will be adopted as the basis of estimation to the exclusion of the profits.

Thus, the measure of damages for breach by a sewing machine manufacturer of a contract with a dealer, by which the dealer was to exclusively sell the sewing machines of the manufacturer in a designated vicinity and receive a designated per cent from the established rental price of the machines, by selling to others in that vicinity at a much lower price, is the value of the dealer's time during the period he was employed under the contract, estimated without reference to the profits, with reasonable expenses added, less the sum he actually earned during the time. *Wilson Sewing Mach. Co. v. Sloan*, 50 Iowa, 367.

So, where a contract was entered into by which one was employed as a clerk for a designated period, under an agreement by which he was to receive a designated portion of the net profits of the business, which was to be not less than \$35 per week, and before the completion of the period the employer discharged him and prevented him from performing his agreement, in the absence of evidence of profits the specific sum weekly agreed upon will furnish a criterion from which the damages may be estimated, and may properly be considered as a reasonable compensation for the breach for the period during which the clerk remained unemployed under the contract. *Gifford v. Waters*, 87 N. Y. 80.

#### IV. Partnership contracts.

While profits of a partnership already earned are recovered by a partner on an accounting, not as damage for any breach of contract, but as property belonging to him, and cases with reference thereto are therefore not within the scope of this note, an action by a partner against a copartner for breach of the partnership agreement or of some agreement with relation thereto seeking to recover for profits which might have been made if it had not been for the breach, is plainly an action for damages, measured by estimated future profits, and cases of that character are here included. And it will be seen that in such cases a recovery may be had if the breach consists in something other or more than a mere failure to furnish funds as agreed, and if the profits are reasonably susceptible of estimation.

Thus, the object of a commercial partnership is profit, and the loss of the profits a partnership would have made during a stipulated term of the partnership is a proper subject of compensation for breach of the partnership contract. *Bagley v. Smith*, 19 How. Pr. 1, 10 N. Y. 489, 61 Am. Dec. 756.

And the measure of damages for the wrongful dissolution of a partnership by a partner contrary to his covenants in the articles of partnership is the actual money value of the injured partner's interest in the contract at the time of the breach; and, as tending to show such value, the actual state and condition of the partnership property, business, and assets at the time, together with proof as to actual results accomplished, whether of profit or loss, or both, in the past, would be competent evidence; but it would not be safe to go beyond this into the region of conjectural profits. *Reiter v. Morton*, 96 Pa. 229.

So, breach of an agreement between a publisher and an author that a literary work prepared by the author should be published at the expense of the publisher, and that the profits should be divided between them, by the act of the author of refusing to supply further materials and manuscript, authorizes an action at

law by the publisher against the author, as such an action is not an action for the recovery of partnership profits, but for the act of the author in refusing to contribute his labor toward the attainment of the profits to be subsequently divided between the parties. *Gale v. Leckie*, 2 Starkie, 107.

And the termination of a partnership between a publisher and an editor, by the terms of which the editor was to furnish all the necessary material for the publication of a newspaper and for job work for the office for one year, and the publisher was to publish and mail the newspaper and do all the job work of the office for the term, by the seizure of the presses, type, material, etc., under execution against the editor, warrants a recovery by the publisher against the editor of damages for profits lost by the breach of the agreement. *Hunt v. Reilly*, 50 Tex. 99.

And, where land is purchased by two persons under the agreement that it shall be held for the purpose of speculation, the one party advancing and furnishing the purchase money and the other contributing his time and services in the management and control of the premises, in the letting, leasing, surveying, and selling the same, the net profits to be equally divided between them, and the party advancing the money afterwards refuses to allow the other to have anything to do with the land, and denies his rights under the contract, the jury, in an action for the breach, should first ascertain the reasonable measure of cash value of the land in controversy at the time of the repudiation of the plaintiff's rights, and deduct the amount of purchase money and all necessary expenses paid by or for the defendant for the land, and the balance remaining will constitute the profits, which should be equally divided between them, one half of which the plaintiff would be entitled to recover. *Clarkson v. Whitaker*, 12 Tex. Civ. App. 483, 38 S. W. 1032.

So, evidence of the amount of past profits of a partnership business may be considered by the jury in an action for breach of covenant to continue the partnership, as bearing upon the future profits recoverable for the breach. *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, 19 How. Fr. 1.

And the testimony of the plaintiff in an action for damages for breach of a copartnership agreement, that the business of the firm was prosperous and increasing at the time of the dissolution, and that there were no signs of diminution; and a statement by the bookkeeper of the firm showing a profit for the preceding two months, of a stated amount, and a statement by the defendant in a letter that the books of the firm showed a profit of a certain amount per month,—are sufficient to go to the jury as evidence that there would have been profits if the partnership had not been dissolved and the business had continued. *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291.

And testimony in an action for breach of a contract to open and work a stone quarry on joint account, broken by one of the parties having the title in his own name by selling the same, given by the purchaser thereof as to the price of stone such as that quarry produced, and that it had not materially changed in the markets in which the output of the quarry was chiefly sold, and as to what he expected and hoped to make out of the quarry for a year or more to come, furnishes a reasonably substantial and safe basis upon which to assess the value of prospective profits to warrant their allowance as damages. *Treat v. Hiles*, 81 Wis. 280, 50 N. W. 896.

But opinions of witnesses as to the value of  
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an agreement for a partnership in a tannery are inadmissible in an action for a violation of the agreement before the period of its termination. *Reed v. McConnell*, 101 N. Y. 270, 4 N. E. 718.

And the jury in an action for the premature dissolution of a partnership in violation of contract, in estimating the damages of the party injured, should consider all the contingencies to which the business carried on was subjected, in determining the question of the probable amount of profits which would have been made had the business been continued, and what was the reasonable and probable pecuniary loss sustained in consequence of the dissolution. *Hunter v. Land*, 81\* Pa. 296.

And ordinarily where one partner fails to furnish his agreed share of the partnership funds the only damage for which he is liable for such failure is interest on the money due and withheld; and he cannot recover for damage or loss of profits from not furnishing such capital. *Krapp v. Aderholt*, 42 Kan. 247, 21 Pac. 1063; *Delp v. Edlis*, 190 Pa. 25, 42 Atl. 462.

And failure of a partner to supply capital agreed to be contributed by him necessary to the successful performance of a contract between the firm and a railroad company, and his subsequent surrender of the contract for cancellation, whereby the other partner lost great gains and profits which would otherwise have accrued to him as his share of the firm profits, does not warrant a recovery in an action at law by the one partner against the other, where it appears that the firm was actually formed to do business as such. In such case the wrong can only be ascertained and remedied after a final settlement of the affairs of the firm in equity. *Buckmaster v. Gowen*, 81 Ill. 153.

So, damages for profits which would probably have been made by higher prices subsequently obtainable, for breach of an agreement to continue a partnership for the purpose of manufacturing and selling vinegar for five years, are not sufficiently certain for recovery, and the jury should not consider the present and the probable future rate of prices during the balance of the partnership contracted for. *Van Ness v. Fisher*, 5 Lana. 236.

In the above case *Griffin v. Colver*, 16 N. Y. 489, 61 Am. Dec. 718, *supra*, III. a, 2, d, and *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, *supra*, were distinguished upon the ground that in those cases, when the court submitted the question of damages to the jury, they were no longer prospective; the time having expired up to which the profits in question would be estimated.

And damages for refusal to carry out an agreement to form a partnership to carry on a hennery, by which the defendant was to supply the means and the plaintiff furnish the labor and have one half of the profits derived from the enterprise, does not take the form of a *per diem* value of the labor of the plaintiff against whom the wrong was committed, and proof of what she could probably have earned had she been disengaged and able to procure employment is inadmissible. *Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180.

So, where one gives up his practice of law, and enters into a contract with another by which he takes upon himself the cultivation of an estate and plantation in conjunction with the other's son, he cannot, on disagreement with the other and dissolution of their contract, and upon the recovery by the other of the estate and plantation, recover damages for the loss of his law practice, and for the loss of his professional earnings during the

time he occupied the estate as for a breach of the contract, his absence not being the consequence of the breach, but of the contract itself. *Williams v. Barton*, 13 La. 404.

And breach of a contract by a partnership contained in a letter written by a partner to a third person, to the effect that if he would give up an offer of another partnership and become a member of the writer's firm he would pay him the difference in the value of the two offers as soon as the actual sum could be arrived at, stating that they had compared the two offers, computed their value, and supposed the former offer to be from \$1 to \$3,000 more valuable, authorizes a recovery of substantial damages,—that is, some amount intermediate between the \$1 and the \$3,000 designated by the parties in the absence of evidence that the injured party's rights were merely nominal; but further than that the value of the offer would be conjectural and uncertain. *McWhirtner v. Douglas*, 1 Coldw. 591.

So, the measure of damages for breach of contract for the formation of a partnership for the purpose of erecting ice works and manufacturing and selling ice, by which one party was to furnish the money to buy the machinery, erect the buildings, etc., and the other was to superintend the erection of the works and their operations, the net profits to be equally divided, by the expulsion and eviction of the superintendent by the capitalist, after the completion of the works but before any extended operation thereof, would be the value of the services rendered by the superintendent, including his skill, his time and labor in constructing and operating the factory, and not the superintendent's share of the profits for any specified time. *Ball v. Britton*, 58 Tex. 57.

And where a party, promised the command of a ship for an East India voyage from which he would have derived considerable profit, relinquished the appointment upon the promise of a member of a partnership to introduce him into the firm, which promise was not performed, he is entitled to recover damages estimated according to what the jury thinks is the proper value of the contract, and the value of the East India voyage, though not to be recovered as special damages, is to be taken as an ingredient for estimating the value which each of the parties set on the contract in dispute. *M'Neill v. Reid*, 9 Bing. 68, 2 Moore & S. 89.

#### V. Contracts for sale or purchase.

See note, *Loss of profits of sale or purchase as damages*, in 52 L. R. A. 209.

#### VI. Contracts for carriage.

##### a. Breach by shipper.

Breach by a shipper of a contract with a carrier for the transportation of goods or property warrants a recovery by the carrier for the profits that would have been made had it not been for the breach, and the general measure of damages is the difference between the cost of transportation and the contract price. But the carrier is not entitled to the full contract price, and it is thought that no recovery could be had if the profits were contingent or uncertain, or if they were to arise, not from the contract for carriage, but from some collateral enterprise.

Thus, one who enters into a contract to take a specified quantity of poles and dock logs to New York for a specified price, the performance of which is prevented by the owner's selling the timber shortly afterwards, is entitled to recover for such breach what he could have made by its fulfillment, together with the immediate

loss he sustained in preparing to perform the contract by sending men for that purpose. *Durkee v. Mott*, 8 Barb. 423.

And a breach of a contract by which one party agreed to carry coal for the other during the season at regular prices, the other to load his boat in regular turn with his own, by failure to load his boat, entitles the owner of the boat to recover the profit of one trip, which it appears he could have made during such detention. *Kelly v. Fall Brook Coal Co.* 67 Barb. 183.

And the owner of a canal boat, who entered into an agreement with persons shipping potatoes to carry a boat-load from one city to another during the season of canal navigation, though he would be entitled to rescind the contract for failure of the shipper to furnish a full cargo and for delay in loading, which might prevent him from getting through in season, is not obliged to do so, and is entitled to recover for all the damages and losses he has suffered through the default of the other party, where he did his best to go through, but could not do so. *Starbird v. Barrons*, 38 N. Y. 230.

So, the measure of damages for a breach of contract to furnish a designated quantity of wheat and pay a particular price for its transportation is not the price stipulated to be paid on full performance, but the actual injury sustained in consequence of the defendant's default. *Utter v. Chapman*, 38 Cal. 659.

And that for violation by the United States of a contract for the transportation of military supplies, the contract having been repudiated by the Secretary of War after considerable expense had been incurred, is the clear net profit the contractor would have realized if he had been permitted to perform the contract, which is the difference between what it would have cost him to perform the service and the amount he was to receive for it. *Moore v. United States*, 1 Ct. Cl. 90.

And in deciding what would have been the profits in such case, the court is not bound by the opinion or estimates of witnesses, but should make the assessment of damages from the facts and elements furnished by the evidence, making due allowance for the usual risks, contingencies, and for insurance, interest, depreciation of stock and material incident to such operations, and expense of superintendence and agencies, the value of personal time and expenses, and the keeping and care of stock and materials for the time they would have been employed as well as the immediate and direct cost of transporting goods. *Ibid.*

But breach by the owner of a contract for hauling his cotton entitles the party injured to recover only what he could have made on the contract if he had been permitted to do the hauling. He cannot recover the entire amount he would have received without any deduction of what it would have cost him to do the work. *Fox v. Elston* (Tex. Civ. App.) 33 S. W. 749.

And a person having a contract with another to do all his hauling for the wharves and depots of a specified city for a designated year, who is prevented by such other party from performing the contract, is not entitled to recover his special wages for the year, but only the profits which he would have made from performance of the contract. *Nixon v. Myers*, 141 Pa. 477, 21 Atl. 670.

And the rule that where a party has violated his contract through its entire scope, so that the contractor has been deprived of profits which he might have made within the contemplation of the parties when they made the contract, the contractor should recover his gains prevented as well as his losses sustained, does

not apply to the violation of a contract for the transportation of military stores and supplies, where the breach related to a minor matter in the contract, and has merely thrown upon the contractor needless expense, as in such case he should recover damages for such needless expense only. *Bulkley v. United States*, 7 Ct. Cl. 547.

The same rule applies where the breach is by one carrier of a contract with another carrier for continued transportation of passengers, or of goods shipped with the former.

Thus, a railroad company having an arrangement with a ferry company to employ the ferry in all cases in which it engaged in contracts for transportation of persons or property beyond the terminus of its road is liable to the ferry company, where it gives its ferrying to another company, for all profits lost by the ferry company by reason of the breach. *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 388, 39 Am. Rep. 519.

And the measure of damages for breach of a contract between the owner of a steamer and a railroad company for the transportation and delivery by the steamer at a steamboat landing of a quantity of coal, by preventing the delivery of any coal to him, is the difference between the cost of transportation and the price under the contract. *Boiland v. Northwestern Fuel Co.* 34 Fed. 523.

But the measure of damages for breach of a contract by a railroad company with a stage owner, for the transportation of passengers between certain places, is not the difference between what the stage owner was to receive for carrying the passengers and what it would probably cost him to carry each passenger, without reference to any other contract or other business of the parties, where, by reason of the stage owner's connection with other business in which he was engaged, he could transport passengers between such places without largely increasing his necessary outlay, as in such case the legitimate profits of the contract to him were proportionately increased, and the wrongful termination of the contract by the railroad company occasioned him a greater loss, for which he was entitled to recover. *Frye v. Maine C. R. Co.* 67 Me. 414.

Though where a contract between a railroad company and a stage owner, by which the stage owner was to run a stage line from one place to another by the most direct line for the convenience of travel coming or going to the railroad according to a certain time-table, which time-table provided for a run between such places and beyond to another place, in consideration for which the stage owner was to have the exclusive right of taking between the places mentioned in the contract for a term of years, and the railroad company broke the contract by contracting with other parties to do the work, the transportation of passengers beyond the places mentioned in the contract to the place mentioned in the time-table is not so connected with the transportation stipulated for in the contract by the reference thereto in the contract as to warrant a recovery for the breach of the loss of business, and the profits on the transportation beyond the places mentioned in the contract to and from the place mentioned in the time-table. *Ibid.*

#### b. Breach by carrier.

##### 1. Measure of damages generally.

A contract for the carriage of goods or persons is one for the rendition of services, and is governed by the same rules as general contracts for services, the line between liability 53 L. R. A.

and nonliability for profits lost resting upon the question whether they are the proximate and direct result of the contract of carriage, and certain in nature and amount on the one hand, or whether they are collateral, speculative, contingent, or uncertain on the other.

Thus, the measure of damages for breach of a contract to transport goods from one place to another is the difference between the value of the goods at the point of shipment and their increased value at the place of destination. *Bracket v. M'Nair*, 14 Johns. 170, 7 Am. Dec. 447; *Baltimore & O. R. Co. v. Jumphrey*, 59 Md. 390; *McGovern v. Lewis*, 56 Pa. 231, 94 Am. Dec. 60.

And the measure of damages for breach by a carrier of a contract to carry three cargoes of salt, by failure to take two of the cargoes, where it appeared that vessels could not be gotten to carry the salt after the carrier's default, and that the salt was not an article of special utility for preservation, but an article of merchandise only valuable as such, would be the excess of the value of the salt at the place to which it was to be carried at the date when it should have arrived beyond that at the place of shipment and the expense of loading, shipment and delivery. *Ward's Central & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544.

So, where goods are delivered to a carrier to be carried from one place to another, and are lost, and the goods are worth more at the latter place than at the former, the owner is entitled to recover the value of the goods at the latter place. *Rice v. Raxendale*, 7 Hurlst. & N. 96, 30 L. J. Exch. N. S. 371.

It has been held, however, that the loss of a market caused by delay in the transportation of goods or property is not included in the damages given therefor. *The Parana*, L. R. 2 Prob. Div. 118, 36 L. T. N. S. 888, 25 Week. Rep. 596; *Hawes v. South Eastern R. Co.* 54 L. J. Q. B. N. S. 174, 52 L. T. N. S. 514; *Wibert v. New York & E. R. Co.* 19 Barb. 36; *Conger v. Hudson River R. Co.* 6 Duer, 375.

As the immediate or proximate cause of the loss in such case is the decline in the market, and not the delay. *Wibert v. New York & E. R. Co.* 19 Barb. 36.

And that a shipper of dried apples cannot recover of a railroad company, in an action for negligence in not conveying them to market within a reasonable time, the difference between the price of dried apples at the time they should have been delivered and the price of the property at the time when the property was in fact delivered, as damages. *Jones v. New York & E. R. Co.* 29 Barb. 633, following *Wibert v. New York & E. R. Co.* 19 Barb. 36, and *Overruling Kent v. Hudson River R. Co.* 22 Barb. 278.

And that the measure of damages suffered by an assignee of bills of lading for breach of a contract of carriage of a quantity of sugar and hemp by undue delay in the voyage is interest at the ordinary commercial rate on the value of the goods for the period of the delay and delivery, and not the difference between the market value of the goods when they ought to have been delivered and the market value when they were actually delivered, as it cannot be known what will be done with the goods on shipboard when they arrive at their destination. *The Parana*, 36 L. T. N. S. 888, L. R. 2 Prob. Div. 118, 25 Week. Rep. 596.

See also *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273; *Gulf, C. & S. F. R. Co. v. Cole* (Tex. App.) 16 S. W. 176; *Scott v. Boston & N. O. S. S. Co.* 106 Mass. 468, *infra*, VI. b., 2.

But the prevailing rule would seem to be that the measure of damages for an inexcusable delay on the part of a carrier of goods until

after they have diminished in market value is the amount of the diminution, and that no question of contingent or speculative profits is involved. Cutting v. Grand Trunk R. Co. 13 Allen, 385; St. Louis, I. M. & S. R. Co. v. Muddford, 48 Ark. 502, 8 S. W. 814; Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 252; Gelvin v. Kansas City, St. J. & C. B. R. Co. 21 Mo. App. 273; Medbury v. New York & E. R. Co. 26 Barb. 564; Lindley v. Richmond & D. R. Co. 88 N. C. 547; Galveston, H. & S. A. R. Co. v. Douglass, 1 Tex. App. Civ. Cas. (White & W.) § 67, p. 29; Wilson v. Lancashire & Y. R. Co. 9 C. B. N. S. 682, 80 L. J. C. P. N. S. 232, 7 Jur. N. S. 862, 3 L. T. N. S. 859, 9 Week. Rep. 635.

Though an agreement between a shipper of animals and a railroad company, by which the shipper assumes all risk of injuries which the animals may suffer from designated causes and by reason of any delay, refers to injuries to the animals by reason of delay in loading or unloading in transportation, and has no reference to an injury caused by a fall in the market price between the time when delivery should have been made and the time when it was actually made. Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 252.

In the above case Conger v. Hudson River R. Co. 6 Duer, 375, *supra*, was distinguished upon the ground that in that case the question was whether the shipper could recover from the carrier for damages occasioned by a loss of market through delay, and the court intimated that such damages were too speculative in their character to form a basis of a legal action.

And Wibert v. New York & E. R. Co. 19 Barb. 36, *supra*, was criticised, the court saying that that case seems to lay down a rule of damages wholly unwarranted by reason or authority, and to apply a similar principle to other cases it would be necessary to hold that one who had unroofed the house of another, in consequence of which it became deluged with rain, would not be liable for the damages caused, because unroofing the building did not cause the rain.

The allowance in an action for breach of contract to transport goods, of the difference between the price at the point where the goods are and that to which they are to be transported, and an allowance in an action against a vendor for not delivering chattels sold, of the market price upon the day fixed for delivery, though amounting to an allowance of profits, is permitted, as these profits do not depend upon any contingency. Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718.

This rule is probably based upon the theory that a carrier must be deemed to know that goods or property shipped were either sold or intended for sale, or for some purpose, the utility of which would depend upon the market value of the property at the time it came to hand, such being the usual purposes of shipment. It is to be observed that with reference to delay in sending telegrams (see *infra*, VII.), the object and purpose of which are more varied and not so apparent or easily ascertained, liability is confined strictly to cases in which knowledge of the purpose of the telegram is brought home to the telegraph company.

Thus, breach of a contract to carry wheat from one place to another authorizes a recovery of the difference between the value of the wheat at the former place with the freight added and the market price at the latter place at the time it would have arrived there if carried according to contract. O'Connor v. Forster, 10 Watts, 418.

And a railway company professing to carry perishable goods from one place to another within a specified time is liable, on the promise made by the station clerk that goods shall be for-

warded to a place beyond its line before a particular hour, which promise is not fulfilled, for the amount of profits which might have been realized from the goods, if they had arrived in proper time. Wilson v. York, N. & B. R. Co. 18 Eng. L. & Eq. 567, note.

And where a loss is sustained by a shipper of sheep from a delay on the part of the common carrier in transporting them to market and a fall in the market price during the period of delay, the loss sustained by him is a proper element of damages to be taken into account by the jury in connection with other facts and circumstances of the case. Kent v. Hudson River R. Co. 22 Barb. 278, Overruling Wibert v. New York & E. R. Co. 19 Barb. 36, *supra*.

And the unnecessary detention by a railroad company of a shipment of a lot of dressed pigs, during which delay the market price fell, entitles the shipper to recover the difference in the value of the pigs at the time and place they ought to have been delivered and the time of their actual delivery; and this is the rule even in the absence of evidence that the property was sent to the consignee to be sold, or that it was actually sold at a loss. Ward v. New York C. R. Co. 47 N. Y. 82, 7 Am. Rep. 405.

In the above case Wibert v. New York & E. R. Co. 19 Barb. 36, and Jones v. New York & E. R. Co. 29 Barb. 633, *supra*, were in effect overruled, and Kent v. Hudson River R. Co. 22 Barb. 278, *supra*, was reinstated, and the rule above stated was said to have been fully recognized in Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718, *supra*.

So, breach of contract upon the part of a railroad company to carry the equipment of a theatrical company, by failing to deliver at the time contracted for, whereby the theatrical company was prevented from giving an exhibition advertised, and compelled to refund the money for the tickets sold, entitles the theatrical company to recover for such loss of profits as can be shown to be the direct result of the breach of the contract. Leach v. New York, N. H. & H. R. Co. 89 Hun, 377, 35 N. Y. Supp. 305.

And where, in an action for such loss of profits, it was shown that before it was known that the equipment would not arrive tickets for the performance were sold to the amount of nearly \$400, a person who had for several years been engaged in the sale of tickets for that particular place of amusement, and who sold the tickets on this occasion, may be permitted to testify that about one fourth of the whole amount of tickets sold were usually sold in advance of entertainments for the purpose of arriving at the profits lost through the breach of the contract. *Ibid*.

And while the measure of damages, in an action against a railroad company for the non-delivery of goods shipped, is the price at which the goods can be obtained in the market, if there be no market at the time and place of delivery, the damages are to be ascertained by taking into consideration the cost price and expense of transit, and also the reasonable profit of the importer, to be assessed by the jury acting upon their own experience and knowledge of business. O'Hanlan v. Great Western R. Co. 6 Best & S. 484, 34 L. J. Q. B. N. S. 154, 11 Jur. N. S. 797, 12 L. T. N. S. 490, 13 Week. Rep. 741.

And one who enters into a contract with the United States to receive and transport all the military supplies that might be required to be transported to a designated military district, upon the performance of which he enters, and which he is prepared to execute, but which is broken by the United States by entering into a contract with another party for the same work, is entitled to recover the gain or

profit he would have made for the services under the contract which he was not permitted to render, deducting therefrom a reasonable sum for the less time engaged and for release from the care, trouble, risk, and responsibility attending a full execution of the contract. *Wildner v. United States*, 5 Ct. Cl. 468.

So, the rule of damages for failure to deliver the whole of a cargo of Chinese goods is the difference between the price agreed upon between the parties and the market value of the goods at the place of the breach; and the fact that there were no Chinese goods in the market at the time corresponding to the description of those sold does not warrant the admission of evidence in an action for the breach, showing what they were worth in broken packages, or the profits which might have been made from a sale of the goods. *Tobin v. Post*, 3 Cal. 873.

Where damages for breach of contract of carriage consisting of lost profits or otherwise can be ascertained by computation, or are in their nature capable of being definitely fixed, the parties are confined to direct evidence, and are not permitted to prove collateral facts from which inferences as to the amount of damages sustained may be drawn. But where they cannot be fixed by computation or direct evidence, the kind and character of the evidence admissible for the purpose of proving them depend upon the circumstances of each case. *Leach v. New York, N. H. & H. R. Co.* 89 Hun, 377, 35 N. Y. Supp. 305.

The fact that a railroad company did not own any cars at the time of a contract for carriage does not relieve it from liability for profits lost to a shipper on account of the breach of its contract with him to furnish cars. *Baxley v. Tallassee & M. R. Co.* (Ala.) 20 So. 451.

As to effect of notice of use or purpose to sell, see *infra*, VI. b, 2.

## 2. Remoteness, contingency, and uncertainty, and their effect.

Compensation for actual loss sustained is the fundamental principle upon which the allowance of damages is based, and allowance will not be made in an action for breach of contract for carriage upon a calculation of speculative profits. *Medbury v. New York & E. R. Co.* 26 Barb. 564.

And the loss of profits on the sale of the goods to be carried, or other damage of like character, is too remote to furnish a proper basis for recovery. *Galveston, H. & S. A. R. Co. v. Douglass*, 1 Tex. App. Civ. Cas. (White & W.) § 67, p. 29; *Lindley v. Richmond & D. R. Co.* 88 N. C. 547; *Southern R. Co. v. Myers*, 32 C. C. A. 19, 58 U. S. App. 131, 87 Fed. 149.

In the absence of a definite contract for carriage to a given point by a given time, with such reasons for making it as would naturally lead the agent of the carrier to contemplate the profits the shipper or passenger expected to realize. *Southern R. Co. v. Myers*, 32 C. C. A. 19, 58 U. S. App. 131, 87 Fed. 149.

And in such case it is error to admit any testimony in an action for the breach with reference to the speculative profits which the passenger might have made if he had been safely carried through on schedule time. *Ibid.*

Thus, one who delivers goods to a carrier for transportation, which goods are unreasonably delayed, is entitled to recover of the carrier for personal expenses in looking after and inquiring for them, but he is not entitled to recover for the loss of hire of his goods by a third party under a contract by the terms of which he was to take them if delivered in a specified time. *Hales v. London & N. W. R. Co.* 4 Best & S. 66.

And a railroad company upon whose road cat-

tle were shipped is not liable, in an action for damages to the cattle, alleged to have been caused by delay, for the difference between the price which the cattle brought when they reached their destination and the price at which they were contracted to be sold, where it does not appear that the railroad company was informed that the cattle were being shipped to fill a contract, or that it was important to have them at their destination at any given time. *Gulf, C. & S. F. R. Co. v. Cole* (Tex. App.) 16 S. W. 176; *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273.

And a shipper of cattle, who leased space for cattle on a line of ocean steamships for one year, cannot recover for breach of the contract damages for loss of profits based on an alleged arrangement with third persons, that upon his procuring space on two lines of steamers, one running to Liverpool and the other to London, they would take his contract off his hands and pay him a commission for buying and selling the cattle. *Brauer v. Oceanic Steam Nav. Co.* 34 Misc. 127, 69 N. Y. Supp. 465.

And the owner of an animal shipped from one place to another, which animal was injured during transportation, nothing having been said or done at the time of the contract for transportation to cause the defendant or its agent to know the purpose for which the animal was being shipped, cannot recover from the railroad company for loss of the use of the animal, caused by the injury, for any particular purpose. *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 360, 25 Am. Rep. 403.

So, the jury, in an action by a shipper of hops against a railroad company for delay in their delivery, in consequence of which a purchaser refuses to receive them, is not at liberty to take into account, in estimating damages, the loss of the bargain between the shipper and the consignee. *Simmons v. South Eastern R. Co.* 7 Hurlst. & N. 1002.

Nor is it warranted in considering, in an action for not delivering a lot of fruit trees, the fact that the consignee had sold the trees for more than he gave for them, where it is not shown that the railroad company had notice of such sale or the day of delivery. *Wabash, St. L. & P. R. Co. v. Lynch*, 12 Ill. App. 365.

And breach of contract for the carriage of a quantity of hay within a reasonable time, from one place to another in wagons of a specified size at a designated rate per load, by failing to supply wagons of the size provided for in the contract, and providing smaller wagons instead, warrants a recovery for the extra cost of carriage, if any, occasioned by the use of the smaller wagons, for the extra cost of conveyance by other means, but not for the profits which would have resulted from a sale of the hay at the time when the contract ought to have been performed. *Irvine v. Midland G. W. R. Co.* Ir. L. R. 6 C. L. 55.

So the rule of damages for loss of goods at sea on board a vessel which was not seaworthy is that the carrier shall pay for goods not delivered their net value at the port of delivery, but he is not liable for any speculative or possible profits which the owner might have anticipated in his peculiar business. *Bazin v. Steamship Co.* 3 Wall. Jr. 229, Fed. Cas. No. 1-152.

Nor can a carrier contracting to carry articles be held liable, on a breach of contract, for the profits which the owner might have realized by the sale of the articles which he might manufacture from them. *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502.

And refusal of a carrier to deliver goods to a manufacturer until he has paid freight on a lot of material previously delivered, and de-



taining them one day, do not entitle the manufacturer to recover the profits lost to him by the consequent stoppage of his mill. *Walte v. Gilbert*, 10 Cush. 177.

And a purchaser of cotton for use in his mill, who ships it by rail to the mill, the delivery of which is delayed by the railroad company, is not entitled to recover for wages paid to employees while his mill is standing idle because of the nonarrival of the cotton, or for profits which might have been made by the running of the mill during such time, where at the time of the shipment notice was not given that the purchaser had no other cotton, and that, in case of its nonarrival in season, his mill would be stopped, though he afterwards and during the time the goods were delayed repeatedly gave such notice. *Gee v. Lancashire & Y. R. Co.* 6 Hurst. & N. 211, 30 L. J. Exch. N. S. 11, 3 L. T. N. S. 328, 9 Week. Rep. 103.

And the measure of damages in an action against a carrier for delay in the delivery of cotton sold "to arrive" is not the decline in market value between the date of the sale and the actual arrival of the cotton, where the carrier on receiving the property had no notice of the contract of sale relied on, or the profits which might on the fall in market have resulted therefrom to the consignee, and they could not have been contemplated by the parties to the contract. *Scott v. Boston & N. O. S. S. Co.* 108 Mass. 468.

So, a cap manufacturer, who purchases cloth for the purpose of making it into caps, and delivers it to a carrier for transportation, which is not delivered within a reasonable time, has no right to claim as damages the profits he would have made upon the sale of the goods, or of the caps had the goods been delivered in proper time. *Wilson v. Lancashire & Y. R. Co.* 9 C. B. N. S. 632, 30 L. J. C. P. N. S. 232, 7 Jur. N. S. 862, 3 L. T. N. S. 857, 9 Week. Rep. 635.

And delay in the carriage and delivery of a quantity of kid skins does not render the carrier responsible for loss of wages of workmen kept by the consignee unemployed by reason of the delay in the arrival of the goods, or for loss of profits by reason of such goods not being worked up and sold in the course of trade. *Le Peintur v. South Eastern R. Co.* 2 L. T. N. S. 170.

And testimony as to the number of feet of sawed lumber an uncut forest would make, and the profits which might have been made from the manufacture of such uncut forest into lumber, are too remote and uncertain for consideration in an action by the owner against a railroad company for charging excessive freight rates on the owner's shipments of lumber in violation of a contract for rates. *Florida C. & P. R. Co. v. Buckl*, 16 C. C. A. 42, 30 U. S. App. 454, 68 Fed. 864.

Nor does failure of a railroad company to carry coal according to contract, whereby the other party to the contract was obliged to suspend his work for want of the coal, authorize a recovery of profits which he would have made had he received the coal according to contract; and proof of such profits is inadmissible in an action for the breach of the contract. *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502.

In the above case *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38, in which profits were allowed, was distinguished upon the ground that that was not the case of a carrier, but was the ordinary case of an agreement to purchase, at stipulated prices, marble to be delivered as agreed upon in the contract.

So, a traveler on a steamboat cannot recover, in an action against the steamboat company as a common carrier for the loss of his baggage, 53 L. R. A.

damages for loss of profits which he might have made in the practice of his trade or profession if his baggage, including the implements of his trade, had not been lost. *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

And delay of a railroad company in delivering the trunks of a travelling salesman, containing agent's samples, does not warrant a recovery by the travelling salesman for the profits which he could have made while the company held his trunks, where at the time the trunks were received for transportation no notice of the particular necessity or advantage to him of their prompt delivery had been given. *Texas Mexican R. Co. v. Willis*, 3 Tex. App. Civ. Cas. (Willson) § 71, p. 94.

And the same rule was applied to delay in transporting goods to a salesman until he had left the place of their destination, in consequence of which they were forwarded to him at the next town he visited, no notice of the object of the shipment having been given. *Great Western R. Co. v. Redmayne*, 35 L. J. C. P. N. S. 123, L. R. 1 C. P. 329, 12 Jur. N. S. 692.

So, one who ships machinery which the carrier fails to deliver can only recover the value of the machinery for such nondelivery, and is not entitled to the loss of profits from its nondelivery or wages of workmen upon the building in which the machinery was to be used, where no notice had been given at the time of the contract of the necessity for a prompt delivery, and the machinery was such as might be used for many different purposes. *Ruthven Woolen Mfg. Co. v. Great Western R. Co.* 18 U. C. C. P. 316; *British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 449, 37 L. J. C. P. N. S. 235, 18 L. T. N. S. 604, 18 Week. Rep. 1046; *Pacific Exp. Co. v. Darnell Bros.* 62 Tex. 639; *Gulf, C. & S. F. R. Co. v. Maetze*, 2 Tex. App. Civ. Cas. (Willson) § 631, p. 553; *Davis v. Cincinnati, H. & D. R. Co.* 1 Disney (Ohio) 23.

And a carrier to whom machinery was delivered for transportation, which was badly broken and destroyed while in its possession, is liable for the value of the property computed at the place of shipment, where it could not be repaired for less than the price of a new machine, but not for the value of the use of the machine while another was being procured to supply its place, where it does not appear that the carrier had notice of the use to which it was to be put. *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.* 62 Wis. 642, 51 Am. Rep. 726, 22 N. W. 827.

And a common carrier contracting with a miller to carry a broken shaft of his mill and deliver the same to an artificer to serve as a model for a new one, who fails to deliver the shaft to the artificer within a reasonable time, in consequence of which the artificer is delayed in making a new shaft, and the mill, having no other shaft is compelled to remain idle until the new shaft can be supplied, is not liable to the miller for the loss of profits from his mill which he would have made had the shaft been delivered in reasonable time and the new shaft constructed and returned to him, where the carrier did not know that the mill had no other shaft, and that the shaft was sent as a model for a new one. *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. L. & Eq. 398, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 C. L. Rep. 517.

So, a tailor who engaged with a railroad company to carry him as a passenger from one place to another at which the train was advertised to arrive the same night, and upon arriving at the end of the line found the train continuing on a connecting line had gone, and, instead of taking special conveyance and hiring a boat to get there that night, remained until morning and pro-

cooded by train the next day, whereby he was too late to reach places previously appointed for meeting his customers, in consequence of which he was obliged to hire conveyances to see some of them elsewhere, and was detained in order to see others, is entitled to recover the amount of hotel expenses where he staid over night, and the railway fare paid the next day; but he cannot recover for the profits and emoluments which he was deprived of by not arriving at his destination in season to meet his customers. *Hamlin v. Great Northern R. Co.* 38 Eng. L. & Eq. 335.

And breach by a railroad company of a contract to carry excursionists to a designated place where public amusements were to be held at a reduced rate of fare, by repudiating it after preparation had been made for it, authorizes the injured party to recover for the net profits on tickets actually sold or bargained for less the probable expense of the excursion, but does not authorize a recovery for the profits on tickets which might have been sold had the contract not been repudiated, as such profits would be conjectural. *Houston & T. C. R. Co. v. Hill*, 68 Tex. 381, 51 Am. Rep. 642.

And that a person having a contract for the sale of property had to turn over his contract to another party to pay him what he owed him, is immaterial and beyond the issues, in an action by such person against a railroad company for loss of profits caused by breach of contract to furnish cars for the shipment and delivery of the property sold. *Baxley v. Tallassee & M. R. Co.* (Ala.) 29 So. 451.

So, breach by a carrier of a contract to carry an opera troupe to a designated place, to arrive there at a designated time, by a delay of such length that the troupe were unable to play as expected upon the day they were to arrive, and also upon the next day, authorizes a recovery of the loss of the performances advertised for those days, as such loss was the direct consequence of the delay; but no recovery can be had for losses growing out of the subsequent breaking up of the troupe in consequence of a failure to pay the performers, though such failure to pay was the result of the inability to play on the two evenings advertised. *Foster v. Cleveland, C. C. & St. L. R. Co.* 56 Fed. 434.

But while the owner of a museum, under a contract with a railroad company for its transportation to a fair at a designated place and time for exhibition at the fair, broken by delay in the transportation so that it did not arrive in season, might not be able to recover the probable net profits of an exhibition at the fair as such because they are too speculative and remote, he would be entitled to recover for the value of the use of the property at such place and time, and such value could not be more properly determined than by ascertaining what the probable net profits of the exhibition would have been. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411.

And the plaintiff in an action against a carrier to recover the value of a picture lost by it in transportation may show that he had orders for copies of the picture, for the purpose of showing that actual use could be made of it in the prosecution of business, and that it possessed a value beyond the mere pleasure which an inspection of it would furnish; but loss of anticipated profits from not being able to supply copies of it that had been ordered cannot be recovered as damages. *Bennett v. Drew*, 3 Bosw. 855.

So, where an express company receives for transportation a box containing plans and specifications to be forwarded to a committee, which had offered a premium to the successful competitor for the best plans for a public building,

and fails to deliver the box until after the premiums are awarded, the loss to the sender of the opportunity to compete for the prize is not too remote to be considered as damages, but he can recover no more than nominal damages without proof of actual injury resulting from the breach. *Adams Exp. Co. v. Egbert*, 86 Pa. 360, 78 Am. Dec. 382.

But in *Watson v. Ambergate, N. & B. R. Co.* 15 Jur. 445, 3 Eng. L. & Eq. 497, which was an action against a railroad company for damages for delay in transporting and delivering plans and models of a machine for loading colliers from barges intended for competition for a prize which had been offered for the best plan, it was said that the proper measure of damages was the value of the labor and materials expended in making the plan and model, but that the chance of winning the prize was too remote to constitute a ground for damages. But the case turned upon other grounds. \*

See also *Cutting v. Grand Trunk R. Co.* 13 Allen, 385; *The Farana*, 86 L. T. N. S. 388, L. R. 2 Prob. Div. 118, 25 Week. Rep. 596, *supra*, V. b.

### 3. Notice of sale and its effect.

Notice to a carrier of a sale of the goods shipped brings the profits of the resale within the rule that the proximate and direct fruits of the contract of carriage may be recovered for its breach. But the notice to or knowledge of the carrier must have been such that the parties will be deemed to have contracted with reference to an enhanced liability on that account. A mere knowledge of an intention to sell is not enough.

Thus, where the owner of goods delivered to a carrier for transportation had made an advantageous sale of them provided they were delivered within a certain time, and the carrier through negligence failed to deliver them at their destination in time, and the owner lost the benefit of his bargain, if the carrier was informed of the sale and its conditions, and the market value of the goods when and where they should have been delivered was less than the contract price, the carrier would be liable for what the owner would lose by the failure to deliver in time, which would be the difference between the contract price and the market value of the goods when delivered. *St. Louis, I. M. & S. R. Co. v. Mudford*, 48 Ark. 502, 3 S. W. 814; *Simmons v. South-Eastern R. Co.* 7 Hurlst. & N. 1002; *Cobb v. Illinois C. R. Co.* 38 Iowa, 601; *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267; *Houston, E. & W. T. R. Co. v. Campbell* (Tex. Civ. App.) 40 S. W. 431, Affirmed in part, and Reversed in part, in 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2.

Less the freight to destination. *Cobb v. Illinois C. R. Co.* 38 Iowa, 601.

And where part of the goods had been purchased to fill the purchaser's contract of sale, he would be entitled to the difference between the market price and the price paid by him or contracted to be paid, together with the profits he would have realized thereon. *Ibid.*

And where grain was contracted to be sold at a particular place to the government, and it was shipped to that place, and the fact that it was intended for the government was known to the carrier, that is sufficient to hold the carrier responsible for the loss of the special contract with the government through delay in transportation, though the terms of the contract of sale to the government were not communicated. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.

And it cannot be urged that the shipper should have gone into the market at that place

and bought corn to fill his contract, and that, not having done so, he can only recover the market price. *Ibid.*

So, the right of a shipper of grain which the carrier failed to transport, to recover profits which he would have made on a resale thereof for which he had contracted, is not affected by the fact that he had settled with the parties of whom he had bought the corn for a less sum than such parties claimed, or were justly entitled to claim, against him. *Cobb v. Illinois C. R. Co.* 88 Iowa, 601.

And refusal to charge, in an action against a common carrier for delay in the delivery of peaches, that the plaintiffs are entitled to recover only for what they paid for the peaches and for the expense of superintending and loading, less what they realized from the sale, and not for the profits that they might have realized at the place of destination, is not error, where the time and route of shipment were specified in the contract. *Central R. & Bkg. Co. v. Skellie*, 86 Ga. 686, 12 S. E. 1017.

So, the measure of damages for failure and refusal upon the part of a carrier to furnish cars for transportation of a quantity of wood, the carrier having notice of negotiations for a sale of the same, is the profits the shipper would have made on the contract for the disposition of the wood, provided he could have carried out that contract; but the refusal of the carrier to furnish the cars, and the fact that but a small part of the wood was ready for shipment at the time the cars were demanded, do not affect the measure, nor does the subsequent failure to prepare the rest for shipment, as he was not bound to prepare and offer it where he knew transportation would not be furnished. *Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2.

And a carrier entering into a contract with a shipper for the transportation of a quantity of cross-ties and other railroad timber, pursuant to which the shipper entered into a contract with another railroad company for the sale and delivery at the place of destination of such cross-ties and railroad timber, is liable to the shipper for failure to furnish cars for transportation, where it had notice at the time the transportation contract was made of the contract with the other railroad company, or knew that such contract was in contemplation, and, before the default, had notice that the contemplated contract had been consummated, and for the profit which the shipper would have made upon such contract had he not been prevented from carrying it out by the failure of the carrier to furnish the cars. *Baxley v. Tallassee & M. R. Co.* (Ala.) 29 So. 451.

But in order to recover such profits the railroad company must have known of the contract through the agents and servants, whose duty it was to see to furnishing transportation, and it is proper, in an action for the breach, to show such knowledge. *Houston, E. & W. T. R. Co. v. Campbell* (Tex. Civ. App.) 40 S. W. 431, affirmed in part, and reversed in part, in 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2.

And a carrier undertaking to carry sheep to a city, who is notified before so doing that the shipper desires to have them there at a time named, as that is market day and the most favorable time to sell them, is liable, for negligent delay preventing their arrival on that day, for the difference between what the shipper was obliged to sell the sheep for when they did arrive and what he would have received at the time when they should have arrived if the carrier had performed his contract. But to entitle the shipper to such damages it is necessary to show that the carrier had such notice at the 53 L. R. A.

time the contract was made. *King v. Woodbridge*, 84 Vt. 565.

So, breach by a railroad company of a contract to receive cattle at a certain station to be sold for beef in a market at another place on the following Monday morning, which was a sale day, when the beef could have been sold to the best advantage, which fact was known to the railroad company, and was in view of both parties when the contract was made, by refusal upon the part of the railroad company to receive the cattle and failure to have them at the market on Monday in time for the sale of that day, renders the company liable, for the consequent loss of the favorable market, for such special damages as actually resulted from the special circumstances. *Hamilton v. Western N. C. R. Co.* 96 N. C. 398, 8 S. E. 164.

And in such case proof as to what days were market days in the place of destination is admissible in evidence. *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627.

And the difference in market price of cattle at the place to which they were being shipped may be taken as a basis of computation of damages in an action against a railroad company for delay in their transportation, where their destination was known to the railroad company, and the delay occurred on its line, though the contract covered only transportation on its own line and delivery to a connecting carrier. *Missouri, K. & T. R. Co. v. Truskett*, 44 C. C. A. 179, 104 Fed. 728.

The mere knowledge on the part of a carrier, however, that a shipper of ties intended to make contracts for the sale of the ties to be transported, cannot impose a liability upon the carrier for loss of profits on such contracts. *Harvey v. Connecticut & P. Rivers R. Co.* 124 Mass. 421, 26 Am. Rep. 673.

And delay on the part of a common carrier in the transportation of cattle does not warrant a recovery for the loss of a market occasioned thereby, where there is nothing to show that the shippers would have sold their cattle had they arrived on the market day. *Conger v. Hudson River R. Co.* 6 Duer, 875.

And a shipper of corn to fill a contract with the government at an advance rate, whose shipment is delayed in transportation whereby the corn is damaged and rejected, cannot recover of the carrier on the basis of the contract with the government, where he had other corn than that delayed in transportation at the place of destination sufficient to fill his contract. He can only recover damages based upon the market value of the corn at the place of destination. *Illinois C. R. Co. v. Cobb*, 64 Ill. 143.

Nor can he recover the damages based upon the contract with the government, where it appears that the shipper had resold to his vendor such portion of his corn as might be thus rejected at the price he had purchased it for, the measure of damages in such case being the contract price for which the shipper sold the corn, less the amount received by him on his resale. *Ibid.*

And a shipper of corn contracted for by the government at an advance rate, who had received notice from the government on the 1st of April that it would receive no more corn under the contract after the 10th of that month, who shipped after the lapse of a reasonable time within which to give notice of such determination by the government to the carrier without having given such notice, cannot recover of the carrier for delay in the shipment so that it did not arrive until after the 10th upon the basis of the contract with the government, but should be confined to the market value of the corn at the place of destination at the time when

It should have been delivered. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.

So, mere notice on the part of a consignor of goods to a carrier that the consigned goods were sold will not render the carrier liable for more than ordinary damages for loss of the sale, based upon the market price of the goods. In order to render the carrier liable for loss of profits under an exceptional contract at a price higher than the ordinary market value, the notice must have been given under such circumstances as to make it a part of the contract that the carrier was to be liable for such damages if the contract was broken. *Horne v. Midland R. Co.* L. R. 8 C. P. 131, 42 L. J. C. P. N. S. 59, 28 L. T. N. S. 312, 21 Week. Rep. 481.

And where a manufacturer contracted to supply a large quantity of shoes at an extremely large price to one who required them to fulfil a contract for the supply of the French army, agreeing to deliver them by a designated day, the shoes to be thrown back on his hands if not so delivered, who delivers shoes to a railroad company consigned to the purchaser in time to be delivered on the designated day, giving notice to the station master that he is under contract to deliver on that day, and that the shoes will be returned if not so delivered, can recover of the railroad company, where it delays their delivery until after the designated time, and the shoes are returned to him, and he sells them at a much smaller price, for the incidental expenses and ordinary damages in view of the ordinary market price only, where the railroad company has no notice of the special price at which the shoes are sold and the special use to which they are to be put, and the demand for them has ceased in consequence of the cessation of the war. *Ibid*

In the above case *France v. Gaudet*, 40 L. J. Q. B. N. S. 121, L. R. 6 Q. B. 199, 19 Week. Rep. 622, was distinguished upon the ground that there the action was between the vendor and vendee, and it was said that there was little analogy between the cases on this subject, and each case would stand on its own ground. And it was said by Blackburn, J., that it was not necessary to decide whether the *dictum* in *Hadley v. Baxendale*, 9 Exch. 341, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 C. L. Rep. 517, is well founded; but the rule that if special notice be given the damages are recoverable, though there be no special contract, is law.

On this subject, see also *WELLS v. NATIONAL LIFE ASSO.*

#### 4. Notice of use and its effect.

Notice to, or knowledge of, the carrier as to a special use to which the goods shipped were designed to be put, is governed by the same rules as notice or knowledge of a sale thereof.

Thus, as between shipper and carrier, when an article is destined for a special purpose, that fact should be communicated to the carrier if it is to be made the foundation of special damages against him, and if it is of a character likely to affect his action. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.

But whenever the object of the shipper of property is specially brought to the notice of the carrier, or circumstances from which the object ought in reason to have been inferred, so that the object may be taken to have been within the contemplation of both parties, damages, though consisting of loss of profits, may be recovered for the natural consequences of the failure of that object. *Kennedy v. American Exp. Co.* 22 Ont. App. Rep. 279; *Simpson v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 274, 16 Moak, Eng. Rep. 330, 45 L. J. Q. B. N. S. 182, 33 L. T. N. S. 805, 24 Week. Rep. 294; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Priestly v. Northern* 53 L. R. A.

*Indiana & C. R. Co.* 26 Ill. 205, 79 Am. Dec. 369; *Gulf, C. & S. F. R. Co. v. Compton* (Tex. Civ. App.) 38 S. W. 220.

And the profits ordinarily derived from the use of the property may be shown in an action against a railroad company for delay in its delivery, not for the purpose of giving the profits as damages, but as a measure for enabling the jury to determine the value of its use. *Gulf, C. & S. F. R. Co. v. Compton* (Tex. Civ. App.) 38 S. W. 220.

So, breach by a railroad company of a contract to deliver a certain number of cars at a particular place, for the purpose of being loaded with corn to be consigned to designated persons, in fulfillment of a contract between the shipper and such persons to deliver to them on board the cars, at designated points, a certain number of bushels of corn, the terms and purpose of which contract were known to the railroad company, warrants a recovery by the shipper of the railroad company for the profits which he would have made on such contracts for the delivery of corn, as the railroad company must have known that the shipper would sustain damages from its failure to supply the cars by reason of his inability to comply with his contract. *Gulf, C. & S. F. R. Co. v. Hodge* (Tex. Civ. App.) 39 S. W. 986.

But where a dealer ascertains the price of corn in a certain place, and enters into a contract with a railroad company for transportation to that place, and then goes among holders of corn and bargains for a large quantity, which the railroad company refuses to carry for the agreed price, he is not entitled to recover for what he would have made on the grain in the absence of proof that he shipped more than a very small part of it or of what portion of the whole was delivered to him, or that he was obliged to store it or had incurred any expense in regard to it, or was compelled to sell it at home at a loss, or to pay damages to those with whom he had bargained for failing to take it. *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

So, a manufacturer of woolen goods, who ships samples of goods to a salesman for the purpose of use in soliciting orders, with notice to the railroad company that there is a commercial necessity that the goods shall be delivered within a reasonable time, such goods having no market value and no real value except for the purpose specified, is entitled to recover of the railroad company for delay in transportation and delivery until after the close of the season for the sale of such goods, for what the goods would have been worth to him for the purpose of use as samples. *Schulze v. Great Eastern R. Co.* 56 L. J. Q. B. N. S. 442, L. R. 19 Q. B. Div. 30, 57 L. T. N. S. 438, 35 Week. Rep. 683.

And one who enters into a contract with a railroad company for the transportation of excursionists, and proceeds to advertise the excursion and sell tickets, after which the railroad company repudiates the contract, is entitled to recover the difference between the amount he was to pay the railroad company for each excursionist that would have gone with the proposed excursion party and the amount that he proposed to take them for after deducting the expenses he would have incurred in getting up the excursion, the recovery being limited to the amount of net profits that he would have realized on the number of tickets the evidence satisfies the jury with reasonable certainty he would have sold. *Houston & T. C. R. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659.

And a label placed upon goods shipped by rail, addressed to a designated stand at a show ground at a specified place, is sufficient notice to a railroad company that the goods were being sent to a show to entitle the sender to

recover damages for loss of profits and expenses incurred by the goods being delayed so as not to arrive at the designated place in time for the show. *Jameson v. Midland R. Co.* 50 L. T. N. S. 426.

So, where a dealer was in the habit of going about the country exhibiting his wares at shows to attract purchasers, and having them at a show delivered them upon the show ground to the receiving agent of a railroad company to be carried by a particular day to a show ground at another place where there was a similar show, at which he intended to exhibit, the railroad company keeping an agent upon the show ground for the purpose of drawing custom to its line, must be deemed to have known that the dealer had been exhibiting his goods and that they were being sent to the other show ground for the same purpose, and will be held liable therefor where the goods did not arrive until after the day stipulated, in consequence of which the dealer lost several days in going to meet them and waiting for them, for the damages thus caused, as well as for the loss of profits, though the amount thereof must be a matter of speculation. *Simpson v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 274, 16 Moak, Eng. Rep. 330, 45 L. J. Q. B. N. S. 182, 33 L. T. N. S. 805, 24 Week. Rep. 294.

And in *Kennedy v. American Exp. Co.* 22 Ont. App. Rep. 279, it was held that the owner of dogs delivered to an express company to be carried to a city for the purpose, known to the company, of being exhibited at a dog show, but which were not delivered until ten hours after their arrival in the city and until it was too late for them to compete is entitled to damages against the express company, including the anticipated profits.

But a contract between the advance agent of a theatrical troupe and the agent of a railroad company for carriage at a reduced troupe rate, during the making of which information was given as to the number of the troupe and as to their object in going to the place of destination, and as to the times at which they were to play there, is not such a contract for carriage as would bring into the contemplation of the parties liability on the part of the carrier for damages for loss of profits which the theatrical troupe might reasonably expect to make at the place of destination by giving the contemplated show, which were lost through the delay. *Southern R. Co. v. Myers*, 32 C. C. A. 19, 58 U. S. App. 181, 87 Fed. 149.

And a theatrical manager who purchased tickets for himself and troupe over a railroad, at the terminus of which they were to take a connecting train and proceed to a place at which a performance was to be given, who was delayed by a collision upon the first road, so as to miss connection with the train upon the other road, and failed to reach his destination, is not entitled to recover the anticipated loss of profits, etc., by reason of failure to meet the engagement to give a performance, where he first notified the railroad company of his arrangements by telegraph late at night at the point of delay, and it does not appear that the telegram was received in time to enable the railroad company to remedy the difficulty. *Georgia R. Co. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274.

As to duty of shipper to reduce damages in case of breach of contract for carriage, see *Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 48 L. R. A. 225, 45 S. W. 2, *infra*, XIII. And see, generally, *infra*, XIII. 53 L. R. A.

## VII. Contracts for transmission of telegrams.

### a. Rule as to message in cipher, or not showing meaning.

A telegraph company, in contracting to transmit a despatch, cannot be deemed to have contracted with reference to anything of which it had no notice or knowledge. When the despatch is in cipher, therefore, or where it does not indicate its meaning to a third person not familiar with the subject-matter, failure to send, or delay in transmission, does not involve the company in liability for a loss of profits which might have been made if the telegram had been duly transmitted.

Thus, failure to deliver with reasonable despatch a cipher telegram of the contents of which the telegraph company was not informed, authorizes a recovery against the company only of nominal damages, or damages measured by the sum paid by its transmission, and does not authorize a recovery for loss or profits which would have been made on a resale of property thereby ordered sent, had the telegram been promptly delivered. *Ferguson v. Anglo-American Teleg. Co.* 4 Pa. Dist. R. 88; *Sanders v. Stuart*, 17 Moak, Eng. Rep. 288, L. R. 1 C. P. Div. 326, 45 L. J. C. P. N. S. 682, 35 L. T. N. S. 370, 24 Week. Rep. 949.

And commissions for negotiating a contract lost by an agent through the delay of a telegraph company in delivering a message pertaining to the contract, which would have been concluded if the telegram had been sent, cannot be recovered where the message did not indicate upon its face any occasion for special care, and there was no notice or information of any fact to the defendant, or contained in the message itself, indicating its importance, or that special damages would result from any neglect. *McColl v. Western U. Teleg. Co.* 7 Abb. N. C. 151, 12 Jones & S. 487.

And contracts carried over from the previous year, and purchases of cotton a few days afterwards, by one whose telegram accepting an offer by his foreign correspondent to buy and sell cotton on future days, written in cipher, was not sent, are special circumstances which cannot be considered in estimating his damages, or in connection with his loss of profits, where the agent of the telegraph company had no knowledge thereof. *Western U. Teleg. Co. v. Way*, 83 Ala. 542, 4 So. 844.

So, delay upon the part of a telegraph company in the delivery of a message sent by a part owner in an oil well to an agent asking how the well was doing, received by the company without information or notice of any fact indicating that extraordinary care or speed in its despatch or delivery was important, or that extraordinary or special damages would result from any want of care or accuracy in performing the services, does not entitle the sender to recover of the company a sum for which the oil well might have been sold in excess of what it was sold for, upon failure of the owner to receive a reply, though the agent of a telegraph company to whom the despatch was originally delivered, and from which company the defendant received it, was notified that the owner of the well intended to accept an offer to purchase it, unless the answer to the despatch showed the property to be worth more. *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165.

In the above case *Leonard v. New York A. & B. Electro Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446, *infra*, VII. c, and *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751, *infra*, VII. b, 1, were distinguished upon the ground that the object of the

messages in those cases, and the purpose of the persons sending them, were clearly indicated by the messages themselves, and the damages awarded were such as necessarily and ordinarily attend a failure of the purpose, and would naturally result from the neglect of the telegraph company to perform its duty.

And failure of a telegraph company to deliver a despatch asking a party to come to a designated place in the morning, whereby the sender failed to sell a race horse in which he owned a half interest, and which could not be sold without consent of the party addressed, and which he was afterwards obliged to sell for a much smaller figure, does not warrant a recovery against the telegraph company of the difference between the price at which he might have sold and the price for which he did sell, as the message did not disclose anything which would lead the telegraph company to believe or expect that a transaction was pending by which he would be enabled to make a profitable sale of his horse, or that he was engaged in a business transaction, whereby profit or damage might result. *Melson v. Western U. Teleg. Co.* 72 Mo. App. 111.

And neglect on the part of a telegraph company to deliver a despatch directing the purchase of a designated number of revolvers on commission does not entitle the party to whom it was addressed to recover for commissions on the purchase of the revolvers, or for an amount paid as damages for nonperformance of an agreement to buy, where the telegraph company had no information whatever as to the purpose to be accomplished by the message except what could be derived from the despatch itself. *Landsberger v. Magnetic Teleg. Co.* 32 Barb. 580.

So, to hold a telegraph company delaying the transmission of a message to a broker directing the purchase of certain stocks responsible for the loss of the difference in the price of the stocks between the opening of the stock exchange on the morning when the message should have been received, and the hour when the same was received, it would be necessary that the agent or operator of the company should have known the contents or meaning of the message, either by the same having been written out in plain intelligible words, or by its having been otherwise explained to him; and the mere fact that the operator and others in the office knew that the message pertained to stock, and were told that it was a telegram which required attention and promptness in sending, is not sufficient where the despatch was in cipher. *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452.

And a telegraph company delaying the transmission of a message directing the selling of stock cannot be held liable for loss of profits resulting from the delay, merely because the operator was familiar with transactions of that character in the stock exchange, and knew that a direction to sell stock under the circumstances of the transaction implied that a short sale was intended, which would be followed by an order to buy to cover. *Cahn v. Western U. Teleg. Co.* 1 C. C. A. 107, 2 U. S. App. 24, 48 Fed. 810.

And the recovery for failure of a telegraph company to transmit a message directing the purchase of a quantity of oil, to fulfil a contract previously made by the sender, which message indicated on its face that it related to the purchase of property and nothing more, should be limited to the price paid for the message, as all other sums beyond that amount would be contingent, uncertain, and speculative in their character. *Kiley v. Western U. Teleg. Co.* 39 Hun, 158.

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In the above case *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 93 Am. Dec. 157, *infra*, VII. b, 2, was distinguished upon the ground that in that case if the telegram had been delivered in due time it would have concluded a valid contract of sale, and the advance which thereafter took place in the price of the goods was a direct loss to the party sending the message.

But the fact that a telegram delivered to a telegraph company directed to a ship broker was in cipher does not prevent the telegraph company from being liable for commissions which the ship broker would have made on a contract which he lost through delay on the part of the company in delivering the message. *Western U. Teleg. Co. v. Fatman*, 78 Ga. 286, 54 Am. Rep. 877.

#### b. Rule when message is in plain terms.

##### 1. The general right to recover.

Where a telegraphic message is in plain terms, and there is a delay in sending or a failure to send and transmit it, a recovery may be had for profits lost in consequence of such delay or failure, where the loss was the proximate consequence of such delay or failure, and the profits were not speculative, contingent, or uncertain.

Thus, delay upon the part of a telegraph company in the delivery for three days of a telegram addressed to a broker directing him to purchase certain stocks, the despatch disclosing the nature of the business to which it related, during which three days the price of the stock in question advanced, entitles the sender to recover of the telegraph company the difference between the price at the time the telegram should have arrived and the time that it did arrive. *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751.

In the above case, *Landsberger v. Magnetic Teleg. Co.* 32 Barb. 550, *supra*, VII. a, was distinguished upon the ground that in that case the direction to get a specified quantity of money of a named company did not disclose the fact that it was to be gotten to save from failure a valuable contract.

So, where, by reason of the failure on the part of a telegraph company to deliver a message directed to a ship broker, he lost a contract by which he would have made certain commissions had the message been promptly delivered, such commissions are not too remote or speculative as a measure of damages. *Western U. Teleg. Co. v. Fatman*, 78 Ga. 286, 54 Am. Rep. 877.

And negligent failure on the part of a telegraph company to transmit a message, or delay in such transmission, directing the sending of property designed to be sold, entitles the party injured to recover profits, where the market value is greater than the contract price. *Manville v. Western U. Teleg. Co.* 37 Iowa, 214, 18 Am. Rep. 8; *Evans v. Western U. Teleg. Co.* 102 Iowa, 219, 71 N. W. 219.

And negligently delaying the transmission and delivery of a telegram reading, "Send bay horse today. Mock loads tonight," whereby the sender lost the sale of the horse directed to be sent, warrants a recovery by the sender against the telegraph company for damages for the loss of such sale, where it appears that Mock was a well-known purchaser of horses in that vicinity, and was in the habit of shipping horses purchased from that place to a central market. It being presumed that the agent of the company knew such facts, and the telegram fairly conveyed the idea to the agent that the horse was needed on that day for the purpose of sale to Mock. *Thompson v. Western U. Teleg.*

Co. 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 759.

So, ordinarily, the measure of damages for failure of a telegraph company to deliver a message offering to purchase a horse, whereby the owner was prevented from accepting the offer, where it appears that the agent transmitting the message knew of the horse and that the message related to a pending trade and that an answer was expected, would be the difference between the market value of the horse and the price which the proposed purchaser would have paid for him had his offer been accepted; but where there was no market value for the horse, and the owner's agent afterwards, after diligent effort, disposed of him at a much smaller figure, which was all that could be realized for him, the owner would be entitled to recover the difference between the price he would have received had he been able to accept the offer and the price he actually received, together with the expense of keeping. *Herron v. Western U. Teleg. Co.* 90 Iowa, 129, 57 N. W. 696.

But the measure of damages for failure to deliver a telegram giving a quotation on the price of mules, directed to one who had contracted to sell mules but who lost the sale on account of the delay of the message, is not the difference between the price at which he would have bought the mules if the message had been delivered in due time and the price at which he had contracted to sell them, but that difference less the expense of transporting the mules. *Western U. Teleg. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336.

So, damages for the loss of a sale resulting from the failure of a telegraph company to deliver a telegraph message directing the purchase of a designated quantity of wool, where the operator was notified that the wool had probably been resold, should be measured by the difference between the market value of the wool at the time the message should have been delivered and at a reasonable time after the omission to transmit had been discovered. *Western U. Teleg. Co. v. Haman*, 2 Tex. Civ. App. 100, 20 S. W. 1133.

And a guano dealer, whose telegram ordering a quantity of guano was not transmitted, is entitled to recover of the telegraph company for his commissions on the same, where he had contracted for the sale thereof, and the nature of the telegram was such as to give the company notice that it related to a commercial transaction. *Walden v. Western U. Teleg. Co.* 105 Ga. 275, 31 S. E. 172.

And damages suffered by the sender of a telegram by reason of the failure of the telegraph company to deliver the despatch, thereby preventing the sender from consummating an exchange of land for a stock of goods, allowing to him the profit he would have made had such exchange been consummated, are not too remote for recovery. *Western U. Teleg. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870.

And, where a telegraph company fails to deliver a message accepting an offer to sell a lot of land, whereby the opportunity of making the purchase at a reduced figure was lost, it is no defense, in an action against the telegraph company for such failure, that another party had sent a telegram an hour previous accepting a proposition to sell the same land, where the delivery thereof was also delayed, and if the telegram of the plaintiff had been sent in season, the acceptance would have been prior to that of the other party. *Alexander v. Western U. Teleg. Co.* 67 Miss. 386, 7 So. 280.

So, the lost profit of a proposed contract of employment is the natural result of a failure on the part of a telegraph company to trans-

mit a message correctly for which it had received pay, owing to which the sender lost the employment; and damages may be recoverable therefor. *Kemp v. Western U. Teleg. Co.* 28 Neb. 661, 44 N. W. 1064; *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1.

And the measure of damages for delay on the part of a telegraph company in delivering a message sent to a physician, calling for a professional visit in another city, thus preventing the gain which might naturally be expected to follow, is the difference between what he would have made had he gone and what he made at home during the time. *Western U. Teleg. Co. v. Longwill*, 5 N. M. 208, 21 Pac. 330.

And the loss of the difference between a year's salary of a traveling salesman which he would have received from the person he contracted with, and the sum he made during the year, is the proximate and natural effect of a failure of a telegraph company to deliver a message by which the contract of employment for the year would have been consummated, and it is liable therefor where its agent had full notice of the purport of the message. *Western U. Teleg. Co. v. Valentine*, 18 Ill. App. 57.

And an instruction, in an action by a person to whom a telegram is sent offering him employment at \$2 per day against a telegraph company for negligent failure to deliver the message, that the plaintiff's measure of damages is \$2 per day for the time which elapsed from the sending of the message to the day of the commencement of the action, less any sum that he might have made from other employment which might have been secured through reasonable efforts, if erroneous, is more favorable to the defendant than it is entitled to, and will not authorize a reversal of the judgment, where the damages are not excessive. *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

But failure on the part of a telegraph company to deliver a message in season, so that the person to whom it was addressed lost the benefit of a contract of employment, authorizes a recovery of the amount paid for sending the message only, and not for the value of the employment, where, under the terms of the contract therefor, he was liable to be dismissed from the employment as soon as he had entered upon it, so that it cannot be known what damages he had suffered. *Merrill v. Western U. Teleg. Co.* 78 Me. 97, 2 Atl. 847.

So, the profits which would have resulted from the performance of a contract for threshing are not too uncertain and contingent for recovery in an action against a telegraph company for failure to send a telegram accepting a proposition to do the work, by reason of which many of the persons for whom the threshing was to be done made other engagements, where the plaintiff threshed about one third of the grain originally contracted for, and the expense and profit upon that transaction appear, as it is reasonably certain he would have made a proportionate profit if he had secured the threshing of the entire amount. *Western U. Teleg. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554.

But the negligence of a telegraph company in the transmission of a message, whereby the person to whom it was directed lost the threshing of 20,000 bushels of grain for which he had a contract at the time, only entitles the injured party to recover the amount he would have earned less the expense he would have incurred in earning it. He cannot recover the contract price. *Western U. Teleg. Co. v. Robinson* (Tex. Civ. App.) 29 S. W. 71.

And the estimation of the profits as damages

for breach by a telegraph company of a contract between a person engaged in the general business of collecting telegraphic news and such telegraph company for the transmission of the news, running through a long period of years, upon the average yearly profits made under the contract for the period preceding its breach, should be made by deducting the value of the time which before had been given to the execution of the contract and in the future would not be given therefor. *Goodsell v. Western U. Teleg. Co.* 21 Jones & S. 46.

And in estimating the damages against a telegraph company for failure to send a telegram which was a reply to an offer by a foreign correspondent of the sender to buy and sell cotton on different days in the future, and which was an acceptance of the offer, the contract as it would have been made had the message of acceptance been delivered must be regarded as an entirety, and the net profits which would have been realized from the contract as an entirety constitute the actual damage suffered by the sender. And, if profits would have accrued to him from one part of the contract, and losses would have resulted from the other, he can only recover the difference in his favor. *Western U. Teleg. Co. v. Way*, 83 Ala. 542, 4 So. 844.

**2. Remoteness, contingency, and uncertainty, and their effect.**

Though the meaning of a telegram is definite and apparent no recovery can be had for a loss of profits caused by its breach, as a general rule, where the profits were remote, contingent, or uncertain, the rules as to remoteness, contingency, and uncertainty with reference to contracts in general being applicable.

Thus, failure to deliver a telegram in time does not entitle the party receiving it to recover of the telegraph company a sum of money which he would or might probably or possibly have made as profits if he had received the telegram at the proper time. *Clay v. Western U. Teleg. Co.* 81 Ga. 285, 6 S. E. 813.

And damages on account of the loss of anticipated gains or profits based upon the probability of a horse being able to win prize purses at a trotting race are too remote, contingent, and speculative to be recovered in an action by the horse owner against a telegraph company for negligence in the inaccurate transmission of a message. *Western U. Teleg. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719.

And the measure of damages in an action against a telegraph company for failure to transmit and deliver a telegram accepting an option for the purchase of a lot of stock, or an offer for the sale of merchandise at a designated price, until after the time for acceptance had expired, is the difference between the contract price and that which the sender would have been compelled to pay at the same place, in order by due diligence after delivery of the telegram or notice of failure to deliver it to purchase the same number and grade of stock or the same merchandise; and it is of no consequence that some days subsequent to the delivery of the telegram there was a rise in the market value of stock or goods, and that if the sender had purchased at the contract price he might have obtained profits from such rise in value. *Brewster v. Western U. Teleg. Co.* 65 Ark. 587, 47 S. W. 560; *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 93 Am. Dec. 157.

So, neglect upon the part of a telegraph company to transmit and deliver a message calling for a man to come at once and repair a boiler, whereby the sender, who was a distiller, was compelled to suspend operations for twenty-four hours longer than he would have 53 L. R. A.

done had the telegram been transmitted and delivered, and compelled to pay wages to idle men, and to purchase feed for a large number of cattle which he was at the time slopping at his distillery, entitles the distiller to recover for the additional expense incurred in feeding the cattle and the amount paid the hands; but the profits which he might have made on liquors which he was prevented from making for the twenty-four hours are too remote. *Rich Grain Distilling Co. v. Western U. Teleg. Co.* 13 Ky. L. Rep. 256.

Nor does failure to deliver a telegram warrant a recovery by the person to whom it was sent for the profits of a contract for labor and services in the construction of a railroad, which he might have made and would have had an opportunity of making had the telegram been received. *Johnson v. Western U. Teleg. Co.* (Miss.) 29 So. 787.

And the measure of damages for failure to deliver, as written, a telegraphic message notifying a witness of the day a case was set for trial, and delivering one in place thereof naming a day so much earlier that upon arriving at the place of trial he had to return home to await the arrival of the true day, is his expense in going to and returning from the place of trial and the value of the time lost. And losses resulting from the stoppage of his business, such as salaries of men, cost of keeping teams, and the value of their services and anticipated profits, cannot be recovered unless the telegraph company was notified that such losses would follow from failure to correctly deliver the message. *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 649.

And where a telegram notifying a vessel owner of a cargo of 3,000 bushels of wheat which he could obtain was incorrectly transmitted so as to read 8,000 bushels, and on account thereof the owner abandoned a contract for another cargo and sent his vessel to the place where the cargo in question was to be taken, the damages which would naturally flow from the default of the telegraph company, and which could have been in the contemplation of the parties at the time, consist of the reasonable compensation for sending his vessel to such place and return without freight; and he is not entitled to claim for the profit he might have made from carrying the 8,000 bushels. *Lane v. Montreal Teleg. Co.* 7 U. C. C. P. 23.

So, failure on the part of a telegraph company to send a message, by which the sender directed a broker to purchase a designated quantity of specified stocks, or grain, or other property, which stock advanced in price immediately after the time the message should have been received, and afterwards fluctuated, so that if the stock had been purchased when the message should have been received it could have been sold at a profit the next day, does not authorize a recovery against the telegraph company for such loss of profits, in the absence of evidence that if it had been bought at that time it would have been sold at a profit on the next day, or at any other time before the suit was brought. *Western U. Teleg. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917; *Hibbard v. Western U. Teleg. Co.* 33 Wis. 558.

And the same rule applies to delay in the delivery of a telegram directing the purchase of a quantity of oil. *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577.

And delay in transmitting a telegram directing a broker to sell a quantity of stock sent in anticipation of a heavy decline in the value of the stock, with the desire to sell before the decline began, with a view of purchasing



later the same number of shares when the price had reached a lower figure, thereby realizing the difference in the market value at the time of the repurchase, so that such difference is not realized, does not warrant a recovery by the sender of the amount which would have been realized by such transaction had the telegram been transmitted in time, as such damages are too remote and uncertain. *Cahn v. Western U. Tele. Co.* 1 C. C. A. 107, 2 U. S. App. 24. 48 Fed. 810.

Nor does delay on the part of a telegraph company of one day in sending a message received from a broker, consisting of a request for a quotation of prices, coupled with a statement of those quoted by a rival concern and a suggestion that if the terms were satisfactory he might effect a sale, and would if necessary to bring about the sale forfeit all claim to the brokerage fees, entitle him to damages for the loss of commissions on the claim that by reason of the delay he failed to make a sale of the merchandise; and an instruction that the measure of damages is the loss which he suffered in commissions is reversible error. *Postal Tele. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252.

So, a telegraph company failing to deliver a message ordering goods can be held liable only for the difference, if any, between the market value of the goods and the price at which they would have been obtained had the telegram been properly transmitted, and it is not liable for profits that would have been made by the sender upon the basis of a sale of goods which had been made at the time the telegram had been sent, in the absence of evidence that the telegraph company had any notice that the goods were ordered to fill a contract already entered into for their resale. *Western U. Tele. Co. v. J. A. Kemp Grocer Co.* (Tex. Civ. App.) 28 S. W. 905; *Western U. Tele. Co. v. Thomas*, 7 Tex. Civ. App. 105, 26 S. W. 117; *Western U. Tele. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136.

And a lumber company needing a certain amount of a particular class of iron to repair their steam sawmill, whose agent telegraphed them that it could not be found and asking if another kind would do, which telegram was not delivered, by reason of which the operations of their mill were delayed for twelve days, can only recover the actual damages sustained. It is not entitled to recover prospective and speculative profits likely to result from the sale of the boards which were to be manufactured from a large quantity of unsawed logs then on hand. *Reliance Lumber Co. v. Western U. Tele. Co.* 58 Tex. 394, 44 Am. Rep. 620.

See also *Western U. Tele. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870; *Western U. Tele. Co. v. Valentine*, 18 Ill. App. 57; *Western U. Tele. Co. v. Bowen*, 84 Tex. 476, 19 S. W. 554, *supra*, VII. b, 1.

### c. Rule when altered message is sent.

Where the negligence of a telegraph company consists, not in delaying the transmission of a message, but in transmitting a message erroneously so as to mislead the party to whom it is addressed, on the faith of which he acts in the purchase or sale of property, the actual loss based upon the changes in market value is clearly within the rule for estimating damages. *Western U. Tele. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577, *dictum*.

And a telegraph operator who presumes to translate the handwriting in a message sent by him, and to add letters which were not in it, makes the company responsible to the sender or receiver for the damages resulting from his 53 L. R. A.

wrongdoing; and in such case the company is not excused from liability to third persons by the fact that the sender did not pay for its being repeated back in accordance with a rule of the company, whereby they limited their responsibility to such messages as were repeated only. *New York & W. Printing Tele. Co. v. Dryburg*. 35 Pa. 298, 78 Am. Dec. 338.

Thus, the transmission by a telegraph company of a despatch directing the sending of two hand bouquets so as to read 200 bouquets renders the telegraph company liable for the damages suffered by the receiver in procuring a large quantity of expensive flowers for the purpose of making the number of bouquets which appeared to have been ordered. *Ibid.* This case, though not one of loss of profits, is here included, because it is a leading case and one frequently cited in profit cases.

And where a telegram to a broker, directing the purchase of 1,000 shares of a certain stock, was negligently transmitted by the telegraph company so as to read 100 shares, and the broker purchased the 100 shares, after which the market rose rapidly, the loss resulting from the change in market value is the natural result of the telegraph company's mistake, and must be deemed to have been within the contemplation of the parties, and is recoverable in an action against it for negligence; but where, after the mistake was discovered, the market remained stationary for a time and then again advanced, the advance occurring after the mistake could have been remedied cannot be charged to the company. *Marr v. Western U. Tele. Co.* 85 Tenn. 529, 3 S. W. 496.

So, the difference between the market value of the salt in question at Oswego and what it sold for in Chicago, together with the expense of transportation from Oswego to Chicago, is not an improper measure of damages in an action against a telegraph company for a mistake in transmitting a message directing the sending of 5,000 sacks of salt so that it read 5,000 casks of salt, in consequence of which 5,000 sacks were intended, as the telegraph company must be presumed to have known that the manufacturer receiving the order would fill it as delivered, and that the salt would be shipped to Chicago as an article of merchandise, so that, the price in Chicago being less than in Oswego, he would lose the cost of transportation and the difference between the market price at the two places. *Leonard v. New York, A. & B. Electro Magnetic Tele. Co.* 41 N. Y. 544, 1 Am. Rep. 446.

But the damages recoverable by the receiver of a telegram, for a mistake in understanding the price in an offer to sell goods therein contained, are limited to the difference between the price named and the price intended, excluding any loss of profits on a contract of resale, which he had made on the faith of the telegram, where he himself failed to carry it out by refusing to receive the goods, without any excuse except the disappointment caused by the mistake in price. *Fererro v. Western U. Tele. Co.* 9 App. D. C. 455, 35 L. R. A. 548.

And one who sends a telegraphic message quoting the price of potatoes at \$1.70, which message as sent read \$1.07, upon which the receiver purchased of the sender a quantity of potatoes which the sender refused to deliver at the lower price, is entitled to recover, where the potatoes were totally lost, the difference between the price for which he offered to sell the potatoes and the price for which, by the exercise of ordinary care, they could have been sold in the market when the mistake was discovered; but he is not entitled to recover damages erroneously recovered against him by the

buyer for refusal to deliver at the smaller price. *Postal Telegr. Cable Co. v. Schaefer* (Ky.) 62 S. W. 1119.

See also *Western U. Telegr. Co. v. Short*, 58 Ark. 434, 9 L. R. A. 744, 14 S. W. 649; *Lane v. Montreal Telegr. Co.* 7 U. C. C. P. 23,—*supra*, VII. b.

VIII. *Contracts with relation to railroad and station construction.*

Contracts of this class are within the general rules. If made with particular reference to the advantages to be derived therefrom the loss of such advantages is an element of damages, in an action for a breach. As a general rule, however, the profits expected to be made from such contracts are remote and collateral, and not the direct fruits thereof, as well as contingent and uncertain, and therefore not recoverable.

Thus, the measure of damages for breach of a contract to build a motor railroad to connect with the business portion of a city a tract of land which one of the parties had just purchased with the view of fitting and selling it for residences is the difference between the value of the land on the day the road should have been completed, not less than the agreed purchase price, and what its value would have been on that day with the road completed and in operation. *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647.

And the loss of profits or gains of the contract for the purchase of the land which the purchaser is obliged to surrender because of the failure to construct the railroad, the contractor knowing that his object was to enhance the value of the land, may be included in the damages for breach of the contract to build the road. *Ibid.*

And where the general agent of a land company enters into an agreement with a local agent by which the local agent is to remove his store building and stock to another town and become the local agent for the company at that town for the sale and donation of lands, and to induce settlement upon the new town site by the residents of the old town from which he was to remove his store, the company agreeing that a railroad shall be built, equipped, and put in operation to the new town by a designated time, pursuant to which the local agent removes his store building and stock and business to the new town, after which the land company breaks the agreement by failing to secure the construction of the railroad, thus destroying the business of the local agent in the old town, and rendering it impossible for him to carry on business in the new town or return to the old one, as he has placed himself in hostile attitude to it, it is proper for the jury, in an action for the breach, to take into consideration the loss of profits incurred by him in the breaking up of his established business in the town from which he removed. *Arkansas Valley Town & Land Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706.

And the fact that a party contracting to build a road failed to do so, and that it would therefore be difficult to prove with exactness what would have been the value of property which the other party purchased in contemplation of the building of the road with the contract fulfilled, does not prevent him from recovering for the breach of such contract such damages as he may be able to prove. He is only required to give such evidence as the nature of the case will permit. *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647.

So, where a railroad company agreed for a valuable consideration to erect and fit up a station on certain lands, containing no further

description of the station or any stipulations as to its use, and afterwards refused to erect it and substituted a station some distance away, the jury, in an action by the land owner for the breach, may take into account the probable benefit which his estate might have derived from the existence of a stopping place on the line of railroad to which traffic might have been attracted, or which might have been convenient to the persons residing upon the estate, it being assumed that if the company had performed its agreement it would have made the station in a reasonable manner, with regard to the mode of construction and the extent of accommodation. *Wilson v. Northampton & B. Junction R. Co.* L. R. 9 Ch. 279.

And the plaintiff in an action for breach of a covenant by a railroad company for the erection and proper maintenance of sufficient fences on each side of the railroad through his lands and for a crossing and cattle guards, the owner using his land for purposes of tillage for his support and profit, may show how much the land would yield each season, and fix the usual market value of the product at the harvesting season, and out of this should be deducted the expense of tillage, harvesting, and marketing, and the remainder will be the legitimate fruits of the land, labor, and expense which should be secured to him as the natural damages for the breach of the covenant. *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522.

And the opinion of witnesses as to what the value of land would have been if a railroad running to it and connecting it with a city had been constructed in accordance with a contract is admissible in evidence on the question of damages for breach of the contract. *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647.

But the defendant in an action upon a substantive agreement by which he subscribed a certain sum on consideration that a railroad company would build a road to a certain place near which he owned property, cannot recoup for anticipated profits which he claims he could have realized from his real property if the road had been constructed according to the terms of the agreement, such profits being too remote and speculative. *Coos Bay R. Co. v. Nosler*, 30 Or. 547, 48 Pac. 361.

And while a landowner, who grants a right of way to a railroad company across his lands in consideration of the company's agreement to establish a station at a designated place on or near his lands, is entitled to recover for failure to locate the station as agreed, for any actual damages he proves he suffered, with the limitation that such damages must be the natural and proximate consequences of the breach, susceptible of reasonably certain ascertainment, and not merely possible or speculative losses, he cannot recover for the loss of a possible increased patronage to his store and mill to result from the location of the quarters for section hands which would accompany the station. *Evans v. Cincinnati, S. & M. R. Co.* 78 Ala. 341.

And where land is conveyed to a railroad company for a right of way in whole or in part upon consideration that the depot buildings would be erected on the owner's land, and that the right of way should be fenced, which is not done, the owner is entitled to recover the value of the land taken, and for the inconvenience and loss of use caused by the failure to fence, and possibly for any loss in the way of loss of increased convenience in shipping his produce; but he cannot recover for the loss of an anticipated increase in the value of his farm from the location of the depot or the profits of his business. *Rockford, R. I. & St.*

L. R. Co. v. Beckemeler, 72 Ill. 267; Watterson v. Allegheny Valley R. Co. 74 Pa. 208.

Nor can a city recover of a railroad company, for breach of a contract to erect shops and engine houses within its limits, the profits it would have made out of such shops and engine houses if they had been built according to contract. And an inquiry in an action for breach of such a contract, as to whether or not the city had suffered a loss of population since the building of the shops elsewhere, would be tantamount to an inquiry into profits, and would be inadmissible as pertaining to damages too remote and uncertain. Missouri, K. & T. R. Co. v. Fort Scott, 15 Kan. 435.

So, the measure of damages for breach by a railroad company of a contract, made in consideration of a right of way through lands, to construct a bridge over its road on such lands, or to erect a grade on each side so as to make a crossing, by failure to construct the road, is not the difference between the value of the lots without the road and the imaginary or enhanced value had the railroad been constructed; the damages in such case should be limited to the cost of the bridge, together with reasonable compensation for the time and labor of the owner in procuring and managing its construction, and whatever damages might have been sustained during the time required to build it. St. Louis, J. & C. R. Co. v. Lurton, 72 Ill. 118.

#### IX. Agreements not to compete.

While agreements not to compete are not always accompanied by a sale of a business or a right or privilege, they are usually so accompanied, and all agreements of that kind are governed by the same principle. For convenience, therefore, and to avoid separating cases depending upon the same rules, all the cases on this subject, so far as found, were collected and set forth in another note in this series on *Loss of profits of sale or purchase as damages*, 52 L. R. A. 209, under the subhead of "sales of business, goodwill, or exclusive right," on the theory that an agreement not to compete in effect constitutes a sale of an exclusive right. A few late cases, however, not in hand at the time of the preparation of the other note, are set forth below.

Thus, breach of a contract not to engage in a designated business in a specified place, for a stated period, by engaging in such business in bitter competition with the other party, cutting prices and extensively advertising the opposition, warrants a recovery by the other party for his loss of profits during the term of the contract, caused by the illegal competition. But the loss of profits after the termination of the contract, caused by the previous competition, cannot be allowed, as it cannot be said that when the contract was made the parties had in mind that the party injured would continue in business indefinitely. Salinger v. Salinger, 69 N. H. 589, 45 Atl. 558.

And the profits or losses of the defendant after resuming business, in an action for breach of a contract not to engage in a particular business directly or indirectly in competition with the plaintiff, do not constitute an element of the plaintiff's loss or measure the extent of his damages, and therefore the quantity of the various commodities purchased by the defendant and the price paid therefor, which might have formed a basis for estimating such profits and losses, are inadmissible. Dose v. Toozee, 37 Or. 13, 60 Pac. 880.

So, breach of a contract to surrender a storehouse and premises leased to the lessee and not do business therein during a designated year, 53 L. R. A.

by resuming business in such building in competition with the lessee, warrants a recovery for the amount of loss sustained by the lessee, and not for the profits made by the lessor in the business which he resumed. Noble v. Wilder (Tex. Civ. App.) 61 S. W. 325.

See also Vidalat v. New Orleans, 43 La. Ann. 1121, 10 So. 175; Montgomery County Union Agri. Soc. v. Harwood, 126 Ind. 440, 10 L. R. A. 532, 26 N. E. 182,—*infra*, X. a.

#### X. Leases and contracts and covenants with reference to.

##### a. General rules.

Rental value, and not profits, would seem to be the usual measure of damages for breach of covenants to lease, or of contracts and covenants with relation thereto. Profits may be recovered, however, where they were an element of the contract. But they must not have been speculative or conjectural or incapable of estimation.

Thus, profits which are speculative or conjectural are not generally regarded as elements in fixing damages, in actions for breach of contract between lessor and lessee, not because there is anything in their nature *per se* which demands their rejection, but because they cannot be estimated with reasonable certainty. Hodges v. Fries, 34 Fla. 63, 15 So. 682.

In order that profits may constitute the basis of a legitimate inference as to the value of the use of lands leased, they must have been an element of the contract, and there must be established data from which the amount can be ascertained with reasonable certainty. Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601; Hodges v. Fries, 34 Fla. 63, 15 So. 682.

The true inquiry in an action for damages for a breach of contract for a lease of lands is as to the value of the lease at the time the breach occurred, and not how much any person might imagine he could have made by its enjoyment. Cilley v. Hawkins, 48 Ill. 308.

Though the profits of the business of a tenant, the value of which may be ascertained, interrupted by the act of the landlord in wrongfully interfering with the enjoyment of the tenant of the leased premises, constitute a proper counterclaim in an action by the landlord against the tenant for rent. Goebel v. Hough, 26 Minn. 252, 2 N. W. 847.

But a claim for breach of a contract in a lease made by a city to a market that private markets should not be permitted within a radius of six squares of the public market is one sounding in damages *ex contractu*, and the lessee is only entitled to be reimbursed the loss he has sustained under his contract, and such profits of which he has been deprived as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. Vidalat v. New Orleans, 43 La. Ann. 1121, 10 So. 175.

And the measure of damages for the breach by the owners of a fair ground of a contract made when renting ground upon which a candy stand was to be located, not to rent ground for competing stands within designated limits, is the difference in the rental value of the ground when unoccupied by competing stands and that when so occupied, and the profits which could have been realized upon goods that were not sold in consequence, as alleged, of the competition of rival sellers are too speculative and remote. Montgomery County Union Agri. Soc. v. Harwood, 126 Ind. 440, 10 L. R. A. 532, 26 N. E. 182.

So, the loss of a contract by which the lessor

of a hotel sublets it does not enter into the measure of damages resulting from a breach of the contract between the lessee and the owner by which the subletting was defeated, as it is a collateral undertaking, which the parties cannot be presumed to have contemplated when the contract was made. *Stewart v. Lanier House Co.* 75 Ga. 582.

**b. Breach of covenant to lease or renew.**

Breach of an agreement to grant a good and valid lease by failure of title, the party violating the contract having full knowledge of his want of title, warrants a recovery by the party injured, not only of his expenses, but also for damages resulting from the loss of his bargain. *Robinson v. Harman*, 1 Exch. 850, 18 L. J. Exch. N. S. 202.

And breach by the owner of premises of an agreement to lease them to one who designed carrying on his business thereon, the nature of the business intended to be carried on having been communicated to the owner, so that the party injured was unable to commence his trade for some time, warrants, not only a judgment for specific performance of the agreement, but damages for the loss of profits from his trade during such time, as such damages would naturally arise from the delay, and may be reasonably supposed to have been in the contemplation of the parties. *Jaques v. Millar*, L. R. 6 Ch. Div. 153.

And the measure of damages for breach of a contract to lease a house and farm by afterwards refusing to permit an entry upon the premises is not the difference between the price of the rent to be paid and the market value of the use of the premises at the time. In such cases the rule as to the measure of damages in case of a breach of contract for the sale of goods when the purchaser can always or generally purchase others without inconvenience is not applicable, but the party injured is entitled to recover for all such damages as legitimately and directly arise from the breach. *Williams v. Oliphant*, 3 Ind. 271.

So, the damages suffered by one who agrees with the Secretary of the Treasury to erect a building and lease it to the government at a specified annual rent, which agreement the government refuses to carry out, and notifies the contractor to that effect before the completion of the building, are measured by the rule that the gain or profit of which the contractor was deprived by refusal to allow him to proceed with and perform his contract is a proper subject of damages. *Adams v. United States*, 1 Ct. Cl. 106.

But one who contracts to lease a store, which contract is violated by the refusal of the other party to make the lease, cannot establish his damages by showing the profits he would have made if the lease had been executed, by proof of what profits other retailers of goods had previously made at the same place,—especially where there is nothing to show that he was prevented from selling his goods and carrying on his business elsewhere, or that his profits had been curtailed by the alleged breach. *Dennery v. Risa*, 6 La. Ann. 365.

Nor are the opinions of witnesses as to profits lost through the violation of an agreement to rent a store competent evidence, even in cases where the damages claimed are a proper subject of recovery. *Giles v. O'Toole*, 4 Barb. 261.

And the damage in an action for breach of contract to make a lease for a term of years upon which the lessee intended to plant a peach orchard, consisting in the failure of the lessor to make the lease and in causing the lessee to be evicted from the premises within two years from the time he took possession, is 53 L. R. A.

not the probable future profits which might be realized therefrom judging from the number of crops and the prices of peaches for a number of years. And evidence as to the probable future profits is incompetent to be given as furnishing a basis for the assessment of damages. *Rhodes v. Baird*, 16 Ohio St. 573.

And breach by a city of a contract to build and lease stalls in a market house to a designated party at a specified price furnishes no ground for recovery against the city, where the only damages proved consist of the loss of conjectural profits which the proposed lessee might have made, as such damages are too remote and uncertain to be recoverable. *Red v. Augusta*, 25 Ga. 386.

And breach of a contract to lease a store and sell a stock of goods does not entitle the party injured to recover damages for profits which he would have made if the other party had carried out his agreement, selling him the goods and giving him possession of the premises. *Mirandona v. Burg*, 51 La. Ann. 1190, 25 So. 982.

So, breach of contract for the renting of a storeroom entitles the tenant to recover the difference in value between the price agreed upon and the rental value of the room at the time of the breach of the contract, but the profits that she had reason to expect from a business prevented or postponed without cause by the refusal to let her have the storeroom are too remote and conjectural to form an element of recoverable damages, not being susceptible of any satisfactory estimation by established data. *Hodges v. Fries*, 34 Fla. 63, 15 So. 682.

And the same rule applies to breach of a covenant to lease a mill, and evidence in an action for the breach as to what the lessee could have cleared from the use of the mill, is speculative and conjectural, and furnishes no legitimate basis on which to estimate damages. *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127.

So, breach of contract of letting of a business building together with all steam power needed in the business to be carried on in it, by failure to furnish the necessary amount of steam power, by reason of which the business stopped, does not authorize a recovery of the profits which might have resulted from a continuation of the business, as such profits would be too remote. *Manhattan Stamping Works v. Koehler*, 45 Hun. 150.

And the rule of damages for breach by a mill owner of a covenant, in a lease thereof, to put in a water wheel of a specified power, broken by improperly setting the wheel so that it was of less power, is the difference between the rental value of the premises with the specified wheel, and the rental value with the wheel put in, and not prospective profits of the mill, where it does not appear that the lessee had a like business already built up, which might justly serve as a basis for such allowance. *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270, 56 N. W. 734.

And as an existing license is limited to the time for which it was granted, and the obtaining of a new license depends upon the will of other persons than the licensee, profits which might have been realized upon a liquor business in case there had been no expulsion and the license had been renewed or continued are too remote and speculative to be recovered in an action for the expulsion. *Porter v. Johnson*, 96 Ga. 145, 23 S. E. 123.

So, damages for breach of covenant on the part of a lessor in refusing to renew a lease are confined to the difference between what the tenant was to have paid for the rent for the term and what he was compelled to pay for the premises under a new lease taken by him. *Tracy v.*

Albany Exchange Co. 7 N. Y. 475, 57 Am. Dec. 538.

But breach of contract to renew a lease of iron-ore lands and other property, for the renewal of which the lessee had an option, warrants the admission, in an action for the breach, of evidence as to the profits which the lessee would have made out of his lease if he had been permitted to hold and mine the property for the second term. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

And where a lessor agrees with his lessee to give him a renewal lease, and afterwards dies before the expiration of the first term, when it appears that he was tenant for life only and not owner of the fee, and the tenant thereupon obtains from the reversioners a fresh lease at a considerable increase of rent, the executors of the deceased tenant for life are liable, upon the covenant for quiet enjoyment contained in the void lease, for the premium which he had paid his lessor and the cost of preparing the void lease, and also for the difference between the value of the term professed to be granted to him by the void lease and that of the term which he obtained from the reversioners. *Lock v. Furze*, L. R. 1 C. P. 441, 35 L. J. C. P. N. S. 47, 15 L. T. N. S. 161, 14 Week. Rep. 403.

#### c. Breach of covenant to give possession.

A lessee of land, the lessor of which refuses to deliver possession without legal cause, is entitled to recover the difference between the rent to be paid and the actual value of the premises at the time of the breach and all expenses necessarily incurred in consequence of the refusal to give possession, but is not entitled to recover profits that might have been made by conducting a business on the demised premises, such damages being too remote, speculative, and incapable of ascertainment. *Green v. Williams*, 45 Ill. 206; *Smith v. Phillips*, 16 Ky. L. Rep. 615, 29 S. W. 358; *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. 398; *Giles v. O'Toole*, 4 Barb. 261; *Trull v. Granger*, 8 N. Y. 115; *Townsend v. Nickerson Wharf Co.* 117 Mass. 501; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827; *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. 991; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58.

Nor is he entitled to recover what the use and occupation of the premises might have enabled him to make at his work. *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. 991.

In the absence of knowledge on the part of the lessor that the exclusion of the lessee from a part of the demised premises would prevent the successful prosecution of his business and render his outlay useless. *Townsend v. Nickerson Wharf Co.* 117 Mass. 501.

In *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58, *supra*, *Smith v. Eubanks*, 72 Ga. 280, *infra*, X. f, and *Stewart v. Lanier House Co.* 75 Ga. 382, *infra*, X. e, were distinguished upon the ground that each concerned a living business actually brought forth and conducted on the demised premises, and that the specific business was in the contemplation of both parties when the contract was made.

And a lessee in an action for damages against his lessor for refusal to give him possession under his lease is not authorized to give evidence of an advantageous contract for the assignment of his lease, or give testimony for the purpose of showing the value of the lease. *Lawrence v. Wardwell*, 6 Barb. 423.

So, a lessee whose business is unavoidably suspended by refusal of his lessor to deliver possession of the demised premises is entitled to recover, not speculative profits, but interest during such suspension on the amount of capital invested in the business to be carried on thereon 53 L. R. A.

for the time it is idle. *Green v. Williams*, 45 Ill. 206.

And breach of contract to lease and give possession of a store by leasing it to another person does not warrant a recovery by the lessee of the profits he would have made in the business which he intended to carry on in the building during the term, where he was not at the time in the business and had not contracted for the goods which he calculated to sell on the premises. *Marrin v. Graver*, 8 Ont. Rep. 39.

And where a tenant of lands for life makes a lease thereof, to commence in the future for a designated number of years, and dies before he is bound to execute the lease, as the lessee's estate is terminated by the death and the intestate was guilty of no default or bad faith, the lessee can recover only his actual damages, and not the value of his bargain. *M'Clowry v. Croghan*, 31 Pa. 22.

So, failure of a city to give possession under a lease granting a right of wharfage incident to the use of a bulkhead by vessel or boats engaged in commerce, with the right to collect wharfage, confined to the wharfage which may arise, accrue, or become due for the use and occupation thereof at the rates prescribed, entitles the injured party to recover the difference between the rent reserved and the value of the use of the wharf at the rate of wharfage fixed by law, but does not entitle him to recover for the loss of the statutory wharfage which might have been earned by him. *Eastman v. New York*, 152 N. Y. 468, 46 N. E. 841.

And damages for violation of the provisions of a lease giving the lessee the right, at his option, to use from 1 to 1,000 acres of the lessor's land, consisting of preventing the lessor from using more than 40 when he desired to use 200 acres, computed by estimating that, as the product of 20 acres of land was worth \$9,000, the product of 200 acres would have been worth \$90,000, are too remote and speculative, and involve too many contingencies, to warrant a recovery therefor. *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313.

And a lessee of a dwelling house is not entitled to recover of the lessor for failure and refusal to give him possession, whereby, not being able to secure another house, he was compelled to cancel a contract of hiring and lost the profits thereof, for the loss of such profits, in the absence of any allegation in his complaint of knowledge of the contract of hiring on the part of the lessor at the time the lease was made, the measure of damages being the difference between the actual rental value of the premises and the rent reserved in the lease. And in such case evidence of the prospective loss of profits under the contract of hiring is inadmissible. *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. 991.

And while the noncompletion of a building erected by a lessor to be used by his lessee for the purpose of storing a crop of broom corn, by reason of which the lessee was delayed from cutting and housing the corn in proper season, and a large portion of it suffered injury from the effects of frosts, rain, and other actions of the weather, is the proximate cause of the damage to the broom corn, in estimating the damage all purely speculative damages, such as probable profits, must be excluded. *Haven v. Wakefield*, 39 Ill. 509.

But where a lessee shows himself entitled to recover for damages to his business by a failure to give possession under the lease, the character, extent, and value of his established business when the lease was executed and before will furnish a guide to the jury in assessing the prospective and probable value thereof had he been permitted to transfer it to the leased premises.

and is admissible in evidence in an action for the breach. *Poposkey v. Munkwitz*, 68 Wis. 330, 60 Am. Rep. 558, 32 N. W. 35.

And refusal of the owner to yield up possession under an agreement to lease a tavern, stand, and appurtenances entitles the lessee to recover the actual value of the bargain which he had made, and not merely the difference of rent which he had agreed to pay and the actual value of the rent. *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283.

And in *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, it was held that breach of a contract for a lease for one year, by the refusal to put the lessee in possession, entitles him to recover all he could have made on the premises during that year, which would be the value of the crop which might have been raised by an average farmer less the cost of raising, cutting, harvesting, etc.; and the jury may consider the fact that the tenant had the stock and utensils to work and cultivate the land without hiring it done, but they cannot consider the damages resulting from the loss of his labor or the use of his teams.

But one who recovers for loss of profits of his business through violation of a covenant to give possession under a lease cannot also recover the value of his lease, because such value is necessarily a factor in estimating the damages to his business. *Poposkey v. Munkwitz*, 68 Wis. 330, 60 Am. Rep. 558, 32 N. W. 35.

And a lessee of two buildings, leasing them for the purpose of carrying on a dyeing and bleaching business, the lessor agreeing to furnish him with water and machinery in the dye house, and to give him all the dyeing and bleaching which he might require, and use his influence to obtain similar work from others, who is not permitted by the lessor to use the premises or any of the machinery in them, or to do any dyeing or bleaching for the lessor, is entitled to recover of the lessor what he would have made directly out of the contract if it had been fulfilled, excluding remote and speculative damages. *Garsed v. Turner*, 71 Pa. 56.

And a lessee of a hall for the purpose of giving an athletic entertainment, who is refused possession thereof by the owner upon the ground that his theatrical license has expired, is entitled to recover the profit he would have made if the entertainment had been allowed to go on; but in ascertaining this profit it must appear to a reasonable certainty from the evidence; and the jury may consider the number of tickets distributed and their price, and the extent of the crowd seeking admission tickets upon the night of the entertainment, together with the expenses which would have been incurred in giving it. *Behrens v. Miller*, 2 N. Y. City Ct. Rep. 427.

But a lessee of an opera house with its scenery and appurtenances under a lease stipulating that if the lessee should, during the term, pay all back rents which had accrued under a former lease of the same premises they should be restored to him under the former lease, with the rights and immunities thereof, who is never put into possession under the new lease, cannot recover of the lessor, in an action on the new lease for withholding possession, for the value of the old lease as well as the new, on the theory that by withholding possession the lessor had deprived him of the means of earning money to pay up the back rents, and thus prevented the restoration of the old lease, as that would be too speculative and remote. *Wilson v. Well*, 67 Mo. 309.

So, one who leased a store, knowing that there was a valid paramount lease upon the premises executed by himself to another, having seventeen or eighteen months to run after the 53 L. R. A.

time of the giving of the new lease, and was consequently unable to give possession, is liable to the lessee for the loss he has sustained by reason of the breach, which would be the difference between the rent reserved in the lease and the actual value of the store, if the lessor did not know when he executed the lease the purpose for which the store was hired. But if he knew that the store was hired for the purpose of continuing the lessee's former business, and the lessee was unable to procure another suitable store for his business, he would also be liable for damages resulting to the lessee's business by reason of the breach complained of. *Poposkey v. Munkwitz*, 68 Wis. 330, 60 Am. Rep. 558, 32 N. W. 35.

But the fact that the lessor of a store knew that it would be stocked is not sufficient to make him answerable in case of breach of his contract to give possession to the lessee, for the loss of the profits which might have been made by the lessee in carrying on the business intended to be carried on in such store. *Marrin v. Graver*, 8 Ont. Rep. 39.

This class of cases seems to have gone on the theory that the circumstances were such that the profits sought to be recovered must have been deemed to have been within the contemplation of the parties.

#### d. Breach of covenant for peaceable possession.

Breach of covenant for peaceable possession is governed by the same rules as breach of covenant to give possession, the measure of damages being rental value, and not profits lost.

Thus, the measure of damages for breach of a covenant in a lease for quiet enjoyment or peaceable possession is the value of the unexpired term less the unpaid rent, and not the profits which the tenant would have made had he not been disturbed in his occupancy. *Denison v. Ford*, 10 Daly. 412; *Hyman v. Boston Chair Mfg. Co.* 27 Jones & S. 116, 13 N. Y. Supp. 609; *Mack v. Patchin*, 29 How. Pr. 30.

And one who leases a house and store, and fits up the store at a large expense to be used as a jewelry store, after which and before the expiration of the term the lease is annulled, is entitled to recover the price of his fixtures as damages, but cannot recover the difference in the amount of his profits in that store and in the store to which he is obliged to remove. *Redon v. Caffin*, 11 La. Ann. 695.

And a sublessee of premises, who surrenders up possession to enable the paramount landlord to make repairs and alterations, and is kept out of the premises by no fault of his immediate landlord, but by the act of the paramount landlord, is not entitled to recover the profits of his business while he is kept out of possession, as it cannot be deemed that the loss of profits was contemplated by the parties at the time of the execution of the lease as a direct and immediate result of a possible breach of the contract. *Kelly v. Miles*, 26 Jones & S. 495, 12 N. Y. Supp. 915.

So, one who had a verbal lease of premises to a designated time, and who was wrongfully ousted therefrom by the owner before that time, could not, previous to the expiration of the lease, while he still remained out of possession, recover both for the rental value of the premises above the rent he was to pay for the residue of the term, and also for any loss sustained in his business, including the loss of profits which he would have realized had he not been ousted, as it is obvious that he could not realize the advanced rental value as an income independent from the profits derived from using the premises in conducting his business. *Smith v. Wunderlich*, 70 Ill. 426.

And one who, holding certain lands under lease for all purposes, and having the right to exhaust and draw off the oil, upon whose premises his landlord entered with force of arms, and drilled oil wells and operated them, interfering with and disturbing his right to pump oil through his wells, is entitled to recover, not the price of all the oil which the lessor took from the land, but merely the value of the leasehold until the expiration of the term, free from the obstructions which the lessor had put upon it, less the value as affected by those obstructions. *Duffield v. Rosenzweig*, 144 Pa. 520, 23 Atl. 4.

The profits may be shown, however, as an item of evidence on the question of rental value, and may be recovered where they are the direct and proximate result of the contract, and such as must necessarily be deemed to have been within the contemplation of the parties at the time of the contract.

Thus, a lessee of premises sown to a particular kind of grass, upon which a crop was ready to be mowed at the time of the leasing, may show, in an action for breach of covenant for peaceable possession, what the leased premises would probably yield with ordinary and average seasons, and the probable market value of the crop, not for the purpose of forming a basis for the recovery of profits as such, but as facts from which the jury might draw a conclusion as to the value of the lease. *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601.

So, a lessee of the privilege and right to mine and dig coal on designated lands of another, the lessee to pay a stated price for every bushel he may mine or dig, is entitled to recover, not only for the coal actually mined, but for what he really could and would have mined upon the land, and the measure of his damages is the difference between the stipulated rate of compensation and the value of the coal left in the mine. *Lyon v. Miller*, 24 Pa. 392.

And an action for breach by the proprietor of a jewelry store of an agreement with a stationer, by which it was contemplated by the parties that the stationer's business should become a department in the jewelry store, by so changing the character of the business to be carried on in the store and the arrangements of the store as to make it wholly unfit and unsuitable for the stationer's business, is not one for the recovery of the difference between the rent reserved and the value of the use of the premises, as the agreement did not really create the relation of landlord and tenant, but is one for the recovery of the value of the agreement to the stationer at the time of its breach; and where he proves the gross amount of his sales prior to the breach, and the amount of his net profits, showing that during the last year his sales and profits had largely increased, and also what income he was able to make in his business elsewhere during the succeeding year after the breach, and what he was able to earn thereafter, though the elements are more or less uncertain and problematical, they furnish a basis for such a recovery. *Dickinson v. Hart*, 142 N. Y. 182, 36 N. E. 801, 50 N. Y. S. R. 501, 21 N. Y. Supp. 307.

So, a tenant holding under a lease by which his lessor was to furnish seed for crops, who, upon being furnished with seed, notifies the lessor that it is defective, when the lessor insists upon his using it, agreeing to assume the risk of the failure of the crop, is entitled to recover, if the seed is defective, the profits of the crop which would have been made if the seed had been good, which would consist of the difference between the value of the crop actually raised and the value of a crop from good seed. *Flick v. Wetherbee*, 20 Wis. 393.  
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And where a tenant for life of lands makes a lease thereof for ninety-nine years if three persons named therein should live so long, and afterwards dies, and the lease is declared void as against the remaindermen, the executors of the deceased are liable to the lessee under a covenant for peaceable possession therein, both for the means profits and the value of the term lost, together with the cost of defending an action of ejectment brought by the remaindermen. *Williams v. Burrell*, 1 C. B. 402, 14 L. J. C. P. N. S. 98, 9 Jur. 282.

#### e. Breach of covenant to repair or rebuild.

Breach of covenants to repair or rebuild is governed by the same rules as other covenants in leases, the recovery being, as a general rule, the difference between rental value and the amount agreed to be paid. But, as in case of other covenants, recovery may be had for profits lost when they are the direct and proximate result of the lease, and are not contingent or uncertain, and are such as must be deemed to have been within the contemplation of the parties at the time the lease was made.

Thus, the measure of damages for breach of covenant upon the part of a lessor to repair or rebuild is the difference between the rental value of the premises as they were and the rental value of the premises in a proper state of repair, and do not include the estimate of profits of the lessee's business during the period of default. *Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 380; *Cook v. Soule*, 56 N. Y. 420; *Neary v. Bostwick*, 2 Hilt. 517; *Winne v. Kelley*, 34 Iowa, 339; *Bostwick v. Losey*, 67 Mich. 554, 85 N. W. 246; *Fort v. Orndoff*, 7 Helsk. 167; *Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587.

And prospective profits that might have been made by a lessee of premises upon which a shed was situated which fell down before the lease went into effect, had the shed been rebuilt, are too remote and speculative to be estimated as damages to offset a claim on promissory notes given for the rent. *Lightfoot v. West*, 98 Ga. 546, 25 S. E. 587.

So, where, in a contract for the leasing of a building, the parties have declared, in substance, that the rent shall be apportioned as between the part occupied and the part not tenatable, in case of nonrepair or of a necessity for rebuilding or repair, the measure of damages for breach of a covenant to repair would be determined by assuming that the rent reserved is the annual rental value of the whole premises, and by then ascertaining the proportionate value of the portion of the building of which the tenant had been deprived of the beneficial use by the failure of the lessor to perform its covenant. *Thomson-Houston Electric Co. v. Durant Land Improv. Co.* 144 N. Y. 34, 39 N. E. 7.

And when a building erected for business purposes is rented as a whole and without any specific reference to use by way of subletting it, where that is not the primary purpose contemplated by the parties, the damages for a breach of a covenant to repair is the difference in the rental value of the premises as they are and as they were to be, regarding the premises as a whole, and the lessee is not entitled to recover the rental value of the space which he could not use by reason of the unsafe condition of the building due to failure to repair at a certain price per square foot. *Ibid.*

In the above case *Hexter v. Knox*, 63 N. Y. 561, *infra*, was distinguished upon the ground that it fell within a well-defined class, which permits a recovery on a breach of contract of damages, which may be found were contemplated by the parties when the contract was made as a consequence of the breach of the covenant.

So, damages for a breach of a contract between a lessor and a lessee of a building, in which the lessee was retailing merchandise, whereby the building was to be removed to another street, where the lessee's business was to be continued while the lessor erected a better building on the old site, which was to be ready for the lessee at a specified time, for failure to have it ready at that time, based upon the greater value of the new building than the old for business purposes, would involve consideration of the extent of the plaintiff's business, the amount of goods he would probably have sold in the new building, and the profits he would have made thereon, which would be too speculative and remote for recovery; and evidence as to such damages is inadmissible. *Alexander v. Bishop*, 50 Iowa, 572, 13 N. W. 714.

And breach by the lessor of a mill of a covenant to keep the mill in good repair, by neglecting to repair the tail-race, entitles the tenant to remuneration for all expenditures of money, time, and labor made in repairing the mill, and to compensation for the loss of the use of the premises while they were being placed in the condition in which the lessor should have kept them, but loss of custom during such time is too speculative and contingent to constitute a proper ground for damages. *Middlekauff v. Smith*, 1 Md. 343.

And breach of covenant by the lessor of a tavern to make certain repairs and improvements authorizes a recovery by the tenant of the difference between the annual value of the premises with and without the repairs and improvements, but speculative and remote damages, such as loss of custom to the tenant resulting from the want thereof, cannot be allowed. *Fairman v. Fluck*, 5 Watts, 516.

And violation of a contract between a landlord and a tenant by which the landlord agreed to roll logs on the leased land and fence it in, in time for the lessee to seasonably plant it, by a failure upon the part of the landlord to roll all the logs and do the fencing, does not authorize the tenant to recover the value of the crop which he might have produced upon such land, as he did not cultivate by reason of the landlord's failure to roll the logs or build the fences; and the jury should not take into consideration any profit which the tenant might have made on land which he thus failed to cultivate. *Cundiff v. Cundiff*, 18 Ky. L. Rep. 1059, 89 S. W. 433.

The loss of anticipated profits of a business may be recovered, however, as damages, in an action by a lessee of real estate against his lessor for breach of covenant to repair, whereby he is in effect evicted, where the loss of such profits must have been within the contemplation of the parties, and they are not too remote or conjectural, and are capable of being ascertained with reasonable certainty. *Raynor v. Valentin Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 343.

And if improvements made by the lessee of a dye house were necessary in order to enable him to perform a contract by which he leased the dye house and was to do dyeing for the lessor, then the loss of a favorable opportunity to make profit by the use of the improvement is a circumstance proper for consideration by the jury in determining the amount of damages to which the lessee is entitled for breach of the contract by the lessor. *Garsed v. Turner*, 71 Pa. 56.

And the lessee of a steam saw mill, on breach by the lessor of an agreement to repair, whereby the mill was rendered useless during the latter portion of the term, at a time when the lessee had logs of his own in the mill yard sufficient to stock the mill for half of the balance of the 53 L. R. A.

term, which he was compelled to haul to another mill to be sawed, is entitled to recover the amount paid for hauling such logs to the other mill and the cost of getting them sawed there above what it would have cost him to saw them in his own mill, and the profits which he would have made from manufacturing lumber in that portion of his term during which he lost the use of the mill, deducting the time it would have required to saw the logs he had on hand. *Hinckley v. Beckwith*, 13 Wis. 31.

So, the lessee of a hotel under a lease for a term of years in which the owner covenanted to keep it in tenantable condition during the term, and the lessee was inhibited from making repairs without consent, but was bound to keep the hotel open in first rate style, may recoup, in suits for the rent brought by the owner, for a breach of the owner's covenant to repair, whereby the premises fell into a ruinous condition and a large portion thereof became unfit for occupancy, for such damages as were traceable solely to a breach of the covenant, such as profits, which would be its immediate fruits and were independent of any collateral enterprise entered into in contemplation of the same, although such profits are remote and consequential. *Stewart v. Lanier House Co.* 75 Ga. 582.

And a recovery, in an action for breach, by the owner of a building about to erect a new one adjoining, of a contract to lease the old building, and the new one to be erected, for hotel purposes, in which it was covenanted that certain repairs should be made in the old building, and the new building should be finished within a specified time, by failure to have the rooms ready for occupation within the time agreed, of compensation for the loss of the use and occupation of the rooms for which the lessee had furniture, and of a different compensation for rooms for which he did not have furniture, where the evidence showed the value of the use and occupation of the rooms furnished and unfurnished, is not subject to objection that it allowed profits on the use of the furniture in the hotel business, and was therefore contingent upon the use of the hotel by guests. *Hexter v. Knox*, 7 Jones & S. 109, 63 N. Y. 561.

So, breach by the lessor of an elevator of a covenant to rebuild after the elevator had been consumed by fire warrants a recovery upon the part of the lessee of what the unexpired term was worth under all the circumstances; and in determining the amount of damages, consisting of the difference between the value of the lease for the unexpired term and the stipulated rent, the jury may take into consideration the future profits or enhanced value of the lease which might arise from an association of owners of elevators formed mainly for the purpose of regulating prices, though such association was illegal, where it does not appear that the lessee had any connection with it. *Ganson v. Tift*, 71 N. Y. 48.

See also *Raynor v. Valentin Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 343, *supra*, X. e.; and see *Fisher v. Goebel*, 40 Mo. 475, *infra*, XIII., on question of duty of tenant to repair.

#### 1. Eviction.

An eviction is always a breach of a covenant for peaceable possession, and the right to recover for profits lost on account of an eviction is governed by the same rules. The only difference between the two subjects is that there may be an eviction and a consequent right of action on the part of the tenant though the lease contained no covenant for peaceable



possession. And it would seem that damages based upon the profits of which the tenant is deprived are frequently imposed for eviction when they would not be for a mere breach of covenant, on the ground that the eviction was wilful or *malice fides*.

The general rule in case of an eviction of a lessee, where there does not appear to have been wilful wrong or gross negligence, is that the lessee is entitled to a remuneration restricted to the immediate consequences of the wrongful act; and where a lessee pays the rent and enters the premises, and is afterwards evicted by a destruction of the premises, and the lessor fails to supply the lessee with another business place, the profits likely to accrue to him in the prosecution of his business are too remote and contingent to constitute a proper subject of computation as damages. *De la Zerda v. Korn*, 25 Tex. Supp. 188; *Gilmore v. Fries*, 34 Ill. App. 137; *Hayden v. Florence Sewing Mach. Co.* 54 N. Y. 221; *Amaden v. Atwood*, 69 Vt. 527, 38 Atk. 263.

And an instruction in an action for an eviction, that the measure of damages is the difference between the profits which the lessee might have made on the leased premises and those which he might have made at another stand by the exercise of reasonable diligence and industry, and the loss of his stock in trade, is erroneous. *De la Zerda v. Korn*, 25 Tex. Supp. 188.

The measure of damages which a tenant is entitled to recover of his landlord, where he is deprived of the possession of the rented premises by the landlord's act, is the difference between the contract price and the reasonable market rental value of the premises at the time of the eviction; and this is not increased by the fact that the tenant could have made without further expense, but for the eviction, a larger sum from his tillable land and pasture. *Wilkinson v. Stanley* (Tex. Civ. App.) 43 S. W. 606.

And what other parties subsequently taking possession of premises made thereon forms no basis for a recovery by a former tenant for a wrongful eviction therefrom, and cannot be considered in determining the extent of the loss of business or profits of the evicted tenant. *Smith v. Eubanks*, 72 Ga. 280.

So, the damages recoverable, in an action by an assignee of a lease upon breach on the part of the lessor of a covenant in the lease by which the assignee was evicted, consist of the value of the leasehold for the remainder of the term and damages that result as an immediate consequence of the breach, such as injury to crops, goods, machines, furniture, and the like, together with any necessary expenditure of time and money; but the loss of probable profits of the business that the assignee is engaged in constitutes no part thereof. *Cleveland, C. C. & St. L. R. Co. v. Mitchell*, 84 Ill. App. 206.

And while the lessor of property, who, before expiration of the lease and without wilful negligence on his part, again leased the same property to another during the confusion consequent upon the Chicago fire, when there was no visible possession of the lot, is liable to the original lessee for the difference between the rent he agreed to pay and the actual rental value of the property, and for any loss to his business which could not reasonably have been avoided, a recovery for damage to business is not warranted where the lessor offered the lessee another place in which to carry on his business but a short distance away, the acceptance of which might have prevented the loss of profits, and the lessee refused the offer. *Dobbins v. Duquid*, 65 Ill. 464.

So, where the lessee of a hall for theatrical purposes fits it up for that purpose, and long 53 L. R. A.

before the lease expires the owner carries the gas fixtures put there by the lessee from the hall, and removes and damages other furniture put there by the lessee including an oil tank and gas machine, thus rendering the hall unfit for the purpose for which it was leased, the lessee is entitled to recover a sum of money equal to the cost of returning the oil tank, gas fixtures, and furniture, and repairing the furniture injured, and for such consequential injuries as were the direct result of the trespass, such as his inability, by reason of the injury, to use the hall until it could be refitted for use, and for the loss of existing engagements for theatrical entertainments; but he would not be permitted to abandon his business because of the trespass, and require the trespassers to pay him the sum of money he might by possibility have realized from it in the course of an indefinite period of time. *Willis v. Branch*, 94 N. C. 142.

And a tenant who is dispossessed by his landlord, and who does not re-enter, and whose lease does not expire until many months after the ouster, is not entitled to recover, in an action for trespass for the disselsin, mesne profits from the ouster to the end of the term, but must be confined to the ouster itself, or the single trespass, including all the necessary and natural consequences of that act, in view of the surrounding circumstances, including such loss as he sustains by the breaking up of his business, if it is thereby broken up. *Smith v. Wunderlich*, 70 Ill. 426.

So, in *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957, it was held that a lessee unlawfully evicted from the leased premises was entitled to recover therefor, not only the difference between the contract price of the rental for the unexpired term and its actual value, but also expenses for moving his furniture to any other premises he might be able to secure, and perhaps also the value of the time lost in his business. But the court refused to determine whether he had a right to recover profits of his occupation which he might have made if not disturbed, on the ground that it was unnecessary to determine that question, the reversal following from a failure to allow him the expense of moving.

The annual profits of a business transacted in a building, however, is properly received in evidence in an action by the lessee and occupant thereof against the lessor for breach of covenant to repair, whereby the lessee was evicted, as a basis for ascertaining the profits which he might reasonably anticipate during the balance of the term. *Raynor v. Valentin Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 343.

And in estimating damages to a tenant of a building held under a lease providing that the store should be used exclusively for the sale of confectionery, in which he was doing a large and profitable business, for his eviction therefrom, the jury may properly consider the profits he could have made in his business if he had been permitted to carry it on to the end of his lease. *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059.

And the plaintiff, in an action for breach of an agreement between the owner of a house and another, by which the latter was to take charge of a restaurant and kitchen in the house for a term of years, and conduct a first-class restaurant and dining-room for the tenants of the house, by the forcible ejection of the latter, may show what his profits had been before the eviction, for the purpose of establishing the value of his business for which he was entitled to recover, where the judge protects the defendant against a verdict for subsequent profits

by explicitly directing the jury not to give damages for any cause except the breaking up of the business. *Menard v. Stevens*, 12 Jones & S. 515.

So, a lessee is entitled to recover against his landlord for violation of the obligation of his lease, whereby he is evicted without fault on his part, the profits which he might have realized by performance, where they are the direct fruit of the contract, and are clearly proved, though profits on the lease for a period covered by a renewal privilege would be too remote. *Hinrichs v. Tulane Educational Fund*, 49 La. Ann. 1029, 22 So. 96.

And a tenant who is illegally and forcibly dispossessed under a warrant issued in proceedings for that purpose is entitled to recover against his landlord, instituting such proceedings, for his loss of profits during the remainder of the term under the lease. *Hong Sing v. Wolf Fein*, 33 Misc. 608, 67 N. Y. Supp. 1109.

So, an estimate of the profits of a business is admissible in an action for damages for an eviction, where damage resulting from the eviction was certain, though the amount thereof was uncertain. *Myers v. Sea Beach R. Co.* 43 App. Div. 573, 60 N. Y. Supp. 284.

And loss of anticipated profits of a business is sufficiently certain and direct for recovery in an action by a lessee for breach of covenant for repairs in a lease, whereby the lessee was in effect evicted, where the lessee had been transacting the same business for years in the same building and the evidence showed the annual profits of such business. *Raynor v. Valentin Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 843.

And the unlawful eviction of a tenant from a barn occupied by him as a livery and boarding stable, by the destruction of the barn by the landlord, entitles the tenant to recover for loss of profits from boarding the horses of others, for such time as it would have taken to terminate the tenancy, as well as for the difference in the cost of keeping his own horses and of hiring them boarded, where the evidence tends to show that such damages were the natural and proximate consequence of the eviction. *Shaw v. Hoffman*, 25 Mich. 162.

So, where in case of an ouster of a tenant, from the peculiar circumstances of the tenant's business and the actual rental value of the premises, the difference between the actual rental value and what the tenant was paying as rent would not be full compensation for the loss in having his business broken up, the tenant may be permitted to make his election, and, instead of recovering the rental value, demand compensation for the loss of profits in his business occasioned by the ouster. *Smith v. Wunderlich*, 70 Ill. 426.

And one who is wrongfully evicted as a tenant holding over, and afterwards is permitted to resume possession, is entitled to recover as damages therefor what he lost by being evicted, to be measured by what he could have cleared had he not been evicted. *Smith v. Eubanks*, 72 Ga. 280.

And the eviction of a tenant by the destruction of the building leased, though done by a contractor, entitles the tenant to recover, not only the value of the outstanding lease, but also for the loss of the profits of the business when established by proof. *Snow v. Pulitzer*, 66 Hun, 329, 21 N. Y. Supp. 296.

And the owner of a market, who had leased a stall to a huckster and afterwards took forcible possession of the stand leased, forbidding the huckster to enter, is liable to the huckster for the loss of profits which would have been derived from the lease if the business had not 53 L. R. A.

not been interrupted. *San Antonio v. Royal* (Tex.) 16 S. W. 1101.

Loss of profits caused by the eviction of a tenant, which is the natural and proximate result of the eviction and therefore recoverable as damages, may be trebled where the case comes within the statute with reference to trebling damages in case of forcible entry or detainer. *Shaw v. Hoffman*, 25 Mich. 162.

See also *Rhodes v. Baird*, 16 Ohio St. 573, *supra*, X. b; *Smith v. Wunderlich*, 70 Ill. 426, *supra*, X. d; *Raynor v. Valentin Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 843, *supra*, X. a.

#### g. Tenancy on shares.

The direct fruit of a contract for a tenancy on shares is a share of the profits, and such profits, therefore, will always be deemed to have been within the contemplation of the parties. But even in such case a recovery cannot be had for their loss through breach of the contract, where they are contingent, speculative, or uncertain.

Thus, breach by a farm owner of a contract with another for the working of his farm on shares, by refusal to let the other take possession, authorizes a recovery by the party injured for what he might reasonably have made out of his contract. *Wolf v. Studebaker*, 65 Pa. 461; *Hoy v. Gronoble*, 34 Pa. 9, 75 Am. Dec. 628; *Depew v. Ketchum*, 75 Hun, 227, 27 N. Y. Supp. 8.

He is entitled to recover the value of his contract. *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415.

And such damages may be recovered immediately upon refusal of the other party to perform the agreement. *Depew v. Ketchum*, 75 Hun, 227, 27 N. Y. Supp. 8; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415.

And the measure of damages for a breach, by the owner or lessor, of an agreement to let land on shares, is the value of the privilege of occupying and working the farm subject to the conditions of the agreement and under all the contingencies that are liable to affect the result, as in such cases the damage results necessarily, immediately, and directly from the breach. *Taylor v. Bradley*, 4 Abb. App. Dec. 363.

And an agreement to till and farm a tract of land, furnishing the seed, tools, teams, and implements necessary, for which the person tilling it was to have three fourths of the produce, which was broken by the refusal of the owner to harvest the produce or to deliver him his three fourths, does not create the relation of master and servant between the parties, but is in the nature of an adventure, for the breach of which he is entitled to recover his share of the profits or benefits derivable from the contract, and not merely wages upon a *quantum meruit*. *Bowers v. Graves & V. Co.* 8 S. D. 385, 66 N. W. 931.

So, a lessor of a farm to be worked on shares for a term of five years reserving the right to sell on condition that he pay the lessee his damages caused by such sale, who sold during the first year and refused to pay damages, is liable to the lessee for the value of the term surrendered; and the value of such term depends upon the capacity of the farm to yield a profit to the one who works it, under such a contract as was held by the lessee. *Depew v. Ketchum*, 75 Hun, 227, 27 N. Y. Supp. 8.

And the fact that one who rented a farm on shares and was prevented by the lessor from taking possession was engaged in hauling during the summer season, and that he earned money in hauling, does not go to reduce his right of recovery, in an action for a breach of a contract for working the farm, of the amount which he

would have made had the contract been performed. *Wolf v. Studebaker*, 85 Pa. 459.

So, one who enters into a contract with the owner of a farm, by which the owner is to furnish the farm and a team and working implements and seed and pay house rent for the other, and the other is to cultivate the farm, the proceeds to be divided equally between them, is damaged by a breach of the contract upon the part of the owner by failing to pay the house rent, so that the other is evicted and rendered unable to perform the contract, to the extent of the profits he would have received had such contract been performed, as such profits are incident to the contract, and must be deemed to have been in contemplation of the parties when the contract was entered into, and are recoverable for the breach. *Brincefield v. Allen* (Tex. Civ. App.) 60 S. W. 1010.

But the profits of a farm held under a contract to work it on shares for five years, which is broken during the first year, made during such first year, are not to be taken as the measure of the profits which might have been realized in the four succeeding years but for the breach, but as facts which might aid the jury in estimating the value of the contract one year with another. *Depew v. Ketchum*, 75 Hun, 227, 27 N. Y. Supp. 8.

And the profits or the value of wheat raised, in an action for a breach of contract to put in wheat on shares, broken by a refusal of the owner to permit the contractor to perform his contract, cannot be recovered in the absence of an allegation of special damages, and there should be a deduction of the reasonable value of the labor which the plaintiff was required to, but did not, perform in sowing and harvesting the wheat. *Lindley v. Dempsey*, 45 Ind. 246.

So, breach upon the part of an owner of a contract with another for the running of a hotel and boarding house on shares entitles the party injured to recover for her loss of prospective profits by reason of the breach, and the jury in arriving at the amount of damages should consider what profits, if any, would have been made, and whether the business would have proved successful, and award such damages only as would fairly compensate the plaintiff. *Crittenden v. Johnston*, 7 App. Div. 258, 40 N. Y. Supp. 87.

#### *h. Breaches by tenant.*

Breach of contract by a tenant or lessee is very much like a breach by the purchaser of a contract of sale and purchase. The lessee agrees to buy the use of the premises or thing rented and fails to perform his contract. And like breach of an agreement to purchase the damages allowed are designed to be compensatory only, placing the party in the position he would have occupied if the breach had not occurred, the allowance being the difference between the real or market value and the contract price, and not the profits which might have accrued to the lessor.

Thus, the measure of damages suffered by a lessor from the abandonment of the lease by the lessee, after which the lessor relets the property to another, is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there was good faith in the subsequent letting. *Respiul v. Porta*, 89 Cal. 464, 26 Pac. 987; *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 280, 32 S. W. 797.

And breach of contract to take an assignment of a lease of a parcel of land at a designated price by refusing to receive the lease and pay the rent, warrants a recovery of the difference between the agreed price and the fair value of the leasehold interest, subject to the payment

of the rent reserved. *Kingsley v. Siebrecht*, 92 Me. 23, 42 Atl. 240.

So, a lessee of a pail factory with a water privilege belonging thereto and the machinery, tools, implements, and apparatus, in the shop, in which the lessor reserved to himself a certain room in the shop and the privilege of running a lathe therein, is entitled to recover for covenant broken neither the rent reserved nor the amount of the profits, but only a just proportion of the value of the lease according to the extent of the injury, as the lease was of a portion of the premises only, and the interruption and disturbance were partial; but the rent reserved and the amount of business and profits of it are proper evidence to be considered in estimating such damages. *Dexter v. Manley*, 4 Cush. 14.

Loss through failure to rent a house, however, is not necessarily so uncertain and remote as to prevent any recovery of damages in an action for breach of covenant not to sublet and to permit the placing of "To rent" notices on the house, and to allow the premises to be shown for the purpose of selling or leasing the same; the question would be one for the jury to decide under proper instructions from the court, unless the failure to rent the house was too plainly the effect of some other or more potent cause, in which case it would be the duty of the court to direct a verdict for the defendant upon such an issue. *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 38 N. E. 266.

In the above case it was said, with reference to damages, that the plaintiff is not bound to show to a certainty that excludes the possibility of doubt that the loss to him resulted from the action of the defendant in violating his agreement, but certainty to a reasonable extent is necessary, and the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was likely to follow from the breach of the contract, and was the probable and direct result thereof.

#### *XI. The charter or rental of vessels.*

The net profits or earnings which would have been made but for the breach have been allowed as damages in an action for breach of a contract for the charter or rental of a vessel, and this is probably the proper rule where the profits are susceptible of accurate estimation, and the evidence is conclusive.

Thus, the measure of damages for breach of contract to furnish a tug to tow a vessel into the port of lading and to tow lighters to the vessel and back, whereby the owner of the vessel was prevented from performing his contract, and lost the actual profit of the trip, is the net profits he would have made if the contract had been performed and the actual expenses incurred in the attempts to perform it. *Loud v. Campbell*, 26 Mich. 230.

And the charterer of a vessel who refuses to take her, immediately after which she gets another charter which is less valuable, is liable, for the refusal, for the net result of his charter party had it been carried out, less the amount of freight she earned. *Dalbeattie S. S. Co. v. Card*, 59 Fed. 159.

So, in *Johnson v. Meeker*, 96 N. Y. 98, 48 Am. Rep. 609, the owners of a barge, who entered into an agreement to furnish the barge with a captain and crew for the transportation of coal for a designated period, which agreement the other party broke by failing to use the barge, after which the owner notified him that unless he used the barge the owner would do so, giving him credit for the net earnings, which, no response being made, was done, were permitted to recover as damages the amount unpaid on the contract, less such net earnings.

In a great majority of the cases, however, the rental value or the amount for which another vessel could be hired to do the same work is regarded as a measure of damages for breach of a contract for the charter or rental of a vessel better fitted to do justice between the parties generally than the profits lost.

Thus, the measure of damages for failure, for a part of the designated period, to carry out a contract to furnish a vessel to carry lumber from one place to another, where other vessels could have been chartered during the time, is the value of the charter party for such time, which is to be measured by what, with fair and reasonable effort and diligence, the hirer could have procured another vessel of equal or satisfactory facilities for carrying the lumber, and the excess of price that he would have been compelled to pay for such carriage. *Parker v. McCaldin*, 3 Misc. 14, 22 N. Y. Supp. 358.

So, the measure of damages for breach of a contract to furnish a flat boat and hands to meet an excursion train and transport passengers or excursionists to different points, where the party agreeing to furnish the boat knew of the excursion, and the use the other party intended to put the boat to, would be what a similar boat would be worth at such a time, to arrive at which the jury could consider the capacity of the boat, the state of the weather and the tide, and also evidence that the person hiring the boat had engaged enough passengers for this and his other boats, the actual, immediate, and necessary loss being a question for the jury. *Mace v. Ramsey*, 74 N. C. 11.

And one who charters a steamboat for a designated period, to be used in the excursion business, who is wrongfully dispossessed by the owner before the expiration of the period contracted for, is entitled to recover the market value of the charter with its limitations and conditions for the unexpired time, if there is such a value, or the difference, if any, between the charter price and what would be required to be paid to hire another equally fit boat, and compensation to be fixed by the jury for his time and trouble in procuring another boat, or the difference between the price to be paid by him under the charter party and the market value of the use of the boat for the unexpired term for the purpose of excursions, if there is such a value, but he is not entitled to recover upon the basis of the unearned and speculative profits which he would have made if he had not been interfered with; and evidence of such loss of probable future profits is inadmissible. *Mitchell v. Cornell*, 12 Jones & S. 401.

In the above case *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, *supra*, IV., was distinguished upon the ground that in that case the loss of future profits was the direct and immediate consequence of the breach of contract.

So, in *Glover v. McAllister*, 2 Rob. (La.) 161, the court limited the damages, in an action by a master of a steamship against the master of a ship laden with passengers for the breach by the latter of a contract to tow the passenger vessel to another place, to such as were actually sustained, without allowing for profits lost, where it appeared that the steamer could not be got ready for the trip until the succeeding day, and an epidemic of yellow fever prevailed at the place where the ships were, and the master of the passenger vessel felt compelled to leave in tow of another boat which could start at once on account of the apprehensions of his passengers for their safety.

But breach of a contract to supply a vessel at a designated time and place does not warrant a recovery on the theory that the party injured might have sublet the vessel to other ship-

pers at an advance, where he testifies that he did not like to take the risk of making contracts because he was apprehensive that the vessel would not be on hand in time. *Bohn v. Cleaver*, 25 La. Ann. 419.

The measure of damages for breach of a charter party of a vessel for a designated period to carry lumber from one place to another, where another vessel could not be procured, however, is the difference between the value of the lumber at the place of shipment and the value at the place to which it was shipped after deducting charges and expenses; and it is competent to show, in an action for the breach, such value, and that another vessel could not be procured. *Parker v. McCaldin*, 3 Misc. 14, 22 N. Y. Supp. 358.

And breach by the owner of a ship of a contract for its use for the purpose of carrying coal to the African coast, where both parties knew at the time that admiralty contracts were out for sending coal to the African coast, and that bills of lading were to be sent at a particular date, though the owner was not informed of the terms of the admiralty contract, warrants a recovery by the lessee for the expenses incurred in consequence of the failure of the performance of their contract, and any damages arising by reason of the breach, mere notice of the existence of the admiralty contracts being sufficient. *Prior v. Wilson*, 1 L. T. N. S. 549, 8 Week. Rep. 260.

## XII. Miscellaneous contracts.

Under this head cases have been collected which deal with contracts not classifiable under any of the above subdivisions of this note, but which differ with reference to the facts to such an extent as to make it impracticable to give them any distinguishing name. They consist of the odds and ends of the subject. It is to be observed, however, that such cases, like those belonging to particular classes, turn upon the question of remoteness, contingency, or uncertainty, and whether the profits were within the contemplation of the parties, or whether a better standard of measurement than the profits can be found.

Thus, profits which might be derived from the use of money cannot be recovered for failure to pay the money at the time agreed upon. Lawful interest is the only standard for damages arising therefrom. *Skinner v. Dayton*, 19 Johns. 513, 10 Am. Dec. 286; *Hoblit v. Bloomington*, 71 Ill. App. 204; *Short v. Skipwith*, 1 Brock. 103, Fed. Cas. No. 12,809.

And breach of an agreement to make a loan to one who intended to use the money for the purchase of certain lands, after which the lands went up in price, does not authorize the injured party to recover the difference between the price at which he bargained for the land and what it could have been subsequently purchased for after the rise in price, in the absence of evidence that the party, in violating the contract to make the loan, had knowledge of the use to which the borrower intended to put the money. *Equitable Mortg. Co. v. Thorn* (Tex. Civ. App.) 26 S. W. 276.

And the supposed loss suffered by a party to a contract which was broken, the parties thereto living a long distance apart, of what such party might have gained by the difference of exchange on the amount to which he was entitled under the contract, is too extravagant and remote for allowance as damages for such breach. *Gilpins v. Consequa*, Pet. C. C. 85, Fed. Cas. No. 5,452.

And one who by breach of a contract is compelled to pay a mortgage in cash when he should have been permitted to pay it in lumber at

current retail prices, who recovered his loss of profits caused by being compelled to pay in cash, is not also entitled to recover for interest which accrued after the date of payment. *Somers v. Wright*, 115 Mass. 298.

So, the measure of damages for failure to replace stock loaned according to contract is the price on the day when it ought to have been replaced, or on the day of the trial at the option of the lender; and he is not entitled, in an action on a bond for replacing of the stock, to special damages for a profit he might have made if the stock had been sooner replaced, unless he shows that he actually would have made such profit. *McArthur v. Seaforth*, 2 Taunt. 257.

But one who loans stock and takes a bond to secure its replacement, together with interest and dividends, after which a bonus is declared upon the stock, is entitled in equity to be placed in the same situation as if the stock had remained in his name, and is consequently entitled to the replacement of the original stock increased by the amount of the bonus, and dividends in the mean time as well upon the bonus as upon the original stock. *Vaughan v. Wood*, 1 Myl. & K. 403, 1 L. J. Ch. N. S. 107.

And the pecuniary standard of damages in an action for breach of a contract by which one party loaned to another a specified quantity of cotton of a designated quality, the other to return on a future day named the same quantity of cotton of a like quality, by failure to return the same as contracted for, is the value of the specific quantity and quality of cotton as named in the contract; and the measure of damages is not affected by the fact that no place of delivery was named in the contract, or that the cotton was to be delivered in kind. *Bozeman v. Allen*, 45 Ala. 512.

So, an agreement between a landowner and a miller, by which the miller was to build a saw-mill on the other's land, the owner to prepare the foundation at a specified time, and furnish means for the erection with other expenses and to stock the mill until the earnings should pay for the stocking, and the miller to take one half the profits, broken by the landowner by failure to lay the foundation and furnish means as stipulated, whereby the miller was delayed from beginning the operation of the mill, warrants a recovery by the miller of the owner for what the mill would have rented for when finished during the period of delay; but the probable profits to be derived from the use of the mill during such time are too remote, contingent, and speculative to be the foundation of a verdict. *Rogers v. Bemus*, 69 Pa. 432.

And breach by an electric company of a contract with a telegraph company to solicit orders for the use of its protective system, and furnish all apparatus and materials pertaining thereto, and right of ways for wires, and labor necessary to put it in effective operation, in connection with such offices of the other party as might be designated by the parties to the contract, the other party to maintain said apparatus, connections, and appliances in good order and serve users thereof promptly, and collect the rentals, and pay over to the electric company one half of the gross sum that might be derived from the rentals, by refusal to allow the telegraph company to perform all the conditions of the agreement, and by subsequently entering into a similar agreement with a telephone company,—does not authorize a recovery of 50 per cent of the gross receipts from contracts subsequently made; but damages could be awarded upon contracts procured before the breach to the extent of the profits realized therefrom. *Ramsey v. Holmes Electric Protective Co.* 85 Wis. 174, 55 N. W. 391.  
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But breach of an agreement between a publishing company and a publisher, by which the publishing company was to furnish a designated number of copies per month for twelve months, of a paper, the publisher to furnish editorial matter and advertisements for certain pages and the company to furnish the rest, by failure on the part of the publisher to send the editorials and advertisements, in consequence of which the company was unable to send on the journals in salable condition, warrants a recovery by the company of the disbursements which actually occurred, and what it would have made in addition to reimbursing itself if the publisher had carried out his part of the contract. *Sharp's Pub. Co. v. Grant*, 1 N. Y. City Ct. Rep. 314.

So, breach of contract, made on the assignment of a half interest in an invention, to pay the fees of the patent office and attorneys necessary to procuring a patent, does not render the party refusing to pay liable to the inventor, either for the full value of the invention, or for all the profits which he could have realized from a sale of the machine had it been patented, manufactured, and put upon the market. *Holliday v. Brosig* (Tex. Civ. App.) 30 S. W. 841.

And the plaintiff in an action on a bond conditioned to indemnify him from all loss, damage, and harm by reason of any suit prosecuted against him for the infringement of any patent cannot recover damages for loss of probable profits during the time his store remained closed in consequence of illness contracted while away to attend a suit for such infringement, or for diminution of profits consequent upon a reduction of his stock caused by such suit, or for loss of mercantile credit. *Ripley v. Mosely*, 57 Me. 76.

But where an agreement between two parties that one was not to manufacture certain machines from the other's patterns except for him or upon his order is broken by the former making a machine which the latter had not ordered and which did not pass through his hands, the loss of the latter is the profits which he would have made upon a sale of the machine and those profits represent the extent of the recoverable damages; but he cannot claim and include the royalty or other incidental advantage accruing to him from a sale of his patented machine. *Blake v. Krom*, 128 N. Y. 64, 27 N. E. 977.

And where the owner of an invention of a process of manufacturing cereal flours and for the purpose of raising bread enters into a contract with another by which he transfers to him the right to use the patent within prescribed limits of territory, he to manufacture self-rising flour in accordance with the owner's instructions, and use his business tact and skill to sell the same during the continuance of the license, and to purchase all the acid used in making his self-rising flour of the other, pursuant to which he enters into a contract with a third party for the purpose of preparing, in connection with the third party's grocery business, the self-rising flour under the authority of the exclusive privilege granted him, he agreeing to give his time and supervise the business, under which agreement business is carried on for some time, when he dies, whereupon the grocery firm immediately procures a similar contract from the owner of the patent, and refuses to permit the administrator of the deceased to carry out the original contract,—the administrator is entitled to recover from such grocery firm for the profits which would have been made had the contract been carried out upon all the flour which could have been manufactured, adopting the price agreed upon in the contract. *Oliver v. Morgan*, 10 Helsk. 322.

So, breach of the conditions of an appeal bond executed for the purpose of procuring an appeal from a decision of a board of commissioners granting a license to retail intoxicating liquors does not entitle the applicant for a license, in an action thereon, to recover the profits he might have made between the time of the appeal and the dismissal thereof, as such profits are too remote and uncertain to be considered in estimating damages. *Blair v. Kilpatrick*, 40 Ind. 312.

And an individual stockholder in a mine company cannot recover, in an action against the company for breach of contract to develop the mines of the company and construct a railroad running to them, for prospective profits which might have been realized if the contract had been carried out, as what his stock would have been worth and the probable enhanced value of the corporate property, if the enterprise embarked in had been successful, are elements of damage too remote to form the basis for a recovery, even though they are alleged with sufficient certainty. *Cates v. Sparkman*, 78 Tex. 619, 11 S. W. 846.

And in estimating the damages for breach of a contract between two large owners of stock of a railroad, by which it was agreed that the stock of neither should be sold, and that neither should unite in a sale which should not include the stock of the other unless with the consent of the other, it being understood between the parties that there was no market value for such stock unless it was combined so as to form a majority controlling the road, and that the object of the combine was to obtain such control, by means of which it could be sold at an enhanced price, broken by one of the parties refusing to sell when the other had obtained a purchaser, and afterwards combining with another large owner of the same stock and selling,—the jury cannot take into account any mere chances of making uncertain profits, or any speculative value arising from, or depending upon, the possibility of the injured party combining his stock with that of other persons. *Havemeyer v. Havemeyer*, 18 Jones & S. 465.

In ascertaining and measuring the loss under a fire insurance policy upon oil reducing and filtering works, however, and for the protection of specified royalties payable to the policy holder as compensation for an exclusive license to use a certain patent, it is proper to consider the amount of royalties paid for a particular number of months immediately preceding the fire, and also the amount during the time the works were being restored and for some months thereafter, the loss not being confined to royalties upon the amount of oil actually burned. *National Filtering Oil Co. v. Citizens' Ins. Co.* 106 N. Y. 335, 60 Am. Rep. 473, 13 N. E. 337.

And evidence, in an action for breach of contract by which the plaintiff rented a house of the defendants upon their agreement to furnish her with groceries on monthly credit to carry on a boarding house after which they refused her any credit whatever, that the house and furniture would accommodate thirty boarders, but, owing to her inability for lack of means to provide for that number, she was compelled to run the house with only ten, and that if she could have accommodated the boarders she turned away there would have been a profit in the business,—is sufficient to go to the jury on the question of the allowance of damages for the loss of profits. *Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177.

So, breach, by a railroad company leasing lands between its tracks for the purpose of erecting a hotel and eating house, of a covenant in the lease to stop such of its passenger trains for meals at such station as passed at a suitable 53 L. R. A.

time, by failure and refusal to stop its trains so that its passengers and employees could patronize the hotel, warrants a recovery of the profits which would have been made if the contract had not been violated, if they are susceptible of being proved with reasonable certainty, as such profits were the object of, and inducement to, the contract. *Cleveland, C. C. & St. L. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619.

But where in such case, the hotel had not been operated with trains stopping there as contemplated by the contract, and for that reason the profits to accrue were largely problematical and conjectural, the damages should be measured, not by such profits, but by any diminution in the rental value of the premises consequent upon the breach of covenant by the lessor. *Ibid.*

And breach of a contract between two baseball associations by which they were to play a game of base ball at the home town of one club, and the other club was to have a percentage of the gate receipts, and subsequently to play a game at the home town of the other club, when the former club was to take a percentage of the gate receipts, by preventing the second game, entitles the association injured to recover the expenses and outlay incurred in preparing for its performance or the profits it would have realized by performance of the whole contract less such expenses. But where loss of profits is not proved, the recovery should be for the preparatory expense incurred in carrying out its part of the contract. *Athletic Baseball Assn. v. St. Louis Sportsman's Park & Club Assn.* 67 Mo. App. 653.

So, breach on the part of a manufacturer of an agreement with a dealer to renew a contract, by which the manufacturer agreed to deliver to the dealer all of the output of certain goods of the manufacturer's works for a designated term, by refusal to renew, warrants a recovery based on the profits which would have accrued to the dealer during the term of the renewal, as such profits will be deemed to have been contemplated by the parties at the time of the agreement. *Montreal Gas Co. v. Vasey*, 8 Rap. Jud. Quebec B. R. 412.

### XIII. Duty to prevent or reduce damages.

When a contract calls for the personal exertion of a contracting party, as a contract for personal services, or one based upon the individual skill of the party, he must, in case of a breach by the other party, do the best he can to procure other remunerative employment during the period he would have been occupied in the execution of the contract and any remuneration which he thus earned, or which he might have earned, by the exercise of due diligence, will be deducted from the amount he would be otherwise entitled to recover for loss of the profits of the contract. But where the contract broken is such that the party is entitled to procure its performance by any means available to him, his own personal services not being required, so that he would be at liberty at the same time to engage in other enterprises, no deduction from his recovery will be made on account of other business engaged in.

Thus, where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is not generally bound to pay the full amount of wages for the whole time, but may show in defense that the other party had been engaged in other business during the time, thus reducing his actual loss, or that he had been offered employment of the same kind, which was refused by him. *Costigan v. Mohawk & H. R. R. Co.* 2 Denio, 609, 43 Am. Dec. 758; *Perry v. Simpson Waterproof Mfg. Co.* 37 Conn. 520.

And in estimating the future profits of a contract broken by the profits previously earned thereunder, there should be deducted the value of the time of the party injured by the breach for the time the contract has to run, or the amount it could reasonably be expected he would earn in that time. *Goodsell v. Western U. Teleg. Co.* 21 Jones & S. 46; *Perry v. Simpson Waterproof Mfg. Co.* 37 Conn. 520.

The general rule is that after a contract has been entered into between two parties, and notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and losses only as the other party has suffered by reason of such rescinding of the contract; and it is the duty of the other party, upon receiving such notice, to save the former party, so far as it is in his power, all further damages, though the performance of such duty may call for affirmative action on his part. *Hale v. Hess*, 30 Neb. 42, 46 N. W. 261; *Brauer v. Oceanic Steam Nav. Co.* 34 Misc. 127, 69 N. Y. Supp. 465; *Dunn v. Allen*, 55 App. Div. 637, 67 N. Y. Supp. 218.

And the measure of damages for failure and refusal of the owner to permit a contractor to perform a contract for the construction of a building is the difference between the contract price and the actual cost of construction according to the contract, less the value of the contractor's time if he found other employment in which his time was equally or more valuable than it would have been if employed in the performance of the contract, but deducting nothing for the risk, as that is necessarily included. *Joske Bros. v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. 586.

So, if a miller, after refusal of a creditor to deliver corn to him to be ground, under a contract that the miller should grind enough corn to pay his debt at a certain price per bushel of the meal delivered, receives from other persons employment more or less lucrative for the machines which would have been occupied in grinding the corn, or by reasonable effort on his part might have received such employment, the profit that was or might have been made must be deducted from the profit he would have made had the contract been performed, in order to ascertain the actual damage caused by the breach. *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302.

And the measure of damages for breach of a contract between a landowner and a person running a saw mill, by which the latter was to saw for the former all the timber on a certain tract of land into merchantable lumber, and to saw exclusively for him until the timber was exhausted, by refusal of the owner to permit the sawyer to go upon his land or comply with his agreement, is not the difference between the contract price and the cost of doing the work, but the damage will be nominal only where it appears that, during the time which would have been employed in carrying out the contract had it not been for the breach, the mill was provided with all the timber it could saw, and that the sawing of such timber was as profitable as sawing under the contract in question would have been. *Frasler v. Clark*, 88 Ky. 260, 10 S. W. 806, 11 S. W. 83.

And where the owner or master of a vessel upon which a shipper contracted to load a designated quantity of goods at a stipulated price per ton fell short in shipping the whole quantity, and goods were offered by a third person to be shipped to an amount sufficient to make up the deficiency though at a reduced rate of compensation, the owner or master was bound to receive such goods, and deduct the amount received for carrying them from the recovery. *Hockscher v. McCrea*, 24 Wend. 304.

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The burden of proof, where damages have been sustained by a person contracting for the performance of services for another, from being prevented from performing them by the latter, that he could have procured other work from which profits would have accrued, which profits should be deducted from the estimated damages, rests upon the party guilty of the breach of contract. *Cincinnati, I. St. L. & C. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706; *Oldham v. Kerchner*, 79 N. C. 106, 28 Am. Rep. 302.

And a clerk, agent, laborer, or domestic servant under a contract for hire for a year or shorter determinate period, who was improperly dismissed before the term of service expired, is entitled to recover for the whole term unless the employer on whom the burden of proof lies can show, either that he was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected. *King v. Steiren*, 44 Pa. 100, 84 Am. Dec. 419.

And that there was no other work to be gotten in the town is admissible in evidence in an action for breach by the employer of a contract to cut timber into cord wood, upon which a profit would have been made, by refusal to permit the employee to complete the contract, as showing the damage done. *Mounce v. Kurtz*, 101 Iowa, 192, 70 N. W. 119.

But that which should mitigate the damages in an action for breach of a contract for the performance of services prevented by the party to be benefited thereby should be something resulting from the acts of the party causing the injury, or from the contract itself. *Wolf v. Studebaker*, 65 Pa. 459.

And the duty of a party who has been prevented from rendering service, to seek other employment so as to reduce the amount of profits he would have been entitled to upon the original contract upon a breach thereof depends upon whether the original contract was one of hire or for the performance of some specified undertaking. *Watson v. Gray's Harbor Brick Co.* 3 Wash. 283, 28 Pac. 527.

Where a disappointed contractor for the performance of a specified work finds something to do of a different nature from his contract, his doing it does not mitigate the damages or reduce the recovery of what he would have made from his contract. *Wolf v. Studebaker*, 65 Pa. 459.

And a contract for the manufacture of an article by one party for the other from materials supplied by him does not constitute the relation of master and servant between the parties, where the manufacturer owns the factory and machinery with which the work was to be done; and in such case he has the right to make as few or as many other contracts as he sees fit while executing the contract in question, and is entitled to recover the profits for breach upon the part of the other party of such contracts, without reference to whether or not he has made other contracts. *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.* 100 Mo. 325, 13 S. W. 503.

So, testimony showing that a person contracting with another to sink a well for an agreed price per foot, performance of which contract was prevented by the employer, was engaged in digging wells for other parties during the time he would have been engaged in working under the original contract, if it had been carried out, is inadmissible in an action for the breach to reduce the amount of profits to which he would otherwise have been entitled, as such contract is one for the performance of a specified undertaking, and not for hire. *Watson v. Gray's Harbor Brick Co.* 3 Wash. 283, 28 Pac. 527.

And what a person whose logging contract was violated by the other party preventing performance made under a second logging contract made with another during the same logging season, after the breach of the original contract, is not admissible in evidence, in an action for the breach, in reduction of profits allowed as damages, as such contract is not one for personal services. *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979.

And refusal on the part of a landowner to permit the performance of a contract with another to pull all the stumps on his land at a certain rate for each pine stump warrants a recovery of the profits the contractor would have realized had he been permitted to perform the work, and not of the difference between the contract price and the sum he actually received from other employment during the time he would have been employed in completing the work, the rule applicable to contracts for personal services not being applicable. *Nilson v. Morse*, 52 Wis. 255, 9 N. W. 1.

So, a recovery of one whose contract for employment has been violated by the employer will not be reduced on the ground that he had not made an effort to obtain similar employment, where it appears that his original contract was an exceptionally personal contract for the editorial writing on a newspaper, which permitted him to write on any subject he pleased, besides attending to his private business, which could not have been gotten with any other newspaper, and it was not shown that similar employment was offered and declined. *Crawford v. Mail & Exp. Pub. Co.* 22 App. Div. 54, 47 N. Y. Supp. 747.

And a recovery by the owners of a ship under contract to carry a cargo of emigrants across the ocean, for breach of contract with a dock company to discharge the ship without delay, for the loss of the use of the ship and the loss of passage money payable by many of the emigrants, who went by other lines because of the delay, will not be reduced by the fact that some of the part owners of the vessel were also part owners in other vessels, which carried the emigrants who refused to wait for the former vessel, and thereby obtained a profit from their carriage. *Jebson v. East & West India Dock Co. L. R. 10 C. P. 300, 44 L. J. C. P. N. S. 181, 32 L. T. N. S. 321, 23 Week. Rep. 624.*

And where a contractor agreed to erect a building on the land of another, and agreed with a subcontractor to furnish and set up all the marble work in the building at a designated price, and a controversy afterwards arose between the contractor and the owner on account of which the contractor ordered the subcontractor to discontinue work, the measure of the subcontractor's damage is the difference between the sum it would cost to complete the work in accordance with the contract and the sum which he was to receive for it; and where, immediately afterwards, he made a new contract with the owner of the building to complete the work called for by his contract with the contractor, and also to do other work for a round sum agreed upon between them, upon which contract profits were earned, he is not required to allow the amount of profits thus earned in diminution of the damages to which he would otherwise be entitled against the contractor, as he was under no obligation to enter into new contracts with a view to making profits for the other party. *Olds v. Mapes-Reese Constr. Co.* 177 Mass. 41, 58 N. E. 478.

Nor is a person under contract to supply a quantity of wood, who contracts with a carrier for cars for its transportation, bound to prepare the wood and offer it to the carrier in order to recover the profits of his contract, in 53 L. R. A.

an action against the carrier for failure to furnish the cars, where he knew that the transportation would not be furnished, as it is his duty to pursue the course best calculated to lessen the damage resulting from the wrong. *Houston, E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2.

And a tenant cannot, for violation by his landlord of a covenant to build or repair, wholly neglect to make the necessary repairs himself and allow his leasehold to depreciate in value or his business to be broken up, and abandon his lease, and then claim for his damages for the whole loss so incurred, as a part of such damages are to be attributed to his own fault. *Fisher v. Goebel*, 40 Mo. 475.

And a car company having a lease of certain cars with a railroad company does not abandon its lease and release the railroad company from its obligation to comply therewith because it takes possession of its cars upon being notified that the railroad company has gone into the hands of a receiver, and makes such arrangements as it can to receive a revenue from the cars, where the railroad company has manifestly become unable to comply with its contract, and the cars are tendered back to its legal representative, the receiver. *Southern Iron Car Line v. East Tennessee, V. & G. R. Co. (Tenn. Ch. App.)* 42 S. W. 529.

See also *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894, *supra*, VII. b, 1; *Wolf v. Studebaker*, 65 Pa. 459, *supra*, X. g; *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1, *supra*, III. b, 4, h.

#### XIV. Deduction for release from responsibility.

There is always a risk and responsibility attending the execution of a contract of any extent, from which the contractor is released when the contract is broken by the other party. On account of this release some deduction is usually made from the amount of profits the contractor would otherwise be entitled to recover. But no definite rule as to the amount of such deduction seems to have been laid down, and it would appear to be a matter resting in the sound discretion of the court or jury.

Thus, in estimating profits from the performance of contracts requiring the labor, skill, supervision, and care of contractors, with a view to a recovery for breach by the employer of the contract therefor, some allowance should be made for their time, and some deduction from the gross profits, in view of the fact that they are set at liberty to employ their time in other enterprises. *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417.

The measure of damages for the breach of a contract where there is nothing to justify vindictive damages is the amount necessary to put the party injured in as good a condition at the time the contract was broken, as he would have been in had he not made the contract: but a rule which places him in just as good a condition without the risk and labor of performing the services contracted for, as he could possibly be in on their successful completion, is erroneous. *Jones v. Van Patten*, 3 Ind. 107.

And the measure of damages, in an action for breach of a contract to do certain grading on a railroad whereby the contractor was not permitted to do any work, is the profits which would have resulted to him had he been permitted to perform the contract, the true measure being the difference between the cost of doing the work and what the contractor was to receive for it, making reasonable deductions for the less time used, and the release from the trouble, care, risk, and responsibility attend-



ing the full execution of the contract. *Hawley v. Corey*, 9 Utah, 175, 33 Pac. 695.

And in estimating the future profits of a contract broken, by the profits earned for the period preceding its breach, there should be a rebate of interest at the rate of 6 per cent for each year's profit from the date of the report of the breach to the time the profit is calculated. *Goodsell v. Western U. Teleg. Co.* 21 Jones & S. 46.

But while, in estimating the future profits of a contract by basing them upon the profits preceding its breach, there may be elements of uncertainty as to whether profits would be earned in the future for which a deduction should be made, an allowance for such uncertainty, made by estimating it to be no more than would equal certain claims made by the plaintiff for damages on account of the defendant's refusal to perform certain acts requested by the plaintiff and warranted by the contract, is improper as not being based on sufficient evidence. *Ibid.*

So, in *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417, which was an action for breach of contract for work and materials for building the Buffalo State Asylum for the Insane, broken by a refusal to permit the contractors to continue after a part performance, which contract involved the furnishing of a large quantity of cut stone which the contractors were required to take from quarries about 100 miles away and get it ready for the building, for the performance of which capital, machinery, and implements had to be supplied and kept, and with reference to which there would be during the course of performance many contingencies and accidents to vary the results and detract from the profits.—It was determined by the court of claims that the profits would amount to about \$105,000, computed by taking the difference between the contract price and the estimated cost of the stone and cutting, and a deduction of \$30,000 was allowed for the release, by the breach, from the care, labor, trouble, risk, and responsibility which would have attended the performance of the contract; and it was held on appeal that the court could not say that such deduction was error.

And in *Innsley v. Shepard*, 81 Fed. 869, which was an action for breach of contract for the construction of a bridge which the contractor was not permitted to complete, the court took 30 per cent from the theoretical profits which the contractor showed he would have made by executing the contract for unforeseen contingencies which would almost inevitably attend performance of such work.

See also *Gleason v. United States*, 33 Ct. Cl. 65, *supra*, III. b, 2; *Waco Tap R. Co. v. Shirley* 45 Tex. 355, *supra*, III. b, 4, a; *Stout, Hall & Rangs v. United States*, 27 Ct. Cl. 385, *supra*, III. b, 4, c; *Innsley v. Shepard*, 81 Fed. 869, *supra*, III. b, 4, d.

#### XV. Effect of Illegality in contract.

The illegality of a contract, if it is such as to render it void, defeats any right otherwise existing to recover damages for loss of profits from its breach.

Thus, profits made on Sunday in conducting a saloon and theater in violation of law cannot form a legal basis for an estimate of damages, and cannot be recovered as damages for breach of a lessor's covenant to repair. *Raynor v. Valentin Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 343.

The publication of a literary work prepared by an author, however, will not be presumed to be illegal in an action by the publisher against the author for breach of contract, by which the

publisher was to publish the work for one half of the profits to be made; but if the intended publication were shown to be illegal it would be a good defense to the action. *Gale v. Leckie*, 2 Starkie, 107.

In accordance with the rule in tort cases, however, it is thought that, in order to defeat a recovery for profits lost, the contracts must have been void for illegality, not merely unenforceable or prohibited in the absence of license or permission.

Thus, profits lost to a party to a contract from a breach of the contract by the other party may be recovered where the evidence that he would have obtained such profits but for the breach is reasonably satisfactory, though the contract which would have produced the profits could not have been enforced at law because not made in compliance with the statute of frauds. *Waters v. Towers*, 8 Exch. 401, 22 L. J. Exch. N. S. 186, 20 Eng. L. & Eq. 410.

And while the fact that when expected profits of a contract, performance of which was prevented by one of the parties, are unreasonable and unconscionable, may be one of the evidences of fraud in procuring the contract, when the contract is established against all charges of fraud and other attacks upon its validity, it is entitled to all the legal consequences and incidents of a valid contract, and the profits may be recovered for its breach notwithstanding the fact that they are unreasonable and unconscionable. *Hitchcock v. Galveston*, 3 Woods, 287, Fed. Cas. No. 6,534.

See also, on this subject, note on *Damages for tort as affected by loss of profits*, subdivision XII. on *Effect of illegality*, 52 L. R. A. 33, the rules and principles there stated being apparently applicable to this subject. And see *Ganson v. Tilt*, 71 N. Y. 48, *supra*, X. e.

#### XVI. Conclusion.

The profits to be derived from a contract or business are usually, or at least frequently, speculative, conjectural, and uncertain, not only as to amount, but also as to whether or not any at all would be realized, and frequently their realization depends upon the intervention of other agencies than the contract in question. In such cases no recovery for lost profits can be had for a breach of contract, and, owing to the prevalence of elements of remoteness and uncertainty in profits generally, it is a common expression with the courts that profits are too remote, conjectural, contingent, and uncertain for recovery as damages for breach of contract.

There is nothing in the nature of profits, however, which prevents their recovery as damages for breach of contract. Their loss is governed by precisely the same rules as other losses, and they are recoverable as damages where they are the proximate, and not the remote, result of the contract in question, and where they are not conjectural, speculative, contingent, or uncertain, and where they are such as must be deemed to have been within the contemplation of the parties at the time the contract was made. The question for determination is, therefore, What constitutes remoteness, contingency, and uncertainty, and what results will or will not be deemed to have been within the contemplation of the parties when the contract was made?

The question whether the profits are proximate or remote, and whether or not they were within the contemplation of the parties at the time of the contract, seems to depend upon whether or not they are to arise directly out of the contract or its subject-matter and constitute the immediate fruits of the contract,

or to result from collateral engagements or enterprises, or dependent upon some other act or circumstance besides the contract in question for their realization; and the question whether or not profits are speculative, conjectural, or contingent seem to depend upon whether or not they depend upon the chances of business, or so many other incalculable contingencies as to make it impracticable to determine definitely their amount, and whether they would ever be realized, though if the amount can be ascertained with reasonable certainty it is sufficient. To be recoverable profits lost must have been the immediate fruits of the contract, springing directly from it without the intervention of any outside agency, and they must not have been dependent upon the chances of business or any other contingencies rendering their realization uncertain, and their amount must have been susceptible of estimation with reasonable certainty.

Subcontracts and special bargains, however, entered into on the faith of the contract in question, though remote and not within the contemplation of the parties within the meaning of the above rules, may be taken out of the region of remoteness and brought within the contemplation of the parties by such notice or knowledge of such subcontracts or special bargains as will raise an inference that the parties contracted with reference thereto, so as to render the profits thereof recoverable if they can be estimated with reasonable certainty, and there is no contingency as to their realization.

But though the above rules are general and applicable whenever a reasonable degree of certainty exists, where the circumstances are such that an estimate from market values or from something else will furnish a greater degree of definiteness and certainty the law, in an endeavor to do complete justice, will adopt some standard of measurement of damages other than the profits lost, as, for instance, rental value, when from the nature of the case an estimate based on profits must necessarily be uncertain. But such a standard is adopted where the chief object of the contract in question is profits only, where the circumstances are such that the result of a computation by profits must of necessity be uncertain.

Where there is something more than a mere breach of contract, and one party prevents performance by the other, the profits of that particular contract lost to the other by the breach are always the direct and immediate fruits of the contract, and are recoverable for the breach. But to constitute such a prevention of performance the act of the party in fault must have gone to the subject-matter of the contract, and been something more than a mere refusal to pay through inability, though the rule is different where the refusal amounted to a repudiation of the contract.

These rules are applicable to all kinds of contracts, their application varying according to the varying nature of the relations of the parties to the different classes of contracts. As applied to contracts for services, they attach with equal force whether the breach is by the employer or the employee or contractor. In contracts for construction of buildings, however, rental value is usually selected as a standard of measurement instead of profits, as being more definite. The profits of enterprises conducted by agents or attorneys, as distinguished from persons engaged in the more ordinary branches of service, are deemed to have been within the contemplation of the parties at the time the

contract of agency was made, and therefore recoverable, since the attorney or agent himself manages the enterprise, and necessarily has knowledge of its purpose and probable results; and as a general rule where the breach of a contract for services is by the employer, the profits lost are the direct fruit of the contract, consisting of the difference between the contract price and the cost of performance, and the only question is as to their contingency or uncertainty. The fact that payment of compensation for services is to be made by commissions does not affect the application of the general rules, and contingency and uncertainty will defeat a recovery though the compensation contracted for is a share of the profits, and the same is true with reference to breach of partnership agreements and agreements with relation to partnerships.

Contracts for carriage and for the transmission of telegrams are contracts for the rendition of services, and are governed by the rules with relation to a recovery of profits lost, applicable to general contracts for services. The profits usually sought to be recovered by breach of contract by a telegraph company, however, are usually those, not of the contract for the transmission of the message, but of some collateral contract or enterprise. But these are brought within the contemplation of the parties when the message is in plain terms; and where an erroneous message is transmitted so as to mislead the party to whom it is sent, losses based upon changes in market value are recoverable.

As in case of building contracts broken by the builder, the difference between rental value and the contract price is regarded as a more definite measure of damages in case of breach of covenants connected with a lease or of eviction. But where profits are an element of the contract they may be recovered for a breach provided they are not conjectural, speculative, or contingent, or are susceptible of estimation. And in case of tenancy on shares the profits are necessarily the direct fruits of the contract, though even in such case a recovery will be defeated by contingency or uncertainty. The charter of vessels is a rental contract, and governed by the same rules as leases and covenants with relation thereto.

A contractor for the rendition of personal services, however, or services depending upon individual exertion or skill, is required, in case of breach by the other party, to do what he can in the way of otherwise employing himself profitably during the time he would have been engaged had it not been for the breach, for the purpose of reducing the damages, and the profits thus made, or which might have been made with due diligence, are to be deducted from the amount of profits which otherwise would have been recoverable; though this rule does not apply to a contract of such a nature that the contractor would be entitled to procure its performance by any available agency without devoting his own time and personal services to it. And where the contract is one of some extent, or the execution of which will require a period of some time, a deduction should be made in case of a breach by the employer for the release of the contractor from the trouble, care, risk, and responsibility attending full execution. Illegality invalidating a contract, however, will defeat a recovery, for its breach, of profits as well as of anything else; but the mere fact that the contract was unenforceable or prohibited would not be enough.

F. H. H.

**F. L. RICHARDSON**, Receiver of American National Bank, Appt.,  
v.  
**P. Numa OLIVIER.**

(44 C. C. A. 468, 105 Fed. 277.)

1. A shareholder is not, by reason of his relation to the bank, precluded from recovering back a deposit fraudulently taken by the bank when insolvent.
2. A delay of less than three years in seeking to recover back a deposit fraudulently received by an insolvent bank is not such laches as will bar the suit, in the absence of an analogous statute of limitations, where innocent third persons have acquired no interests to be affected.
3. Making a general claim for the proceeds of a check fraudulently received on deposit by a bank when insolvent will not estop the depositor from demanding a return of the full amount, where the receiver knew of the circumstances under which the check was received and collected, and his representations induced the making of the original claim, which could not possibly give the claimant more than he would obtain by a return of the deposit.

(November 20, 1900.)

**A** PPEAL by defendant from a judgment of the Circuit Court of the United States for the Eastern District of Louisiana in favor of plaintiff in an action brought to recover back a deposit taken by the American National Bank while insolvent. *Affirmed.*

The facts are stated in the opinion.

Argued before *Pardee, McCormick, and Shelby*, Circuit Judges.

*Messrs. W. C. Cochran and F. L. Richardson* for appellant.

*Mr. Henry Chiappella* for appellee.

*Shelby*, Circuit Judge, delivered the opinion of the court:

This is a suit in equity brought by P. Numa Olivier against F. L. Richardson, as receiver of the American National Bank. Between 2 and 3 o'clock P. M. on August 5, 1896, Olivier deposited in the bank a check drawn by B. F. Peters on the New Orleans National Bank for \$716. The bank, when it received the check, was known to its officers and managers to be insolvent; and at 3 o'clock on that day the bank closed its doors, and was not again opened for business. On the next morning, August 6, 1896, a bank examiner of the United States took

possession and control of the bank. The check so deposited was collected by the bank examiner after the American National Bank had closed. After the check had been collected, F. L. Richardson was by the comptroller of the currency of the United States duly appointed receiver of the bank, and qualified as such receiver. The assets of the bank went into his possession as receiver, as did also the \$716 collected on the check, which latter sum is now held by the receiver. The main purpose of the bill is to recover of the receiver this sum. On the facts stated, it was a fraud on the part of the bank to receive the check, if it intended to collect it and mingle the proceeds of the collection with its general assets, and for this and other reasons not material to state, the check and the proceeds of its collection remained the property of Olivier, and he, in the absence of other facts constituting a defense, would be entitled to recover the same. This has been decided in several recent decisions of this court, where the reasons are given. *Richardson v. Continental Nat. Bank*, 36 C. C. A. 315, 94 Fed. 450; *Richardson v. Denege*, 35 C. C. A. 452, 93 Fed. 572; *Richardson v. New Orleans Debenture Redemption Co.* 52 L. R. A. 67, 42 C. C. A. 619, 102 Fed. 780; *Richardson v. New Orleans Coffee Co.* 43 C. C. A. 583, 102 Fed. 785.

The receiver contends that Olivier is not entitled to recover, (1) because he is a stockholder in the bank; (2) because of laches and delay in asserting his claim; and (3) because he is now estopped from asserting a claim to the entire proceeds of the check, he having elected to prove his claim and receive dividends as a general creditor. The facts relevant to these defenses should be stated. Olivier owned 20 shares of stock in the American National Bank. The bank was found to be so insolvent that it was necessary for the comptroller of the currency to assess the stockholders to the amount of the par value of the stock held by them. This assessment being made, Olivier on October 20, 1896, paid to the receiver the amount of the assessment against him,—\$2,000. On the morning of August 5, 1896, before he deposited the check as stated, Olivier had a balance in the bank to his credit, as shown by his pass book, of \$816.19. The check deposited was also entered on his book. Adding the amount of the check, \$716, to the balance on the book, \$816.19, the entire amount of credit on the book was \$1,532.19. Richardson, the receiver, was known to Oli-

**NOTE.**—The question of a shareholder's right as a depositor in a bank as affected by his relation to the bank as shareholder is decided in the above case as one of first impression. The trust relation of officers with respect to official acts seems not to obtain with reference to stockholders as such. In the absence of any connection between the relations of depositor and shareholder, the fact that the same person held the relation of depositor and also of stockholder to the same bank does not appear to make his rights or liabilities in either relation different in any respect from what they would be if he did not hold the other relation also. In other words, those relations do not seem to

have any necessary or natural connection with each other.

As to criminal liability for receiving deposit in bank knowing of its insolvency, see, in this series, *Com. v. Junkin* (Pa.) 31 L. R. A. 124, and *note*; *Meadowcroft v. People* (Ill.) 35 L. R. A. 176; *State v. Shove* (Wis.) 37 L. R. A. 142; *State v. Beach* (Ind.) 36 L. R. A. 179; and *State v. Riefert* (Iowa) 38 L. R. A. 485.

For trust in deposit received when bank is insolvent, see *note* to *Bruner v. First Nat. Bank* (Tenn.) 34 L. R. A. 532; *Richardson v. New Orleans Debenture Redemption Co.* (C. C. App. 5th C.) 52 L. R. A. 67.

vier to be a lawyer. The latter applied for a blank form to prove his claim against the bank. On Olivier's cross-examination by Richardson in reference to the check for \$716, he was asked:

Q. Did you say to me, or did you claim, that the money should be returned to you?

A. Yes; I made the observation that I thought the money ought to be returned because the bank had no right to receive that deposit.

The following is from Olivier's deposition:

Q. At the time you made that proof of claim for the whole amount, \$1,532, did you ask Mr. Richardson, the receiver, whether you should include that check for \$716 or not?

A. Well, I made the proof for the whole amount. Mr. Richardson had told me that my check had gone into the general assets of the bank.

Q. Had you ever asked Mr. Richardson, the receiver, whether you could claim back the check or the proceeds of the check for \$716 deposited on the 5th of August, on the day prior to the failure of the bank?

A. Well, at the time I paid that assessment—it was at that time I asked Mr. Richardson about that check, and he said it was gone; that it was in the general assets of the bank. So I paid the assessment. I did not think of making any opposition. I never had any lawsuit before.

Q. Why did you ask him that question,—for what purpose?

A. Well, because I thought they would return me that check, or the amount of that check, and I could use it to pay part of my assessment, but he told me that it had gone into the general assets of the bank.

In reference to paying the assessment of \$2,000 without demanding the return of the \$716, the witness testified:

Q. Did you take my advice, or that of any other lawyer, at the time you made that payment to Mr. Richardson, receiver?

A. No.

Q. Upon whose assurance as to the law of the case did you act?

A. Well, I thought, Mr. Richardson being a lawyer, and telling me it had gone into the general assets of the bank, I need not go to consult with any other lawyer.

It is provided by statute: "The controller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof." Rev. Stat. § 5235.

Under these circumstances Olivier filled up the blank so as to include both the previous deposits and the amount collected on the check, and received the receiver's certificate

dated March 10, 1897, for the entire sum, \$1,532.19. Afterwards he received two dividends on the claim, one of 10 per cent and one of 5 per cent. In his bill, filed on June 19, 1899, Olivier tenders these dividends in certified checks, so far as they were payments on the money collected on the check, one for \$71.60 and one for \$35.80. Since the bill was filed the receiver tendered Olivier other dividends, but he declined to receive them. It was conceded in the bill that the receiver had acted in good faith, and it was not claimed that it had been his intention to deceive or mislead the appellee. The circuit court filed with the decree appealed from an opinion showing the reasons on which the decree is based. (See note.)\*

It is claimed by the appellant that the fact that the appellee is a shareholder in the bank should deprive him of the right to secure a preference. We quote from the brief of the learned counsel for the appellant: "It may well be doubted whether a court of equity ought ever to give a stockholder of a bank a preference over the creditors of the bank, when the only ground for asking such preference is the fraud of the officers of the bank, who represent him in their dealings with depositors. He is joint proprietor of the business, interested in its profits, having a voice in the election of its directors, and therefore responsible in a measure for their conduct of the business. Why should he be

\*The following is the opinion of the circuit court (Parlange, District Judge):

"It is evident that the complainant is entitled to recover, under the doctrine of *Richardson v. Denegre*, 35 C. C. A. 452, 93 Fed. 572, unless by his acts he has deprived himself of the benefit of the doctrine. I am satisfied that he has done nothing which can be successfully pleaded against him as an estoppel. No one has been injured by his acts. No one has been thereby induced to change his position to a less favorable one. Estoppels *en pais* are sustained to prevent the party against whom they are pleaded from gaining an unfair advantage over one whose conduct was influenced by the act from which the estoppel is claimed to result. In this case the injustice, it seems to me, would be in sustaining, and not in rejecting, the plea of estoppel. Though it is fully conceded (and in fact it is pleaded) that the receiver acted in perfect good faith, yet his statement to the complainant was material in producing the condition of things from which it is now claimed that an estoppel arises. The claimant is not chargeable with laches, under the facts of this cause; the receiver having contributed to the delay by his statement to the complainant, and no one having been injured by the delay. For the same reasons, and because complainant was not aware of the facts, the plea that he should be held to his election is not good, in my opinion. The error of mixed law and fact which caused the complainant to act as he did is such an error as a court of equity, in such a case as this, can and should relieve from. Not to do so would be unjust to the complainant, and would be giving to others an unfair advantage over him. Let there be a decree ordering the receiver to pay the complainant \$716 by preference, being the proceeds of the check on the New Orleans National Bank received by the receiver after the failure of the bank. Let the decree further order that the money tendered by the complainant be paid over to the receiver."

preferred to general creditors, who have no interest in the profits and no voice in the management, on the score that his agents have defrauded everybody, including himself?"

The statute fixes certain liabilities on the shareholders of national banks. They are made responsible for the contracts of the bank to the amount of their stock therein at its par value, in addition to the amount invested in such shares. Rev. Stat. § 5151. The appellee has responded to that liability, and paid the amount of the assessment against him. The shareholders of the bank, unless they are also officers of the bank, do not participate in its active management. It is true that they select, either directly or indirectly, the officers,—the president, the cashier, and the directors,—but beyond that they do not participate in its control. When a shareholder makes a general deposit in the bank, the bank becomes his debtor, as in the case of deposits by nonshareholders. When he makes a special deposit, the relation of trust arises, as in the case of special deposits by others. There is no sound reason, we think, for refusing to give a shareholder the same remedies against the bank on account of its frauds that are given to other creditors. The shareholder who is a creditor occupies a dual relation to the bank, and his liabilities and duties in the one relation should not embarrass him in the enforcement of his rights in the other. There is no fact in evidence in this case that shows that the appellee obtained any knowledge or notice of, or that he in any way participated in, the frauds of the bank, so that he should be placed on a footing different from that of nonshareholders who had dealings with the bank. To deprive him of the rights and remedies of others would be to add to the responsibilities and liabilities imposed on him by the act of Congress under which the banks are organized. To establish the doctrine advanced by the appellant would be to discourage shareholders from dealings with the banks in which they held stock, for they would always be at a disadvantage as compared with other clients of the banks. It may be said that it would make the shareholder more particular in the selection of the bank's officers, but the Congress thought it sufficient to impose a fixed liability on the stockholder, and we do not find precedents requiring or permitting us to increase such liability. We think the shareholder in cases like this is entitled to the same remedies that the courts give to the nonshareholder.

The deposit of the check was made on August 5, 1896. The bill was filed on June 19, 1899, less than three years after the deposit. In the application of the doctrine of laches the rule is that courts of equity are not bound by, but they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law in cases of like character. This rule means that under ordinary circumstances a suit in equity will not be barred by laches before the time fixed by the analogous statute of limitations at law. But the statute of limitations would not al-

ways govern. If, owing to special circumstances, it was inequitable to apply the statute, it might not be applied in equity; and, if equitable considerations required the application of the bar, it might be applied in cases where the statute would not bar an analogous case at law. Our attention is not called to any statute of limitations of the state of Louisiana that would bar a suit at law by Olivier to recover the money of the bank within the period which elapsed from the deposit of the check to the time the bill was filed. It is true that, in the absence of any statute of limitations, equity discountenances gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. This principle is applied as a matter of course in cases where to grant relief to the party guilty of the delay would do injustice to innocent third parties who acquired interests during the delay. But in this case there is no analogous statute of limitations that would bar the suit if at law. No innocent third parties have acquired interests to be affected, and such delay as has occurred was apparently caused by a mistake as to the law and the facts caused by the appellant, the defendant in the court below. The rule as to laches is established to promote, and not to defeat, justice. It appears to us that it would be inequitable and contrary to precedent to apply the doctrine to defeat the claim asserted in this suit. *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Kelley v. Boettcher*, 20 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55; *Williamson v. Monroe*, 101 Fed. 322; *Wagner v. Baird*, 7 How. 234, 12 L. ed. 681; *Billings v. Aspen Min. & Smelting Co.* 2 C. C. A. 252, 10 U. S. App. 1, 51 Fed. 338, 348.

The claim that Olivier is bound by his election is in effect a claim that he is, in equity, estopped from now asserting his right to the return of the entire proceeds of his check. The answer, in fact, presents the defense in that form. The answer asserts that Olivier, on account of the facts stated, "is thereby forever estopped from altering his position in relation to said claim, and from attempting to avoid the effect of the settlement thereof which he has voluntarily accepted and made with this respondent." A brief examination of this defense will show the absence of several elements essential to create an equitable estoppel. This will be evident from an attempt to apply the definition of equitable estoppel, as given by modern authorities, to the facts of this case. Pomeroy says: "Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." 2 Pom. Eq. Jur. § 804.

The position of the receiver has not been

changed by any act of the appellee. The receiver has not in good faith acted on any representation or act of the appellee so that the change of position on the part of the appellee will injuriously affect the rights of the receiver or of those whom he represents. It could not have been Olivier's purpose to elect to prove his claim for the proceeds of the check as a general creditor because he thought he would obtain a larger dividend in that way. He could, of course, as a general creditor, or as a privileged creditor or claimant, receive no more than the amount of the check. If the bank was able to pay its debts in full, he, as a general creditor, would be paid in full; and, if the assets were not sufficient to pay in full, he, as a general creditor, would receive only a *pro rata* share. On the other hand, as a preferred creditor he would obtain in full the amount of the check. It is therefore clear that he did not elect to prove the claim as a general creditor with the expectation that he would obtain more than if he claimed a return of the amount of the check. The evidence shows that his original purpose was to claim as a privileged creditor, and he had said to the receiver that "he thought the money ought to be returned, because the bank had no right to receive the deposit," but, on the assurance of the receiver that the collection had passed into the general fund, he proved the claim as a general creditor. The acts or representations of Olivier will not create an estoppel against him, and in favor of the receiver, unless the receiver was deceived or misled. If the receiver was cognizant of the facts, he cannot claim to have been misled or deceived, and cannot urge an estoppel on account of the appellee's conduct, which indicated a different state of facts. 2 Pom. Eq. Jur. § 810. The record leads us to believe that the receiver must have known when and under what circumstances the check was collected. He should not have treated the collection as a part of the general assets of the bank. Having knowledge of the real facts, he cannot claim to have been misled by Olivier's proving the collection as a part of his account against the bank. It cannot, we think, be fairly claimed that Olivier, with full knowledge of all the facts, and without inducement or suggestion on the part of the receiver, so conducted himself in the assertion of his claim and the receipt of the dividends that it would now be contrary to equity and good conscience for him to be allowed to allege and prove the truth. The doctrine of equitable estoppel, therefore, should not be applied to this case. 2 Pom. Eq. Jur. §§ 805, 808, 809.

Some observations were made by the Supreme Court in the case of *Dickson v. Patterson*, 160 U. S. 584, 592, 40 L. ed. 543, 548, 16 Sup. Ct. Rep. 373, that seem pertinent to the instant case. That was a suit brought to procure a decree to rescind certain sales of real estate on the ground of fraud. The plaintiff and the defendant had been dealing in real estate together. They had made purchases and sales. The plaintiff had received some money from the defendant on a

sale made by the latter on their joint account. Later he filed a bill to set aside the sale. The court below dismissed the bill on the ground that the plaintiff had elected to retain what he had received from the sale of the land in question, and to pursue his claim for moneys claimed to be still due. The circuit court held that after the alleged fraud came to his knowledge he was bound to promptly make his election, and, having elected to let the sale stand, he could not thereafter maintain an action to set it aside. The bill having been dismissed for these reasons, which we have very briefly stated, an appeal was taken to the Supreme Court. The Supreme Court reversed the decree of the circuit court, and laid much stress on the fact that Patterson's action had induced or caused the conduct of Dickson which was insisted on as an election. The court said: "But there are other considerations which preclude Patterson from insisting that Dickson made his election of remedies, and must abide by that election. During the correspondence that took place between the parties in 1886, Dickson, so far as the record shows, was not aware that the sale and conveyance to Boehme was merely fictitious, and in execution of Patterson's scheme to defraud him. Patterson assured him that that sale was a real one, and there is no proof to show that Dickson at the time knew or believed anything to the contrary. If it was a real sale, Dickson, having joined in the deed to Boehme, could not go behind it, unless he could show that the latter did not purchase in good faith. But, from what Patterson wrote to him, he had no reason to doubt the validity of the sale to Boehme. Besides, Patterson induced Boehme to inform Dickson by letter that the amount paid was only \$6,000, and that it was changed in the deed to \$10,000 at his (Boehme's) request, and that Patterson was an honest man, with a good reputation. All this was well calculated to make the impression upon Dickson that the only relief he could have against Patterson was to obtain an accounting, and a decree or judgment for such additional sum as was justly due him." (The italics are ours.) *Dickson v. Patterson*, 160 U. S. 584, 591, 40 L. ed. 543, 548, 16 Sup. Ct. Rep. 376.

The court held that, no rights of innocent third parties having intervened, the plaintiff ought not to be denied the fullest relief to which, according to the principles of equity, he was entitled. We think this case is instructive, as tending to show that a plaintiff should not be held to have made an election which creates an estoppel against him if his conduct in making such election was in any way influenced by the acts of the defendant. Can one doubt, to apply the language of the Supreme Court, that what Richardson, the lawyer and receiver, said to Olivier was well calculated to make the impression on the latter that the only relief he could have against the receiver of the bank was to obtain a *pro rata* distribution by proving his claim as a general creditor?

The learned counsel for the appellant has cited many cases on the point now under dis-

cussion. We shall briefly comment on the two cases which he has selected as being nearest in point. One of the cases so selected is *Nanson v. Jacob*, 93 Mo. 344, 345, 6 S. W. 246, 253. This was an action of trover for the conversion of a number of bales of hops. The court first held that a demurrer to the evidence should have been sustained because no conversion was proved, because, "a mere bailee, whether common carrier or otherwise, is guilty of no conversion, though he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner." This ruling really disposed of the case, but the court further considered the effect of obtaining a judgment as on contract for the value of the hops, saying: "There was error committed in regard to the allowance of the claim presented to the assignee of Jacob, in regard to the force and effect of said allowance. That allowance was, to all intents and purposes, a judgment, appealable from as such, and conclusive as such. . . . The official record of the assignee shows positively that he refused to allow the claim on the basis of a conversion, but allowed it as on account. The record of the assignee also shows that Jacob was adjudged by the assignee entitled to a reduction of 2½ per cent commission on the hops, and the claim was then allowed (i. e., with such a deduction), and it was admitted on the trial that plaintiffs had received several thousand dollars on the allowed claim, and at that time the assigned estate of Jacob was still unsettled, and it did not appear what additional payment would be made on account of allowance. In such circumstances as the foregoing, the conversion, if any had occurred, must be deemed as waived. Clearly, the plaintiffs could not have two strings to their bow,—could not ratify the act of Jacob, on the one hand, by having their claim allowed in the ordinary way, with a deduction of commissions, and then, on the other hand, proceed as for a conversion. The two proceedings were utterly incompatible. The plaintiffs were put upon their election to choose which remedy they would pursue, and, having elected to go before the assignee as aforesaid, were necessarily precluded from any other or further remedy." The court added that "any other theory announces this remarkable result: that Jacob is allowed a commission of 2½ per cent on the value of hops he is alleged to have converted tortiously." And, after quoting a number of cases involving the sales of personal property, in which plaintiffs were not permitted to sue for the price and also sue for the property or for its conversion, the court added: "For the most obvious reasons, then, the plaintiffs could not with one hand gather in the proceeds of the hops in the assignee's court, and with the other hand take the hops or their proceeds in the circuit court."

The case of *Burrows v. Johntz*, 57 Kan. 778, 783, 48 Pac. 28, is the other case cited in the brief for appellant. In this case

the claim was first allowed as a debt against the estate in the hands of the assignee. Under the Kansas laws, on the allowance of the claim it "became in effect a judgment." After the creditor had in this way obtained judgment as a creditor, he sought to obtain a preference by showing that he was entitled to a return of the entire fund on which his debt was based. The court held that the claim as last asserted was barred by the Kansas statute of limitations of three years. The court further held that the trust sought to be enforced could not be established because the evidence was not sufficient on a vital point. The court said: "It is impossible to say, from the record, with certainty, that the assignee ever got these funds in any form. A trust is not imposed on the assignee unless the funds of the plaintiff actually came into his hands in their original form, or commingled with the estate, or had been used by the assignor to swell and increase the estate which passed by the deed of assignment."

It was after disposing of the case on these vital points that the court made the observations about the election of remedies, and held that the claimant's election to prove his claim as a general creditor was conclusive against him in his effort to establish the trust.

It will be observed that in both of the cases mainly relied on by the appellant the election made was held to have been, under the local law, in effect the bringing of a suit and the obtaining of a judgment. In neither case was the point concerning the doctrine of election necessary to a decision of the case. The defendant in neither case did anything to cause the claimant to present his claim as a general creditor. We do not question that the court in each of these cases arrived at a correct conclusion, but neither of them can be considered as controlling authority in the present case.

It is not feasible to comment on all the cases which counsel cite as bearing on the question of election and estoppel. Many of them assert well-recognized principles applied to plain cases,—cases where the plaintiff has brought a suit on a contract and subsequently sought to avoid the same contract and cases where a plaintiff has sued for the purchase money of chattels, and afterwards, in another suit, claimed the chattels themselves. In many of the cases the election of the plaintiff has put the defendant to costs and placed him in a position he would not have occupied except for such election. In some of the cases the rights of innocent third parties have intervened, based on the plaintiff's election. All such cases may easily be distinguished from the instant case. In this case no suit was brought, except the one now trying. The plaintiff only proved a claim which he was required to prove by statute, and included in the proof the collection in dispute. Whether he claimed as a common creditor, or sought to obtain the entire collection, what he asked for in either case was the money. The case is not

analogous in that respect to cases where a plaintiff must elect to sue for or claim specific property or its price. In this case, clearly, he was in some measure induced to take the course he took by the receiver's statement. The dividends he received, even if not returned as they were, would have been only a part payment on the entire sum that he was entitled to receive. There is not that incompatibility that would exist in a case where a plaintiff sought to gather in with one hand the property he had sold, and its purchase money with the other. The plaintiff here has only sought to obtain the money. The receiver was not deceived or misled. His position was not altered to his detriment. The rights of no third person have intervened. Olivier did not seek any advantage. He presented his claim in the first instance in a way which could not by possibility give him more than he will obtain by his suit. He acted in good faith and with no improper motive. All these considerations—not any one of them alone—constrain us to hold that Olivier made no such election as to create an estoppel against him.

*The decree of the Circuit Court is affirmed.*

Mrs. Sarah E. ATKINS, Appt.,

v.

C. O. WILCOX, Trustee, etc., of Leopold Keiffer, Bankrupt.

(44 C. C. A. 626, 105 Fed. 595.)

1. A bankruptcy trustee has sufficient interest to be entitled to contest the claim of the bankrupt's landlord to a lien on the assets for rent.
2. A petition for bankruptcy filed by a tenant at a time when there is no default in payment of rent notes does not mature the notes for the remainder of the term, so as to give the landlord a lien on the bankrupt's assets for their amount, under a provision in the contract that upon failure to pay rent punctually the rent for the unexpired term shall at once become due and exigible.
3. Under a statute requiring debts to be fixed liabilities absolutely owing at the time of filing the petition, to be provable in bankruptcy, claims for unaccrued rent are not provable, where by the terms of the lease the rent is to abate in case of destruction of the property, or if the lessee is deprived of its use.

(December 18, 1900.)

**A** PPEAL by opponent from a judgment of the District Court of the United States for the Eastern District of Louisiana affirming the account of a bankruptcy trustee

NOTE.—The above decision construing the bankrupt law with respect to what constitutes a fixed liability absolutely owing by the bankrupt at the time of filing the petition is, so far as it applies to obligations for rent under unfinished leases, the highest authority up to this time. See other authorities on the question, cited in the briefs.  
53 L. R. A.

which disallowed the opponent's claim for priority of a claim for rent to accrue under a lease. *Affirmed.*

The facts are stated in the opinion.

Argued before *Pardec, McCormick, and Shelby*, Circuit Judges.

*Mr. Robert J. Maloney*, for appellant:

A landlord is entitled, out of the proceeds of personal property upon the demised premises in the hands of a receiver or trustee in bankruptcy, to priority of rent due at the time of the filing of the petition in bankruptcy, not exceeding one year, as upon execution.

*Re Gerson*, 8 Pa. Dist. R. 277, 1 N. B. N. 315.

A claim for rent under a lease is a lien upon the stock and fixtures prior to the adjudication in bankruptcy, and the trustee takes said stock subject to said lien, and there is no fund for distribution under § 64 until this existing lien has been discharged by payment or otherwise.

*Marshall v. Knox*, 16 Wall. 551, 21 L. ed. 481; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136.

The trustee takes the property of the bankrupt subject to the liens and equities existing in favor of third parties.

*Re Falls City Shirt Mfg. Co.* 98 Fed. 592, 1 N. B. N. 605; *Goldman v. Smith*, 1 N. B. N. 201; *Goodwin v. Sharkey*, 80 Pa. 149; *Re Goldstein*, 1 N. B. N. 422; *Reed v. Bullington*, 49 Miss. 223; *Re Gerson*, 8 Pa. Dist. R. 277, 1 N. B. N. 315; *Simpson v. City San. Bank*, 56 N. H. 466, 22 Am. Rep. 491; *Collier, Bankruptcy*, p. 373; *Gardner v. Cook*, 7 Nat. Bankr. Reg. 346, Fed. Cas. No. 5,226; *McLean v. Klein*, 3 Dill. 113, Fed. Cas. No. 8,884; *Re Thiessen*, 2 N. B. N. Rep. 625.

*Messrs. E. T. Florance, Charles Rosen, and Edgar M. Cahn*, for appellee:

A claim for future rent is not provable in bankruptcy.

The effect of a bankruptcy act is to wipe out the debt of the bankrupt.

The prohibition against impairing the obligation of contracts is not binding upon Congress, but only upon the states.

*Parker v. Davis*, 12 Wall. 457, 20 L. ed. 287; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496.

Unless the appellant's claim is a "fixed liability . . . absolutely owing" at the time of the filing of the petition in bankruptcy, whether then payable or not, it is not provable against the bankrupt estate.

*Re Frankel*, 2 N. B. N. Rep. 845.

The claim of the landlord for the future rent,—the rent not yet due, the rent for the unexpired term of the lease,—is not a fixed liability and absolutely owing.

*Bailey v. Loeb*, 2 Woods, 578, Fed. Cas. No. 739; *Auriol v. Mills*, 4 T. R. 94; *Lansing v. Prendergast*, 9 Johns. 127; *Savory v. Stocking*, 4 Cush. 607; *Bosler v. Kuhn*, 8 Watts & S. 183; *English v. Key*, 39 Ala. 115; *Re Jefferson*, 93 Fed. 948; *Bray v. Cobb*, 100 Fed. 270, 2 N. B. N. Rep. 586;



*Re Mahler*, 2 N. B. N. Rep. 70; *Re Arnstein*, 101 Fed. 706, 2 N. B. N. Rep. 106; *Re Chambers*, 2 N. B. N. Rep. 864; *Re Collignon*, 2 N. B. N. Rep. 660; *Re Kingman*, 1 N. B. N. 518; *Re Cronson*, 1 N. B. N. 474; *Re Shilliday*, 1 N. B. N. 475; *Re Ellis*, 98 Fed. 967, 2 N. B. N. Rep. 360; *Bailey v. Loeb*, 2 Woods, 678, Fed. Cas. No. 739; *Re Commercial Bulletin Co.* 2 Woods, 220, Fed. Cas. No. 3,060; *Re May*, 7 Ben. 238, Fed. Cas. No. 9,325; *Re Hufnagel*, 12 Nat. Bankr. Reg. 554, Fed. Cas. No. 6,837; *Ex parte Houghton*, 1 Low. Dec. 554, Fed. Cas. No. 6,725; *Re Webb*, 6 Nat. Bankr. Reg. 302, Fed. Cas. No. 17,315; *Re Ives*, 18 Nat. Bankr. Reg. 28, Fed. Cas. No. 7,116.

It is the duty of the trustee to file his account and place thereon only such claims as in his judgment are proper; and it is the duty of the referee and the court to allow only such claims as the bankruptcy act says are provable and allowable.

The trustee properly opposes an illegal claim.

*Re Fizen & Co.* 50 L. R. A. 605, 42 C. C. A. 354, 102 Fed. 295, 2 N. B. N. Rep. 885.

**McCormack**, Circuit Judge, delivered the opinion of the court:

On the 4th day of May, 1899, Leopold Keiffer, by a written lease, rented from the appellant, Mrs. Sarah E. Atkins, certain premises described in the lease for the term of one year, commencing on the 1st day of October, 1899, and ending on the 30th day of September, 1900, for a monthly rental of \$333.33½, for which Keiffer executed and delivered to the appellant twelve rent notes, bearing even date with the lease, and payable to the lessor, one on the 1st day of November, 1899, and one on the 1st day of each and every succeeding month (except the last one, payable on the 30th of September), fixing the interest at the rate of 8 per cent per annum from maturity until paid. The lease recited that should the property be destroyed by fire, or should the lessee be deprived of the use of the premises by some other unforeseen event, not due to any fault or neglect on his part, then he should be entitled to a credit for the unexpired term of the lease, and the corresponding proportion of rent notes should be annulled and returned to him. At the time of the making of this lease Keiffer was in possession of the premises under a lease of similar import bearing date 8th of June, 1898, which provided for a term of one year, commencing on the 1st day of October, 1898, and ending on the 30th day of September, 1899. On October 3, 1899, Keiffer presented his petition, to the court of bankruptcy to be adjudged a bankrupt, which petition in the judge's absence, was referred to a referee, who on the same day declared and adjudged the petitioner to be a bankrupt. By a stipulation of the parties, only certain portions of the record in the bankrupt proceeding were brought up on this appeal, from which it appears that the appellant made proof of a secured debt against the estate of the bankrupt on October 31, 53 L. R. A.

1899, claiming the aggregate amount of the twelve rent notes given and held under the lease of May 4, 1899, and to become payable as above recited. The claim and proof thereof embraced other items, which do not require further notice here. On November 21, 1899, this proof of debt was filed by the referee. The record we have does not show any further action in the bankrupt estate until March 7, 1900, when an account of C. O. Wilcox, trustee of the estate of Leopold Keiffer, bankrupt, was presented to and filed by the referee, who thereon made an order of that date, as follows: "Let a meeting of creditors be held on March 20, 1900, at 3 P. M. Let them be notified according to law, and that they do show cause on the above date why said account should not be approved and homologated." The account showed the receipt of all of the funds that had come into the hands of the trustee, aggregating \$3,651.44. It also showed twenty items of disbursement that had been made by the trustee, and bore an item, "Reserved for future costs, \$150.00," which, added to the disbursements, aggregated \$2,253.77. Among the disbursements is the following: "Mrs. Sarah E. Atkins, landlord. Rent for September, October, and November, 1899, three months, at \$333.33½, \$1,000.00." On March 20, 1900, the appellant appeared before the referee and filed her written opposition to the account submitted by the trustee, on the ground that she had proved her claim for rent for the whole of the twelve months specified in the lease of May 4, 1899 (and other grounds not necessary here to notice), and that by the laws of Louisiana she has a lien of the first rank on all the property in the leased premises, and that the total assets in the hands of the trustee and on deposit to the credit of the estate were realized from the sale of the property contained in the leased premises, and subject to her lien, wherefore she opposes each and every item on said account, and prays that she be declared entitled to a lien first in rank on all the property contained in the leased premises, or on the proceeds, and that the account of the trustee be amended, and he be ordered to pay to her the full amount of her claim in preference to all other claims. The referee rejected her claim for the months of December, 1899, to September, 1900, inclusive, for reasons elaborately given in his judgment thereon, from which judgment Mrs. Atkins appealed to the judge sitting in the court of bankruptcy, by whom the judgment of the referee was affirmed, and she prosecutes this appeal.

It appears that the trustee occupied the premises during the months of October and November, 1899, and that he allowed and paid on Mrs. Atkins' claim for rent the rent which accrued for the months of October and November, under the current lease, at the rate and amount of the notes which had been given therefor. The appellant insists that the trustee was without right or interest to contest the lien of the opponent, as it was claimed in her proof of debt. We are clear that this position is not well taken.

By the express terms of the statute the trustee is selected by the creditors. By the clearest implication he represents all the creditors, and as such representative has an interest in the just administration of the estate which belongs to the creditors. Moreover, this right is expressly recognized in the sixth paragraph of general order in bankruptcy 21 (32 C. C. A. xxii., 89 Fed. ix.), which has itself the force of a statute, even if not clearly founded on the text of the statute, which we think it is. It appears to give the trustee precedence ever of the creditors, for the language is that, "when the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may," etc. The appellant by her proof of debt appears to found her claim, in part at least, on the following provision in the lease: "Should the lessee at any time fail to pay the rent punctually at maturity as stipulated, the rent for the whole unexpired time of this lease shall, without putting said lessee in default, at once become due and exigible." In her affidavit in support of her claim she contends: "According to the terms of said lease, the note maturing November 1-4, 1899, not having been paid, then the whole unexpired amount of said lease represented by said notes becomes due and exigible."

At the date of the adjudication in bankruptcy, and at the date when the debt was proved, there had been no default in the payment of rent under the then current lease, or any violation of its conditions which would render the notes, or any of them, given for the rent that was to accrue due and exigible, and authorize the lessor to enforce her lien on the property then in the leased premises for the payment of all or any one of the rent notes given and held under that lease. The lease does not provide in express terms that the bankruptcy of the lessee would have the effect to mature the notes and render them exigible. The present bankruptcy act has no direct provision on this subject. The bankruptcy act of 1867 contained this provision: "Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." [14 Stat. at L. 517, chap. 176] Section 19.

No such provision, or its equivalent, appears in the present act. Its language applicable to the case we are considering is that debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and do not bear interest. Section 63. This provision has not yet been construed by the Supreme Court, nor, as far

as we are advised, by any one of the circuit courts of appeals. The National Bankruptcy News reports show that it has been frequently ruled on by referees in bankruptcy, and by four of the judges for districts in other circuits. In the opinions of the referees and of the judges of the courts of bankruptcy, just referred to, there is a marked unanimity to the extent that rent to accrue in the future, if it can be called a debt, is a contingent one, both as to its amount and as to its very existence, and that there is no provision in the act of 1898 which allows proof of such debts. In the very nature of the case, there is great diversity of view as to the ground on which this ruling is placed. The opinions and judgments necessarily have relation to the terms of the contract of lease out of which the claim for future rent grew, and are largely controlled by the particular provisions of the respective instruments. Some of the opinions, however, take ground broad enough to cover the subject, without reference to the terms of leases in general use. The judge for the district of Kentucky in his opinion uses this language: "The court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must of necessity cease, when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant, and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused, — a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are thenceforth the same as those of any other stranger. He cannot use nor occupy the premises. No obligation upon his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and, indeed, no debt of any sort, against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt, and future rent has not, in any just sense, accrued before the adjudication." *Re Jefferson*, 93 Fed. 951.

The judge of the court for the eastern district of North Carolina seems to concur in the views just stated. In his opinion we find this language: "As to the rent of the bank: The contractual relations being terminated, a landlord is not entitled to prove a claim for rent against a bankrupt after such bankruptcy ceases to use the building. The relations of landlord and tenant are severed by operation of the bankrupt law. The trustee of his estate may, after adjudication, occupy and use the rented or

leased premises for the estate; but under such circumstances it would be chargeable to the estate, not as rent under bankrupt's contract, but as cost and expenses of administering the same." *Bray v. Cobb*, 100 Fed. 270, 2 N. B. N. Rep. 588.

Touching the language above quoted from the opinion of Judge Evans (*Re Jefferson*, 93 Fed. 951), Judge Lowell, of the Massachusetts district, says: "With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar provision of the statutes of Kentucky. Let us consider an actual example. A lease recently examined was made for a term of several hundred years, upon a payment of \$16,000 at the beginning of the term, and subject to a future rent of \$1 a year if demanded by the lessor. Clearly this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankrupt act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication. It follows, then, that the lease here in question was not determined by the bankruptcy of the lessee, but only by the re-entry of the lessor." [*Re Ellis*, 98 Fed. 968, 2 N. B. N. Rep. 360.]

The actual example proposed for consideration by Judge Lowell is a leasehold in form, certainly, but it appears to be substantially, in fact, a purchase of the freehold for a present consideration paid in cash at the beginning of the term, and to have value as an asset equal to the current market price of the freehold in the premises let. It is an estate with such an inconsiderable burden as may well be disregarded, and, as the learned judge says, clearly this would be an asset of a bankrupt's estate which the trustee not only would almost certainly elect to assume, but which the creditors, or the court on their motion or on its own motion, would compel him to assume. The doctrine of election to which he refers sprung out of the state of the law in bankruptcy as it was at an early time in England construed by the common-law courts. The rule as then announced has been greatly modified in England by statutes passed from time to time, and the decision of the English courts on these various statutes, and the decisions of the state courts in this country on the various insolvency acts, are more interesting than helpful in our effort to construe the provision of our bankruptcy law now in force. Moreover, the question as to the effect that the adjudication in bankruptcy has on the relations subsisting between the landlord and tenant, while it is kindred to the question with which we are dealing, its connection therewith is by 53 L. R. A.

no means vital. The language of our statute affecting the claim here involved requires that the debt shall be a fixed liability absolutely owing at the time of filing the petition. Under the insolvent law of the state of Massachusetts prior to the statute of 1879, only such debts (with certain exceptions) were provable as were "absolutely due" at the time of the first publication of the notice of issuing the warrant of insolvency. The case of *Bowditch v. Raymond*, 146 Mass. 109, 15 N. E. 285, shows that the language "absolutely due" was treated as exactly equivalent to the language "absolutely owing," as it must be, for the statute provided for proving debts payable at a future date. After referring to numerous cases in which it had been held that under that statute future rent to accrue under a lease in which the insolvent debtor is lessee cannot be proved, it is said: "The principle of these cases is that such rent is not a debt absolutely due at the time of the first publication. The lease may be terminated by the eviction of the lessee or otherwise, and no rent may ever accrue or become due. The lessor's claim is a contingent one. It is not contingent merely as to amount but the very existence of the claim depends upon a contingency" referring to *Bordman v. Osborn*, 23 Pick. 295. Further on in the opinion it is said: "The existence of any debt in the future depends upon contingencies, and therefore the appellants' claim cannot be proved under our insolvent law prior to the statute of 1879."

In the lease before us the lessee binds himself—"to make no sublease, nor transfer said lease in whole or in part, nor use the premises for any other purpose than that herein contemplated, without the written consent of the lessor."

And again it declares: "And, should the lessee in any manner violate any of the conditions of this lease, the lessor hereby expressly reserves to himself the right of canceling said lease without putting the lessee in default; the lessee hereby assenting thereto, and expressly waiving the legal notice to vacate the premises."

It is not so clear that this leasehold is an asset of the bankrupt's estate which the trustee would almost certainly elect to assume, or that the court should on its own motion, or on the motion of creditors, require him to assume. Nor is it quite clear what he could do with it if he did assume it. It is not necessary for us to hold that the adjudication in bankruptcy terminated this lease and absolved the relations between the landlord and the tenant thereby created, nor is it necessary or prudent to announce in advance what the holding should be in any given case which may possibly arise. We therefore content ourselves with announcing that, in our opinion, there was no error in the judgment of the district court rejecting the appellant's claim.

That judgment is therefore affirmed.

## UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

CHICAGO HOUSE-WRECKING COMPANY *et al.*, *Plffs. in Err.*,  
v.

UNITED STATES OF AMERICA.

(45 C. C. A. 343, 106 Fed. 385.)

**A stipulation for a certain sum as damages** for failure to comply with a contract to remove a building by a certain time will be construed as a penalty and the recovery limited to the damages actually suffered, although the bond expressly provides that the sum named shall be liquidated damages, and not a penalty, where it would not be difficult or impossible to assess the actual damages from the testimony given,—especially under a statute which provides that, in suits to recover a forfeiture which appears by default or confession or upon demurrer, the court shall render judgment for so much as is due according to equity.

(February 12, 1901.)

**ERROR** to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of plaintiff in an action upon a bond given to secure the prompt performance of a contract. *Reversed.*

Statement by **Bunn**, District Judge:

The facts in this case are very fully and fairly stated in the brief of counsel for plaintiffs in error as follows: On the 5th day of August, 1897, the defendant in error instituted an action in debt in the circuit court of the United States for the northern district of Illinois against the plaintiffs in error herein on a bond executed by them to the defendant in error for \$20,000, and dated the 28th day of December, A. D. 1896, and conditioned that if the plaintiff in error the "Chicago House-Wrecking Company" shall by the 1st day of April, 1897, complete in each and every particular the work contemplated by the contract dated May 26, 1896, and do and perform each and all of the covenants therein stipulated by said company to be kept and performed, then this obligation to be void; otherwise, to be and remain in full force and virtue."

There was a further recital in the bond that the plaintiffs in error "and their sureties are held and firmly bound unto the United States of America in the sum of \$20,000, lawful money of the United States of America, computed and agreed upon by

and between the United States of America and ourselves as liquidated damages, and not as a penalty, to be immediately due to the United States of America on the 1st day of April, 1897." The history of this bond is as follows: On the 28th day of April, 1896, defendant in error invited proposals for the purchase and removal of the old United States Custom-House and Subtreasury building at Chicago. Each bidder was notified that "a copy of the advertisement, general instructions, and conditions, specifications, accepted proposals, and letter of acceptance of proposal will be attached to and form a part of the formal bond and contract to be executed and approved." The Chicago House-Wrecking Company, one of the plaintiffs in error, became the successful bidder, and on the 26th day of May, 1896, entered into a formal contract for the purchase of the building and its demolition and removal. The obligations of the contract on the part of the Chicago House-Wrecking Company were as follows: "That the party of the second part covenants and agrees to and with the party of the first part to purchase the United States Custom-House and Subtreasury building in the city of Chicago, county of Cook and state of Illinois, including extension, heating apparatus, elevators, sidewalk flagging, lot and area coping, drainage, water, gas, and other piping," etc., and to remove the same from the premises, with all concrete foundations, foundation walls, coal vaults, etc., and all *débris*, etc., and to leave the site clean, in strict and full accordance with the specification for the work, the advertisement for proposals, dated April 28, 1896, general instructions and conditions, the proposal dated May 16, 1896, addressed to William Martin Aiken, supervising architect, by said party of the second part, and letter dated May 26, 1896, addressed to said party of the second part by C. D. Hamlin, acting secretary of the treasury, accepting said proposal, "a true and correct copy of each of which said papers is attached hereto, and is hereby made a part of this contract." "The party of the second part further covenants and agrees . . . that the entire work shall be completed to the full satisfaction of the said party of the first part within five (5) months from the date of the approval by the secretary of the treasury of the formal bond hereto attached." This formal bond, which was for \$10,000,

**NOTE.**—For a case in which a stipulation is held to be for stipulated damages, although it uses the word "penalty" in describing it, see *Tode v. Gross* (N. Y.) 13 L. R. A. 652.

For other cases sustaining a provision for stipulated or liquidated damages, see also *Wilhelm v. Eaves* (Or.) 14 L. R. A. 297; *Tennessee Mfg. Co. v. James* (Tenn.) 15 L. R. A. 211; *Wallis Iron Works v. Monmouth Park Asso.* (N. J. L.) 19 L. R. A. 456; *J. J. Douglass Co. v. Minnesota Transfer R. Co.* (Minn.) 30 L. R. A. 860; and *Pierce v. Southern P. Co.* (Cal.) 40 L. R. A. 350.  
53 L. R. A.

For cases holding that the provision on that subject is a penalty, see *Carey v. Mackey* (Me.) 9 L. R. A. 113; *Wilkinson v. Colley* (Pa.) 26 L. R. A. 114; *Krutz v. Robbins* (Wash.) 28 L. R. A. 876; *Meyer v. Estes* (Mass.) 32 L. R. A. 283. See also cases in *notes* to *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551, and *King Iron Bridge & Mfg. Co. v. St. Louis* (C. C. E. D. Mo.) 10 L. R. A. 826.

For covenant fixing price for act permitted by contract as distinguished from stipulated damages, see *Smith v. Bergengren* (Mass.) 10 L. R. A. 768.

but which was not used on the trial of this case, was approved by the then acting secretary of the treasury on the 13th day of June, 1896. Upon the approval of the contract and bond by the acting secretary of the treasury, plaintiff in error the Chicago House-Wrecking Company began the work of demolition and removal of the building, and had gotten down to and into the walls of the first story when it became evident that they could not complete the work within the time stipulated in the contract. An extension of time was asked by plaintiffs in error, and granted by the department, until the 1st day of April, 1897; and on the 28th day of December, 1896, plaintiffs in error, in compliance with the terms of said extension of time to April 1, 1897, executed the bond on which this action is brought. At the time of giving this bond the work of removal had not reached the cement bed or foundation upon which the building rested, and plaintiffs in error had no knowledge of its actual thickness, except as they had been told by defendant in error in the general instructions and conditions which had been promulgated by the department for the use and guidance of bidders in making their proposals, and afterwards made a part of the contract. These general instructions and conditions under the head *Foundations*, stated as follows: "The building rests on a continuous mass or slab of concrete, covering the whole area of building, and varying from 3' 6" to 4' 6" thick. The space between the top of said slab and under side of basement floor was also filled with concrete. Louisville and White Creek cement was used for this concrete." These general instructions and conditions contained other provisions. Under the subject *Requirements*, it was stated: "Before submitting a proposal, each bidder should make careful examination of the specification and of the building, and fully inform himself as to quantity and quality of the materials, and the work to be performed. And, should his proposal be accepted, he will be responsible for any and every error in his proposal resulting from his failure so to do." Under the subject *Examining Building*, it was stated: "Parties intending to submit bids must apply to the custodian of the building for permission to examine the same, and for such other information as may be desired, and in making said examination must conform to the directions of the custodian."

On February 24, 1898, plaintiffs in error filed a plea confessing a breach of the bond, in that the work was not fully completed before the 1st day of April, 1897, and setting up in avoidance thereof the great thickness of the concrete foundations in excess of the thickness as given in the general instructions and conditions. On April 10, 1899, plaintiffs in error filed seven other pleas, to the following effect, namely: The first plea being the same as the plea filed February 24, 1898, except confessing in more precise language the failure to complete the work entire by April 1, 1897. The second plea confessing the breach, and setting up in avoid-

ance thereof the making of test borings in the concrete foundation wherever it was possible to do so, and wherever not occupied by machinery, pillars, boilers, etc., and that this extra thickness was subsequently discovered in those inaccessible parts. The third plea confessing the breach, and setting up a delay of thirty days in the completion of the work by reason of the supervising architect withholding permission for that length of time to the wrecking company to remove the granite flagging and sidewalk as provided in the contract. The fourth plea confessing the breach, and alleging that the agents and officers of defendant in error exercising control and direction over the work aided and assisted the officers of the city in retarding the progress of the work. The fifth plea confessing the breach, and alleging that, because of the extra thickness of the concrete foundation, it was necessary to do blasting, and that the work was delayed in its completion because the city authorities of the city of Chicago delayed the giving of authority to make such blasting. The sixth plea confessing the breach, and setting up a claim in the nature of set-off against defendant in error in the sum of \$16,958, being the cost of removing this extra thickness in the concrete foundation in excess of the thickness given in the general instructions attached to and made a part of the contract. The seventh plea confessing the breach, and setting up the request of the defendant in error that the sidewalk flagging be left on the ground, to be used in the new building. On May 28, 1899, an amendment was filed to the fourth plea, alleging that after waiting a reasonable time for permission from the supervising architect, to remove the granite flagging and sidewalk, and not having received same, they proceeded to remove the same, and were hindered by the officers and servants of defendant in error in doing so; also an additional plea setting up a set-off for \$10,000 expended in removing the additional thickness of concrete subsequently discovered.

Upon the trial of the case, plaintiffs in error, in open court and to the jury, admitted the breach of the bond, in that they did not complete the demolition and removal of the building in question by the 1st day of April, 1897, and moved the court that, having admitted the issues, the burden of proof be adjudged to be on them, and they be entitled to open and close the case in the introduction of testimony and argument to the jury. The motion was refused, and an exception taken by the plaintiff in error. Counsel for defendant in error then introduced in evidence the bond sued on, the original contract marked "Plaintiff's Exhibit B," together with the exhibits attached thereto, one of which was the general instructions and conditions. Here counsel for the plaintiff (defendant in error) stated to the court that if it is admitted that the work was not completed according to contract on the 1st day of April, 1897, the plaintiff would not call any witnesses and would close its case, and thereupon it was admit-

ted in open court by counsel for the defendant (here plaintiffs in error) that the contract referred to in the bond sued on in this case was not completed on the 1st day of April, 1897, as required by the contract, and that this admission should be taken as evidence and proof of that fact. This concluded the testimony on the part of the plaintiff. Thereupon plaintiffs in error tendered witnesses and offered proof of the various pleas set up in their answer, which testimony was excluded by the court on objection by counsel for defendant in error, and exception was taken to the court's ruling. Counsel for plaintiff in error also offered to show by the witnesses that the wrecking company, having obtained the extension of time and given the bond required therefor, continued to prosecute the work of removal of the building and the performance of the various items in connection therewith enumerated in the contract; that after a time the walls of the building were removed, and the work of blasting and removing the concrete foundation was begun; that it was then discovered for the first time that the concrete mass or slab under the outer walls and inner walls and pillars, and under that portion occupied by the electric light plant, the boiler and engine room, and other places occupied by heavy machinery, had a thickness of from 7 to 12 feet, and contained an excess of about 14,500 cubic yards over what would be contained in the dimensions furnished by the government under the subject *Foundations*. This testimony was likewise excluded by the court, and exceptions taken. It was further offered to be proved that the wrecking company continued to prosecute the work of its removal, notwithstanding the fact that it was apparent the work could not be completed within the period of the extension; that after April 1, 1897, which was the expiration of the extension period, the wrecking company continued the work of removal with the full knowledge and acquiescence of the government, and completed the work about the 14th day of June, 1897; that the quantity of extra material so removed from this cement foundation was about 15,500 cubic yards, and the extra cost of its removal was about \$16,500; that during all of this time, from the 1st day of April until the 14th day of June, the government permitted the wrecking company to go on expending large sums of money to remove this extra concrete and finish the work, accepted the results, and received the benefits thereof. This offer the court also excluded upon objection by counsel for defendant in error, and exceptions were duly taken. Testimony was also offered to show that, but for this extra thickness in the concrete foundation, the work would have been completed by April 1, 1897; but this, too, was excluded. It was further offered to be shown by the witness James C. Rankin, who was the supervising architect for the United States government in the original erection and construction of this building in the years 1868, 1869, 1870, and 1871, that the original plans and specifications of this building contemplated

making the concrete foundations about 4 feet thick, but that various local conditions necessitated making it much thicker. The same testimony was offered by the witness Garnsey, an architect who was associated with the architect Rankin in the erection of the building; also that the concrete under the columns and outer walls was in excess of 7 feet in thickness; that later on concrete pieces, or buttresses, were put down on the outside of the walls to strengthen them; that these pieces were put down 12 feet below the surface in many places, and the thickness of the concrete under the outer walls and pillars was as much as 9 feet in thickness. All of which testimony the court excluded. The court also refused to permit plaintiffs in error to show that they were delayed in the completion of the work by reason of the conduct of the city authorities in withholding permission to do the necessary blasting to remove the concrete foundation, and that they were also delayed by the officers and agents of the government, who refused them permission to remove the granite flagging and sidewalk at the proper time in the progress of the work. All the rulings of the court were made upon the theory that the bond sued upon was a bond for liquidated damages, and that the amount thereof became due as a debt upon the failure to fully complete the work by April 1, 1897. The action was defended on the theory that the bond, notwithstanding the recitals on its face, was in fact and in law a penal bond, and that, under § 961 of the Revised Statutes of the United States, the recovery must be limited to such sum "as is due according to equity." The court said: "It is a matter of law here. I passed upon all the points you suggested. There is no use wasting any more time,"—and, after refusing the instructions requested by plaintiffs in error, directed the jury to find against them "for the total sum of \$20,000" and "to assess the damages at the sum of \$20,000" which was accordingly done; and the court, after overruling a motion for a new trial, entered judgment upon the verdict.

Argued before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

Messrs. Charles H. Aldrich and John B. Brady for plaintiffs in error.

Mr. S. H. Bethes, for defendant in error:

This is not a penal bond. It was given for liquidated damages. The damages were uncertain and indefinite, and it is and was impossible to determine what the damages are and were.

1 Sutherland, Damages, 2d ed. §§ 285, 290-293; 1 Sedgw. Damages, 8th ed. §§ 405-407, 416, 419; *Hennessey v. Metzger*, 152 Ill. 514, 38 N. E. 1058; *Burk v. Dunn*, 55 Ill. App. 20; *Harris v. Miller*, 6 Sawy. 319, 11 Fed. 122; *Texas & St. L. R. Co. v. Rust*, 19 Fed. 241; *Lynde v. Thompson*, 2 Allen, 456; *Hall v. Crowley*, 5 Allen, 304, 81 Am. Dec. 745; *Wolf v. Des Moines & Ft. D. R. Co.* 64 Iowa, 380, 20 N. W. 481; *Geiger v. Western Maryland R. Co.* 41 Md. 4; *Clark v. Barnard*,

108 U. S. 456, 27 L. ed. 787, 2 Sup. Ct. Rep. 873.

This principle applies in cases of public buildings and works where a public policy or interest supervenes.

*Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; 5 Decisions Comptroller of Currency, 1898, 1899, p. 315; *Malone v. Philadelphia*, 147 Pa. 416, 23 Atl. 628.

There was not, and could not be, part performance within the time, and completion of the work after the time, with the acquiescence of the defendant in error, the United States. The government was not, and could not be estopped by the acquiescence of its officers, even if there was a completion of the work at any time.

*Taylor v. Marcella*, 1 Woods, 302, Fed. Cas. No. 13,797; *Mechem*, Pub. Off. §§ 828, 830, 837, 838.

*On petition for rehearing.*

Damages provided for in this kind of a case under this bond were properly to be considered liquidated damages because they were indefinite and uncertain, and because a public interest or policy supervened.

*Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Malone v. Philadelphia*, 147 Pa. 416, 23 Atl. 628; 5 Decisions Comptroller of Currency, 1898, 1899, p. 315.

The case at bar is clearly distinguished from *East Moline Co. v. Weir Plow Co.* 37 C. C. A. 62, 95 Fed. 250. In the case at bar, public interest or policy supervened. The case of *East Moline Co. v. Weir Plow Co.* was not such a case. That was a case between corporations. In it there was a number of stipulations to be performed of varying degrees of importance, for the breach of some of which the damages were readily ascertainable, while in the case at bar there was but one stipulation to be performed, and that was that the work should be completed on May 20, 1897.

**Bunn**, District Judge, delivered the opinion of the court:

We think it was error to direct a verdict for the full amount of \$20,000, the amount named in the bond, without requiring evidence of actual damages sustained. Such a claim would seem to savor more of the pound of flesh and "due and forfeit of my bond" rule than of the spirit of modern equity. Unless it be clear that the case is one where it would be difficult or impossible to assess the actual damages from testimony given, the court should construe the amount named in the bond or contract as a penalty, although the parties have chosen to call it "stipulated damages." It is a general rule that, where the contract provides for the payment of a large sum of money upon the failure of the party to pay a smaller sum, the amount named as damages will be construed as a penalty, although called "stipulated damages." This is not because the contract to pay money is essentially different from a contract to perform work or labor or to do any other thing, but because the

actual damages are capable of assessment; and the rule is just the same in all cases where the actual damages can be assessed from testimony. The parties cannot, by calling the sum mentioned "stipulated damages," change what is essentially a penalty intended to secure the performance of the contract into damages, to take the place of the damages actually sustained.

The Revised Statutes of the United States (§ 961) provide: "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

This rule Congress has provided for the guidance of the Federal courts in all cases where it is applicable. It is just, benign, and equitable, while the rule which the court has applied in the case at bar seems harsh, inequitable, and quite unnecessary. Aside from the above statute, which defines the attitude of the government towards these cases, and prescribes the rule it is willing to abide by, we think, under the more recent adjudications of the courts, both in this country and in England, the \$20,000 mentioned in the bond in this case should be construed as a penalty, rather than as stipulated damages to be recovered upon any slight breach of the contract, when nominal damages or small actual damages to be assessed by the jury would satisfy the conditions more justly and equitably. If the parties could at will change what is essentially a penalty, and properly intended to enforce the obligations of the contract, into stipulated damages, it could be done in any case, although the damages might be either nominal or easily assessable. Take the case at bar. When found that the work of removal could not be completed by the time named, the parties entered into an agreement extending the time several months, to April 1st. At the time of giving the bond in suit, and when the time was thus extended, the work of removal had not reached the cement bed or foundation upon which the whole building rested, and which has been the prime obstacle to the performance of the job. When this cement foundation was reached it was found, or at least it was so alleged, to be much thicker,—more than twice as thick in places as the government proposals and schedules had given out. This, it was claimed, caused great delay and an extra expense of some \$16,500. Can it be just, or really supposed to have entered into the contemplation of the parties, that under such circumstances, arising, probably, without any expectation or anticipation of either party, if the completion of the work was delayed for a single hour or day beyond the 1st of April, that the wrecking company should pay the sum of \$20,000? Or if the work were completed by the time

named, except a few yards of excavation in the cement foundation, or the clearing away of a little rubbish, which could be accomplished in a few hours or days, and the expense easily estimated, that the like punishment should follow? Such a rule, if supported by law, certainly does not seem to comport with the more benign and beneficent rule of the statute above quoted, or the plain principles of equity and fair dealing. According to the construction placed upon the contract, the same measure of damages would apply if the wrecking company required one day or six months beyond the time fixed to complete the work. Such considerations, we think, go to show that the amount named should be construed as a penalty. There is no complaint that the wrecking company did not complete the job. The only complaint is that it ran a little beyond the time fixed. Saying nothing about the claimed right of the company to recover of the government the extra expense of \$16,500 incurred in the removal of the cement foundation, is there anything unreasonable in the claim, in case it be true that there was this difference between the actual facts in regard to the thickness of the cement and the representations in the government schedules upon which the bid was made, that this would form a reasonable excuse for not completing the work by the very day named in the contract? Or suppose it be true, as claimed, that the company was hindered and delayed in the work by the action of the government officers having the matter in charge; is there anything unreasonable in the claim that this would form a good excuse for delay? A similar question has recently twice been before this court, particularly in *East Moline Co. v. Weir Plow Co.* 37 C. C. A. 62, 95 Fed. 250, where the question was gone into more or less exhaustively, and the decisions reviewed. That case grew out of a contract for the removal of the plow company's factory from Monmouth, Illinois, to a point near Port Byron Junction, where the plaintiff company owned real estate it desired to enhance in value and to place upon the market. The contract contained various stipulations of varying degrees of importance, with this provision as to damages: "It is hereby mutually agreed by and between the parties hereto that the measure of damages for the default of either party to carry out this agreement shall be \$50,000, less such sums as may have been paid by either party to the other."

The plaintiff sought to recover the \$50,000 as stipulated damages, and the defendant made the same claim against the plaintiff, by way of counterclaim. No proof of damages was offered by either party, and the court held that neither party could recover the \$50,000, which the court construed as a penalty. The opinion in that case will obviate the necessity of any very extended review of the authorities in the case at bar. Still, a brief reference to some of the leading adjudications contained in the brief for plaintiff in error may not be inappropriate.

In *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 53 L. R. A.

25 U. S. App. 134, 65 Fed. 794, it was provided in the contract that "the sum of \$5,000 is now hereby estimated, assessed, and accepted between the parties hereto as liquidated damages to be paid by the parties of the second part unto the party of the first part, which the parties of the second part hereby declare to be due, and promise and bind themselves to pay unto said party of the first part, or to its assigns, immediately upon the termination or annulment, or declaration of the termination or annulment, of this contract by the party of the first part for any of the causes or reasons herein set out."

Upon this clause in the contract the court says: "Is this sum of \$5,000 inserted as a penalty or as liquidated damages? 'Upon this subject,' says Judge Deady in *Harris v. Miller*, 6 Sawy. 319, 11 Fed. 118, 'the law is peculiar, and, instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.' In a note to *Spencer v. Tilden*, 5 Cow. 144, it is said: 'This doctrine which converts damages apparently stipulated or fixed by the parties into a penalty came from the civil law through the court of chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, courts must disregard the particular expressions of the parties; for the moment we agree that a party may, by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specified default, secure the whole to himself, without regard to the real damages, we bring back the oppressive rule of the common law. The gripping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh unless the courts interfere in all cases, and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape, or upon whatever footing, if it be in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal.' The rule laid down in *Barton v. Glover*, Holt, N. P. 43, 45, is: When a sum of money, whether in the name of a penalty or otherwise, is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed or contract, and the penalty as accessory, and therefore only to secure the damages really incurred.' The fact that the parties speak of it as liquidated damages is not conclusive. *Lampman v. Cochran*, 16 N. Y. 275. . . . 'The subject-matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed to. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the



term "liquidated damages" will not prevent the court from inquiring into the actual injury sustained, and doing justice between the parties." 2 Sedgw. Damages, 7th ed. p. 399; Pom. Eq. Jur. § 433."

In the case of *Bignall v. Gould*, 119 U. S. 495, 30 L. ed. 491, 7 Sup. Ct. Rep. 294, the language of the bond sued upon was, "in the penal sum of \$10,000, liquidated damages." Justice Gray, in delivering the opinion of the court, said: "By the rules now established, at law as well as in equity, the sum of \$10,000, named in this bond, is a penalty only, and not liquidated damages. As observed by Lord Tenterden in a similar case: 'Whoever framed this agreement does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages, for the sum in question is described in the same sentence as a penal sum and as liquidated damages.' *Davies v. Penton*, 6 Barn. & C. 216, 222, 9 Dow. & R. 369, 376."

The subject of liquidated damages is fully and exhaustively considered, and what we consider the true rule laid down, in 19 Cent. L. J. 284, as follows: "But if the court, after a thorough inspection of the contract in all its provisions, and consideration of its subject-matter, and all its surrounding circumstances, the ease or difficulty of measuring the breach in damages, the situation of the parties, and the usages to which they may be understood to refer, from the whole, decide that equity and good conscience require that such sum shall be treated, not as liquidated damages, but as a penalty provided to secure the due performance of the act, and therefore subject to the chancery powers of equity courts, or the statutory powers of common-law courts, they will betray no hesitation in doing so," citing *Peine v. Weber*, 47 Ill. 43; *Low v. Nolte*, 16 Ill. 475, 477; *Rahn v. Horstman*, 12 Bush, 249; *Foley v. McKeegan*, 4 Iowa, 1, 86 Am. Dec. 107; *Williams v. Green*, 14 Ark. 315, 321; *Durinel v. Brown*, 54 Me. 468, 471; *Bearden v. Smith*, 11 Rich. L. 554, 556; *Grasselli v. Louden*, 11 Ohio St. 349, 361; *Reynolds v. Bridge*, 6 El. & Bl. 545; *McPhee v. Wilson*, 25 U. C. Q. B. 169, 172; *Magee v. Lavell*, L. R. 9 C. P. 107, 115; *Beale v. Hayes*, 5 Sand. 640; *Hoag v. McGinnis*, 22 Wend. 163, 165; *Gillis v. Hall*, 7 Phila. 422, 2 Brewst. (Pa.) 342; *Perkins v. Lyman*, 11 Mass. 76, 81, 6 Am. Dec. 158; *Hodges v. King*, 7 Met. 583; *Dakin v. Williams*, 22 Wend. 201; *Chamberlain v. Bagley*, 11 N. H. 234; *Hosmer v. True*, 19 Barb. 106; *Strecker v. Williams*, 48 Pa. 450; *Curry v. Larer*, 7 Pa. 470, 49 Am. Dec. 486; *Cushing v. Drew*, 97 Mass. 445; *Lindsay v. Anesley*, 28 N. C. (6 Ired. L.) 186; *Hamaker v. Schroers*, 49 Mo. 406; *Hise v. Foster*, 17 Iowa, 23; *Bigony v. Tyson*, 75 Pa. 157; *Colwell v. Foulks*, 36 How. Pr. 306, 320; *Fisk v. Gray*, 11 Allen, 132; *Wallis v. Carpenter*, 13 Allen, 19; *Lord v. Gaddis*, 9 Iowa, 265.

Again, the author says: "The leading case upon the second branch of the rule just stated is *Kemble v. Farren*, 6 Bing. 141. Though it has been questioned and repudi-

ated by some courts as an attempt to make a contract for the parties in derogation of their own, as an unjustifiable interference with the freedom of action of competent persons, it has withstood all hostile criticism, and the array of cases which have cited it with approval and followed it is a standing voucher for the logic of its decision. An actor made a contract not to play for five seasons with any one but the obligee, and the latter promised to pay the former £3 10s. each night, and some other small expenses. The bond provided that, if either party should violate any of such promises, he should forfeit to the other the sum of £1,000, not by way of penalty, but as and by way of liquidated damages. As a strict adherence to this language would have made the employer liable in the sum of £1,000 for a neglect to pay one single night's stipend, viz. £3 10s., the damages from the nonpayment of which would be too slight for notice, and as there was nothing to indicate that this result was to be excluded, but, on the other hand, the clause covered violations of any and all stipulations, the court came to the conclusion that the intention of the parties, which is the 'pole star' in the construction of all compacts, was not to effect so absurd a result, but merely to provide a penalty as security for the due performance of the various stipulations, and that the words employed were either inserted by mistake, or for purposes of deception and to evade the well-known policy of the law."

In *Wilhelm v. Eaves*, 21 Or. 194, 14 L. R. A. 297, 27 Pac. 1053, there was up for construction a stipulation for the payment of \$200 as "liquidated damages on the breach of any of several promises or agreements which were of varying degrees of importance." The court, in an exhaustive opinion holding this to be penalty, and not for liquidated damages, says: "The decision of the question as to whether a given sum, provided in the contract to be paid on a breach thereof, shall be considered as liquidated damages or a penalty, is often inherently difficult, and there is much apparent conflict in the adjudged cases. The words 'liquidated damages' are not at all conclusive as to the character of the stipulation. Compensation for a breach of a contract is always desirable, and the courts are not bound by the language used by the parties; and, if the construction is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty. *Cushing v. Drew*, 97 Mass. 445. While it is usually said that the intention of the parties, as gathered from the subject-matter of the contract, the language used, and surrounding circumstances, is to govern in cases of this kind, 'such intention,' says Mr. Sutherland, 'under the artificial rules that have been adopted, is determined by very latitudinary construction. To be potential and controlling that a stated sum is liquidated damages, that sum must be fixed as the basis of compensation, and substantially limited to it, for just compensation is recognized as the universal measure of damages not punitive. Parties

may liquidate the amount by previous agreement, but, where a stipulated sum is evidently not based on that principle, the intention to liquidate damages will either be found not to exist, or will be disregarded and the stated sum treated as a penalty.' 1 *Sutherland, Damages*, 480. In *Jaquith v. Hudson*, 5 Mich. 133, *Christiancy, J.*, says: 'The law, following the dictates of equity and natural justice in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained, considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him, by the aid of a court, to extort more. . . . This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties, by express stipulation or any form of language, however clear the intent, to set it aside.' From the confused array of individual cases upon this question there may be deduced certain general rules that are recognized and enforced by the courts, and the apparent conflict in the cases arises rather from the application of these rules to the facts of the individual case than in the principles themselves. One of these rules is that when a contract specifying one certain sum as liquidated damages contains various stipulations of different degrees of importance, and the damages from a breach of some of which would be easily ascertainable, though the remainder might belong to that class which justifies such arrangement as to damages, and by the terms of the contract such sum would be payable equally on the failure to perform the least as of that to perform the most important, or equally on the failure to perform that one the damage from the violation of which would be easily ascertainable as to that from the breach of which the loss would be difficult of ascertainment, the stipulated sum will be regarded as a penalty, and not liquidated damages, though the language of the parties be the strongest which could be employed to evince a contrary intent,"—citing *Kemble v. Farren*, 6 Bing. 141; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *Lampman v. Cochran*, 16 N. Y. 275; *Daily v. Litchfield*, 10 Mich. 29; *Cheddick v. Marsh*, 21 N. J. L. 463; *Trower v. Elder*, 77 Ill. 452; *Lyman v. Babcock*, 40 Wis. 503; *Niver v. Rossmann*, 18 Barb. 50; 3 *Parsons, Contr.* 161; 2 *Pom. Eq. Jur.* § 443; 1 *Sutherland, Damages*, 521; 19 *Cent. L. J.* 282,—where the authorities are fully collated.

In *Beale v. Hayes*, 5 Sandf. 640, Judge Duer, delivering the opinion of the court, says: "It is not always, however, that damages are to be construed as liquidated because the parties have declared them to be so. The language of the parties to this agreement is clear and emphatic that the sum of £3,000 shall be recoverable from the party making default, as and for liquidated damages; yet no court of justice, without an entire disregard of prior decisions, can give effect to the apparent intentions of the 53 L. R. A.

parties by adopting that construction of their agreement which the terms they have used so forcibly suggest. . . . When consequences so unreasonable would follow, the law presumes that they must have been overlooked by the parties, and therefore mercifully gives to their language an interpretation which excludes them. When it would be plainly unconscientious to exact a large sum for a trivial breach, even a court of law, acting upon a principle of equity, will release the parties from the literal obligation which their language imports."

In *Sutherland on Damages* [2d ed.] p. 601, the author, in speaking of these building contracts, says: "In a building contract containing the usual clauses fixing the days for completing the various parts of the work, a stipulation to the effect that any neglect to comply with the conditions of the contract and finish the work as provided should entitle the employer to claim damages at the rate of \$10 per day for every day's detention so caused was held a covenant for stipulated damages. The more recent authorities, however, are to the effect that the damages ordinarily resulting from the failure to fulfil a building contract which contains only the usual conditions are not so uncertain as to be the subjects for such stipulations."

One of the leading English cases upon this subject is that of *Re Neuman*, L. R. 4 Ch. Div. 724. The case grew out of a contract for the erection of certain buildings, which provided that they should be completed by the 25th day of December, 1875: the language of the contract on this point being: "The said works to be finished, completed, and delivered up, cleared of all scaffolding, rubbish, and other impediments, on or before the 25th of December, 1875, and in default thereof the said contractors shall forfeit and pay to the said governors the sum of £10 per week for every week after that date during which the said work shall remain unfinished and not delivered up."

The works were commenced by the contractors, and were carried on by them until the 5th of November, 1875, when they failed. On the 3d of February following, the governors entered into a contract with the sureties of the contractors for the completion of the buildings on their own account, which contract contained a stipulation that nothing therein contained should prejudice the remedy of the governors under the prior agreement and bond. The works were ultimately completed by the sureties, but not until September, 1876. In February, 1876, the governors tendered proof against the estate of the contractors for the sum of £1,000 as liquidated damages for the breach of the contract. The affidavit of proof made did not allege any particular damage, and the trustees rejected the claim against the estate on the ground that it was not shown that any damage had been sustained by the non-performance of the contract. Application being made by the governors of the county court, the judge affirmed the decision of the trustees on the ground that the final clause was intended only to fix a penalty for the

nonperformance of the contract. The governors appealed to the chief judge. Bacon, Ch. J., upon an appeal, reversed the judgment of the county court, saying: "The provisions of this contract are so plain that, however it may have been in other cases which have been mentioned, it would be very difficult to give any other meaning to them than that which they bear on their face. . . . Here it was of the substance—the very essence—of the contract that the buildings should be completed by the 25th of December. In November the trustees had the option of saying that they would or would not complete the contract, and they went on with it up to a certain time, when they repudiated it. The meaning of the clause, if it means anything at all, is that the penalty of £1,000 has been incurred. I cannot alter the contract; I cannot find any circumstances to induce me to say, or to justify me in saying, that in the events which have happened a less sum than £1,000 should be paid. If I were to say that, I should be obliged to ask myself how much less than £1,000 ought to be paid. What means have I of ascertaining that? It has not been suggested that there are any particulars of the amount of damage which has been incurred, and I do not know that anybody is in a position to furnish them. But I say that, if the contention of the trustees were right, I should be puzzled greatly in either finding, or directing any other tribunal to find, the amount of the specific damage which has been sustained. The order is wrong, and the appeal must succeed. The appellants must have their costs of the hearing in the court below and of the appeal." From this decision the trustees appealed. Upon this final appeal the opinion of Chief Justice Bacon was reversed by the concurring opinions of all the justices, from which we quote as follows: "James, L. J.: I am of opinion that this case is clearly within those which have been referred to by Mr. Bagshawe. The authority of *Kemble v. Farren* cannot be considered as having been in any degree nibbled away by those cases before Lord Wensleydale which have been referred to, and which it is said show that the principle of *Kemble v. Farren* is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble v. Farren*, in which it was laid down in broad terms that wherever there is a sum mentioned at the end of a contract as damages for the nonperformance of any of a great number of stipulations, there it must be treated as a penalty. The law is, I think, stated in a very satisfactory way in a case which was referred to in the argument of *Kemble v. Farren*. I mean *Astley v. Weston*, 2 Bos. & P. 346, 353, in which Mr. Justice Heath said: 'Where articles contain covenants for the performance of several

things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages.' Baggallay, J. A.: I am of the same opinion. I will only add that the principle upon which *Kemble v. Farren* was decided was commented upon by Lord Westbury in the case of *Thompson v. Hudson*, L. R. 4 H. L. 1, in these terms: 'If the sum described as liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the large sum named never could have been meant to be the real measure of damages. It was an oppressive agreement. The sum named never could have been the proper amount of damages arising upon the nonobservance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, and therefore the very large sum stated to be damages was properly regarded as in the nature of a penalty.' If further authority is wanted for the decision at which we have arrived in this case, I think it is found in the words used by Lord Coleridge in *Magee v. Lavell*, L. R. 9 C. P. 107, which appear exactly applicable to the present case. Bramwell, J. A., says: I am entirely of the same opinion. I do not wish to quote anything I have said as an authority, and I do not wish to repeat it. Therefore, instead of repeating it, I will simply say that I abide by everything I said in *Betts v. Burch*, 4 Hurlst. & N. 506. It has been argued that in *Galsworthy v. Strutt*, 1 Exch. 659, and the other cases referred to by Mr. De Gex, we have the authority of Lord Wensleydale that this £1,000 can be proved against the debtor's estate. If it were a question of bare authority, independently of principle, I should say that we have the rule laid down by Lord Coleridge in *Magee v. Lavell*, L. R. 9 C. P. 107, expressly to the contrary, where he says, p. 115: 'If we look to the nature of the contract in the present case, it will be seen that it involves several events of various degrees of importance; and therefore, according to the general principle governing such cases, the sum mentioned must be considered as a penalty, and not liquidated damages.' . . . I am of opinion that this appeal must be allowed. I may add that I cannot think there can be any difficulty in assessing the damages."

We are of opinion that the case at bar comes fairly within the spirit and meaning of these adjudications.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to grant a new trial.

Rehearing denied.

## GEORGIA SUPREME COURT.

A. T. SMALL *et al.*, *Plffs. in Err.*,  
v.

Dora SLOCUMB *et al.*, Substituted Defendants.

(112 Ga. 279.)

- \*1. The vendor of land who retains title thereto for the purpose of securing the payment of the purchase money cannot by injunction prevent the vendee from clearing the land and cutting the timber thereon, unless such acts impair the value of the vendor's security.
2. The evidence being conflicting upon this point, this court will not interfere with the discretion of the trial judge in finding that the value of the vendor's security was not lessened by the acts of the vendee.
3. Congress has power to levy and collect taxes by requiring revenue stamps to be placed upon certain written instruments, and has power to prescribe a punishment for failure or refusal to comply with that requirement, and to provide that such instruments shall not, unless stamped, be admissible as evidence in the Federal courts. It has, however, no power to prescribe rules of evidence for a state court, and therefore the act of Congress which declares that certain written instruments shall not be received in evidence in any court until stamped as required by the act is to be understood as applicable to the Federal courts only.

(November 27, 1900.)

**E**RROR to the Superior Court for Jones County to review a judgment denying an injunction to restrain defendants from cutting timber on certain land. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Dessau, Harris, & Harris* for plaintiffs in error.

*Messrs. George S. Jones, Hardeman, Davis, & Turner, and Hardeman & Moore* for defendants in error.

**Simmons**, Ch. J., delivered the opinion of the court:

It appears from the record that Small and Lowe brought an action of ejectment against Mrs. Pottle. On October 17, 1898, a consent decree was entered into by the parties, whereby the plaintiffs were recognized as the owners of the land, and wherein it was provided that Mrs. Pottle should have the right to redeem the land by paying to the plaintiffs, within five years from the date of the decree, the sum of \$6,100, principal, with interest thereon at 8 per cent

per annum to the time of payment; the interest being payable annually. The details of this consent decree need not be mentioned here, save to say that it contained the following clause: "It being the purpose of this agreement that said decree shall operate as a bond for title from the plaintiffs to the defendant, the plaintiffs having agreed to sell said property to the defendant under the terms herein above set forth." On October 19, 1899, Mrs. Pottle executed a lease to the land to Mrs. Slocumb for the period of ten years, commencing January 1, 1900. By this lease Mrs. Slocumb bound herself to pay a rental of \$658 *per annum*, out of which was to be paid to Small and Lowe a sum sufficient to cover the interest annually becoming due to them from Mrs. Pottle. Mrs. Slocumb was by this lease given the privilege of paying off the principal debt of \$6,100 and taking the rights of Small and Lowe in the premises, except that Mrs. Pottle should have the right to redeem the land at the expiration of the lease, and not before. Mrs. Slocumb undertook, by the terms of the lease, to build tenant houses on the place, and was given the privilege and right of cutting and sawing the timber except on certain specified portions of the land, for the purpose of sale or otherwise. Mrs. Slocumb entered upon the place, and was proceeding to cut some of the timber and clear up a part of the land, when Small and certain persons who claimed under Lowe filed against Mrs. Slocumb and her husband and the administrator of Mrs. Pottle a petition for injunction on the ground that the defendants were committing waste, and that the cutting of the timber would depreciate the plaintiff's security. Both plaintiffs and defendants read before the trial judge a great many affidavits on the question as to whether there had been any waste or any depreciation of the value of the property, and as to whether any such waste or depreciation would result from the acts sought to be enjoined. It is unnecessary to set out these affidavits, either literally or in substance, further than to say that they were conflicting, and that the judge was authorized by the evidence before him to find either that the acts complained of would depreciate the value of the property, or that they would result in an increase in its value. He refused the injunction, and the plaintiffs excepted.

1, 2. Under the consent decree above mentioned, the relation of vendor and vendee was established between the creditors and Mrs. Pottle. The results were the same as though the former had sold the land to the latter, reserving title in themselves to secure the payment of the purchase money, and giving bond for titles, binding them to convey when the purchase money, with the agreed interest thereon, was paid. They sustained the same relation to each other, on the question of security, as mortgagee and mortgagor. *Moses Bros. v. Johnson*, 88

\*Headnotes by **SIMMONS**, Ch. J.

**NOTE.**—As to want of internal revenue stamp on instrument requiring stamp, as affecting criminal prosecution, see *Thomas v. State* (Tex. Crim. App.) 46 L. R. A. 454, and *note*.

For effect of omission to stamp an instrument on which the law requires a stamp, or to cancel stamp on such instrument, see *Knox v. Rossi* (Nev.) 48 L. R. A. 305, and *note*; *Wingert v. Zeigler* (Md.) 51 L. R. A. 316; and *Southern Ins. Co. v. Estes* (Tenn.) 52 L. R. A. 915. 53 L. R. A.

Ala. 517, 7 So. 146. Mrs. Pottle had the right to transfer her bond for titles to Mrs. Slocumb, or to lease the land to her for a term of years. Mrs. Slocumb, as to the use of the land during this lease, stood in the shoes of Mrs. Pottle. Practically the only real interest that the plaintiffs had in the land was its value to them as security for the payment of the purchase money. When that is paid, then, under the decree, they will be compelled to make title to Mrs. Pottle, her personal representative or assigns. If Mrs. Pottle or Mrs. Slocumb do not by their acts lessen the value of the land in such manner as to make it insufficient fully to secure the plaintiffs, we think the latter cannot complain. Certainly they cannot complain if the value of the land is not at all impaired, or if it will be worth more cleared than before the timber was cut. To cut timber and clear land so as to make arable what was before woodland is not, in this state, waste, unless the value of the land is thereby impaired. The judge found, on sufficient evidence, that the value of the land here involved would not be lessened by the acts complained of, and we cannot say that he erred in so finding, nor interfere with his discretion in refusing the injunction sought by the plaintiffs.

3. On the trial of the case the defendants tendered in evidence the lease executed to Mrs. Slocumb by Mrs. Pottle. This was objected to by the plaintiffs on the ground that it had not been stamped as required by the internal revenue act of Congress of 1808. It appeared that the lease had no stamp upon it. The judge overruled the objection, and admitted the lease in evidence. The plaintiffs excepted, and assigned this ruling as error. We fully recognize the power of Congress to levy and collect taxes for the support of the government. We fully recognize its power to do this by the imposition of stamp duties, and to prescribe penalties for their nonpayment. We also recognize its power to regulate the practice and procedure and to provide rules of evidence in courts established under the Constitution of the United States. After much reflection, and a careful and thorough investigation of cases in the courts of other states, we have come to the conclusion, however, that Congress has no power to prescribe rules of evidence for a state court. Under our system of government, the states retained all powers of sovereignty which were not granted to the general government by the Constitution. They had the power to create and establish their own courts, and to regulate the practice and procedure and to prescribe rules of evidence therein. There is nothing in the Constitution of the United States which expressly or by implication gives to Congress the power to prescribe rules of evidence for the courts of the states. Of course, Congress, having the power to impose stamp duties, has the power to provide for the enforcement of their payment by any necessary and proper means. But while to make unstamped instruments inadmissible in evidence in state courts would doubtless aid in

compelling the payment of the tax, we think that such a method of collection is neither necessary nor proper, and is therefore not within the power of Congress. The act of 1808 subjects to a penalty anyone who fails or refuses to comply with the provisions as to stamping written instruments, and the Federal courts have ample machinery for the enforcement of this penalty. No other method of enforcement would seem to be necessary, but, even if it were, Congress has power to provide that no unstamped instrument shall be received in evidence in any of the Federal courts. An attempt to extend this provision so as to make it applicable to the courts of the several states cannot, therefore, be defended upon the ground that it is necessary. Nor do we think it a proper means of enforcing the stamp act to interfere with courts peculiarly within the control of the several states, by declaring what shall or shall not be used as evidence in them, or to seek to make the state courts punish a failure to comply with the Federal stamp act, by refusing to allow unstamped documents to be used as evidence in them.

This, however, is no new question. It has been dealt with by the courts of many of the states. We have searched diligently in the Reports of the decisions of the various state courts, and have found but one state court of last resort which has made and adhered to a decision that Congress had the right to prescribe that an unstamped instrument should not be received in evidence in a state court. This was in the case of *Charliers & R. Turnp. Co. v. McNamara*, 72 Pa. 278, 13 Am. Rep. 673, dealing with an act of Congress which provided that certain written instruments should not be received or used as evidence in any court until properly stamped. Even in that case the court did not hold generally that Congress could prescribe rules of evidence for state courts, but that it had power to provide, as it was said to have done in the act then under discussion, for "a disqualification attached to the [unstamped] document, making it incompetent to fulfil its purpose as an instrument of evidence until the stamp duty is paid." We must confess that we are unable to see the distinction thus sought to be drawn. The instrument may be perfectly legal and admissible in evidence in the state court, and yet, if it lacks the revenue stamp, Congress can say to the state court, "This instrument is disqualified, is incompetent to fulfil its purpose as an instrument of evidence, and must not be admitted or received in evidence by you;" and this, according to the case just cited, would not be prescribing a rule of evidence for the state court. Two of the five justices (Thompson, Ch. J., and Sharswood, J.) dissented. Nor are the reasons given for this decision at all satisfactory to our minds. It is based on the supposed necessity for such a provision in order to enforce the stamp tax, and we think that no necessity therefor existed. All other state courts which have dealt directly with this question hold, so far as we have been able to ascertain, either that Congress has

no power to enact that certain documents shall be incompetent as evidence in a state court, or else, without deciding what power Congress has in the matter, that the act of Congress does not apply to the state courts, but to the Federal courts only. Most of those decisions were made in cases arising under the acts of 1864, 1865, and 1866, but the act of 1898 is, with respect to the questions here discussed, substantially a copy of the former acts, and the reasoning of those decisions is in every way applicable here. In the cases of *Clemens v. Conrad*, 19 Mich. 170, and *Sammons v. Holloway*, 21 Mich. 162, 4 A<sup>m.</sup> Rep. 465, Judge Cooley, the great expounder of constitutional law in this country, shows by his reasoning that Congress has no power to prescribe such a rule of evidence for state courts, and that the act should therefore be construed as intended to apply to Federal courts only. In the former case he said in part: "To make an instrument inadmissible in evidence because not sufficiently stamped is, however, quite a different thing from imposing penalties for a breach of the revenue laws. The latter punishes the guilty party, or compels him to perform his duty to the government; the former imposes what may be sometimes equivalent to a forfeiture of rights upon any party, guilty or innocent, who chances to be so circumstanced that he cannot make a showing of his rights in court without the production of the unstamped instrument.

. . . A law so highly penal, it is to be presumed, has been so framed as clearly to point out all the cases to which it was designed to apply, so as to leave nothing to inference. It attempting properly to construe it, it is proper to bear in mind the position of the body which enacted it relatively to the different legal tribunals of the country. Congress creates the courts which operate within the sphere of Federal sovereignty and administer the judicial power conferred by the Constitution of the United States. For them it prescribes rules of evidence, and may establish a course of practice. It has no such general power as regards the state courts. Those courts have another origin, and their rules of evidence and courses of proceeding are prescribed by a different legislative body. Waiving in the present case any discussion of the question whether the state courts are not agencies of state government which are beyond the sphere of the taxing power of the nation, and fully at liberty to investigate in their own modes, under the laws of the state, the questions of fact which are put in issue before them, we think it a just and reasonable interpretation of the law of Congress that the courts which are precluded from receiving unstamped instruments in evidence are only the Federal courts. . . . We think that a rule of evidence laid down in general terms is to be understood as applicable to those courts only for which the legislature prescribing it has general power to make rules, and not to other courts, not expressly named, over which it has no such general power, and with whose proceedings it could interfere, if 53 L. R. A.

at all, only in exceptional cases." See also Cooley, Const. Lim. 6th ed. p. 592, and note. In the case of *Latham v. Smith*, 45 Ill. 29, it was decided (Mr. Chief Justice Breese delivering the opinion) that "no power exists in the Congress to declare by law what shall or shall not be evidence in a state court." And in the case of *Craig v. Dimock*, 47 Ill. 308, the same eminent jurist said: "To hold that Congress, in the exercise of the taxing power, can enter into these [state] courts and prescribe what shall be evidence therein, is so revolting to all our notions of Federal and state power as to compel us to refuse to yield any acquiescence in such a doctrine. By admitting it, the power and sovereignty of the states over legitimate subjects of state power and sovereignty are at once annihilated. We will not deny the power of Congress to require such instruments to be stamped, nor the consequent power to punish by fine an intentional evasion of the law. By conceding this, we yield all that is necessary to enable the government to carry into full effect the taxing power, and at the same time sustain and uphold in its utmost limit the exclusive power of the state to say what shall be evidence in her own courts of justice in a domestic transaction, wholly unconnected in every respect with the general government. It is not questioned that the Congress has power to prescribe rules of evidence, and specify what shall be instruments of evidence in the Federal courts, but is powerless to prescribe them for the state tribunals, as we think. Since the act, then, does not in terms prescribe such rules to state courts, we must conclude that the provisions of the act were only intended to apply to the Federal tribunals. We will not, by implication, hold that the intention of the Congress was to invade the jurisdiction of the states in the administration of justice between their citizens."

These rulings were followed in the cases of *Bunker v. Green*, 48 Ill. 243; *United States Exp. Co. v. Haines*, 48 Ill. 248; *Hanford v. Obrecht*, 49 Ill. 146; and *Bowen v. Byrne*, 55 Ill. 407. In the case of *Wallace v. Cravens*, 34 Ind. 534, it was held: "The Congress of the United States cannot control the rights of parties in the introduction or the weight of evidence in a state court, in a case which arises purely under the laws of the state, and is properly before such court, against the laws of the state." In the case of *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617, it was said: "The act, however, does not in terms extend to proceedings had under the laws of the state, and does not, on its face, import any interference with those laws. Upon the settled rules of interpretation, it must be construed to embrace only proceedings had and acts done in public offices and courts established under the Constitution of the United States, and by authority of acts of Congress framed in pursuance thereof. But if the act of Congress under consideration had in terms embraced the state courts within its provisions, and had enacted that upon a trial in one of those courts a contract or other in-

strument of evidence, otherwise admissible, should not be admitted in evidence except upon compliance with its provisions, it would be our duty to declare its provisions in that respect null and void. Congress has no constitutional authority to legislate concerning the rules of evidence administered in the courts of this state, nor to affix conditions or limitations upon which those rules are to be applied and enforced; nor can it rightfully convert those courts into tax gatherers for the benefit of the Federal government, nor charge them with the duty of inquiring whether or not the revenue laws of the United States have been observed, or of investigating into the motives of parties in omitting to affix revenue stamps to the contracts they may have made." In the case of *Pargoud v. Richardson*, 30 La. Ann. 1286, Manning, Ch. J., delivering the unanimous opinion of the supreme court of Louisiana, said: "Since *Maurin v. Martinez*, 5 Mart. (La.) 436, it has not been doubted that the provisions of the Federal Constitution relative to juries refer only to trials in the Federal courts, and do not apply to the state tribunals. And earlier than then it was held that the amendment to the Federal Constitution which requires the intervention of a grand jury relates only to crimes cognizable by the United States, and to criminal proceedings in its courts. *Territory v. Hattick*, 2 Mart. (La.) 88. When, then, the Congress prohibits a court from receiving in evidence any unstamped note or mortgage, we must assume that it has reference alone to the United States courts, as its prohibition is only obligatory upon them. It is said, however, that nothing is left to inference, since the act of Congress declares that these unstamped instruments are void. . . . It is not needful for us to consider this act in any other aspect than its attempt to impose rules upon the state courts as to the admission of evidence. It is not within the province of Congress to enact rules regulating the competency of evidence upon the trial of causes in a state court. The power to lay taxes is undoubted, but it is not broad enough to include the authority to declare that a written instrument of any kind shall not be received as evidence in a state court unless it is stamped. That is a restriction which appertains alone to the legislative authority of the state. In domestic transactions, in no manner connected with the general government, the state has the exclusive power to establish the rules of evidence in her own courts." This was followed and unqualifiedly approved in the case of *Holt v. Hart's Liquidators*, 33 La. Ann. 673. To the same effect, see *Hunter v. Cobb*, 1 Bush, 239; *Sporrer v. Eifler*, 1 Heisk. 633; *People ex rel. Barbour v. Gates*, 43 N. Y. 40, as explained in *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466; *Bumpass v. Taggart*, 26 Ark. 398, 7 Am. Rep. 623; *More v. Clymer*, 12 Mo. App. 11; *Forcheimer v. Holly*, 14 Fla. 239 (5); *Hale v. Wilkinson*, 21 Gratt. 75; *Craws v. Farmers' Bank*, 31 Gratt. 348; *Davis v. Richardson*, 45 Miss. 499, 7 Am. Rep. 732.

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A number of state courts have held, without passing upon the power of Congress to provide that unstamped instruments shall not be received in evidence in state courts, that the act did not in fact apply to any but Federal courts. See *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Morse*, 97 Mass. 458; *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339; *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Griffin v. Ranney*, 35 Conn. 239; *Haight v. Grist*, 64 N. C. 739; *Weltner v. Riggs*, 3 W. Va. 445. We have also found two cases decided by state courts of last resort since the act of 1898 went into effect. In the case of *Know v. Rossi*, 25 Nev. —, 48 L. R. A. 305, 57 Pac. 179, the supreme court of Nevada held that state courts are not within the provisions of the act of 1898 as to the admissibility of unstamped documents in evidence. Prior decisions of the court, under former acts, apparently holding to the contrary, were explained as having been made without passing directly upon the question of the applicability of the act to state courts. In the recent case of *Cassidy v. St. Germain* (R. I.) 46 Atl. 35, the supreme court of Rhode Island held the act of 1898 to be applicable to Federal courts only, and not to state courts. "According to the note in 48 L. R. A. 306, 'it has been held that the provision of the act of 1898 excluding unstamped instruments from evidence does not apply to the state courts,' in the cases of *Loring v. Chase*, 26 Misc. 318, 56 N. Y. Supp. 312; *People ex rel. Consumers' Brew. Co. v. Fromme*, 35 App. Div. 459, 54 N. Y. Supp. 833; *Gregory v. Hitchcock Pub. Co.* 31 Misc. 173, 63 N. Y. Supp. 975. There are other cases to be found in the Reports where the construction of the acts was under consideration, but where no question was made as to the applicability of the acts of Congress to state courts, or as to the power of Congress in this regard. Among these are the cases of *Green v. Lowry*, 38 Ga. 548; *Alexander v. Lieth*, 39 Ga. 180; *Hoops v. Atkins*, 41 Ga. 109; *Kile v. Johnson*, 48 Ga. 189,—as are also such Alabama, Texas, and Wisconsin cases upon the subject as we have been able to find. These cases are not authority on the question as to whether the stamp act of Congress applies to state courts or only to Federal courts, or as to whether it is within the power of Congress to make such an act applicable to state courts. These questions were not made, and were not decided. Had the questions been raised, the results of those cases might have been entirely different. Those of the cases which decided that an unstamped instrument was inadmissible in evidence only where the failure to stamp was with intent to evade the act were said by Manning, Ch. J., in *Pargoud v. Richardson*, 30 La. Ann. 1286, to hold "not a safe or certain doctrine, . . . but one born of a wish to recognize a doubtful power, and at the same time to restrict it within such limits that its exercise would not impinge the authority of the state." In Colorado the stamp laws were held to be applicable to the Colorado courts, because

Colorado was not a state, but a territory of the United States. For collections of cases upon this and kindred subjects, see *Ash & A. U. S. Int. Rev. Law*, pp. 373 *et seq.*; *Id.* pp. 381 *et seq.*; *Gould & S. War Rev. Laws*, 1898, pp. 31, 43 *et seq.*; *Id.* p. 80; *Gould & T. Notes U. S. Rev. Stat.* p. 695; 7 *Alb. L. J.* 49; notes to *Know v. Rossi* (Nev.) 48 *L. R. A.* 305.

On the whole, we have no hesitation in ruling as we do; for we are satisfied that our ruling is right in principle, and supported by the very decided weight of authority.  
*Judgment affirmed.*

All the Justices concur except **Lewis, J.**, absent.

## INDIANA SUPREME COURT.

### MANUFACTURERS' GAS & OIL COMPANY *et al.*, Appts., v. INDIANA NATURAL GAS & OIL COMPANY.

(.....Ind.....)

The prohibition of the transportation of natural gas out of the state, made by act March 9, 1889, is unconstitutional, because natural gas, when reduced to possession, is a commercial commodity, so that its transportation out of the state is a matter of interstate commerce.

(November 27, 1900.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Grant County in favor of defendant in an action brought to enjoin the transportation of natural gas out of the state. *Affirmed.*

The facts are stated in the opinion.

**Messrs. Warner & Brady and W. A. Ketcham**, for appellants:

Natural gas has been likened by all the courts to game.

Laws prohibiting the transportation of game beyond the limits of the state are not in violation of the interstate commerce provision of the Federal Constitution.

*Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *State v. Northern P. Exp. Co.* 58 Minn. 403, 59 N. W. 1100; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *The Daniel Ball*, 10 Wall. 557, *sub nom. The Daniel Ball v. United States*, 19 L. ed. 999.

In *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was held that where the manufacture of spirituous liquors was prohibited for any other than mechanical, medicinal, culinary, or sacramental purposes, such property could not in that state be the subject of interstate commerce for the purpose of inception, whatever it might be as the subject of interstate commerce if it was inceptioned in a state where it was permitted.

See also *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *State v. Northern P. Exp. Co.*

**NOTE.**—For natural gas as an article of commerce, see, in this series, *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co.* (Ind.) 6 L. R. A. 579, with note as to power of Congress to regulate commerce; also *Jamieson v. Indiana Natural Gas & Oil Co.* (Ind.) 12 L. R. A. 652, and note.  
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58 Minn. 403, 59 N. W. 1100; *Organ v. State*, 50 Ark. 270, 19 S. W. 840; *State v. Harrub*, 95 Ala. 176, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 10 So. 752.

It is therefore necessarily true that there is a species of property that is not the subject of interstate commerce, and not within the provision of the interstate commerce clause of the Constitution.

If the property in natural gas is of the same general character as the property in fish and game, it is not the subject of interstate commerce, and the state has the power to control or forbid its being made the subject of interstate commerce.

**Messrs. M. Winfield, Foster Davis, W. O. Johnson, and Blackledge, Shirley, & Wolf** for appellee.

**Dowling, Ch. J.**, delivered the opinion of the court:

This action was brought to enjoin the appellee from transporting through pipes natural gas from the gas fields described in the complaint, within the state of Indiana, to any point without the state. The complaint is substantially the same as that in *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* (No. 19,263, at the May term) 50 L. R. A. 768, 57 N. E. 912, excepting that it omits the allegation as to the use of artificial processes for the purpose of increasing the natural flow of the gas from the wells, and in that it charges that the appellee is engaged in transporting natural gas by means of pipe lines from the state of Indiana to the city of Chicago, in the state of Illinois. The suit is founded upon the act of March 9, 1889, which contains these provisions:

"Sec. 1. Be it enacted," etc., "that it shall be unlawful for any person, or persons, company, corporation, or voluntary association, to pipe, or conduct natural gas from any point within this state, to any point or place without this state. . . ."

"Sec. 3. That any person, or persons, company, corporation, or voluntary association, or any officer, director, or agent of such corporation, that shall violate any of the provisions of this act, upon conviction thereof shall be deemed guilty of a misdemeanor, and shall be fined in any sum not less than one hundred dollars, or more than one thousand dollars." Acts 1889, pp. 369, 370.

In the absence of legislative restriction, the transportation of natural gas to points



without the state would undoubtedly be legal, and such use and disposition of the article probably could not be interfered with or prevented. The right of the appellants to relief by way of injunction, if it exists at all, must be derived from the statute. But in *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778, this court held the act of March 9, 1889, invalid, for the reason that it affected interstate commerce; natural gas, when reduced to possession, in reservoirs or pipes, being recognized as an article of commerce. The doctrine stated in that case was reasserted in *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76, and it has not since been questioned in any other decision of this court. It is not alleged in the complaint before us that the appellee is appropriating an undue proportion of the common fund or supply of gas, or that it is using any device or artificial means to produce an unnatural flow of gas from its wells, to the injury of the appellants. Neither is it charged that the means adopted by the appellee for transporting the gas are, in any respect, improper, dangerous to life or property, destructive of the common supply, or likely to inflict injury of any kind upon the appellants. The right of the appellee to take gas from its own wells in the manner adopted by it is not denied. Nothing done by the appellee is complained of, excepting only that it removes natural gas out of the state of Indiana. No ground for the exercise of the police power of the state to prevent such removal is shown. Nothing, save the naked right to transport the gas beyond the limits of this state, is contested in this action. The only reason which can be urged in support of the restraint sought to be imposed upon the appellee is that, the supply of natural gas being limited, and the article being one of great value and convenience, its use ought to be reserved for and enjoyed by the people of this state, to the exclusion of the inhabitants of any other state. But, as natural gas, when reduced to possession, is held to be a commercial commodity, its owner cannot lawfully be prevented from carrying it to and selling it in whatever market he may consider most advantageous. It is true that the Supreme Court of the United States has recently held in *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, that a statute prohibiting the transportation of wild game beyond the limits of the state in which it is taken or killed is not in conflict with the Constitution of the United States. But the distinction between animals *feræ naturæ* and natural gas in respect of their ownership before reduction to possession is a very plain one, and has been clearly pointed out in numerous decisions. *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* (at May term) 50 L. R. A. 768, 57 N. E. 912. In the case of wild animals, before they are reduced to possession, the ownership is in the public, and not in any private person; and they 53 L. R. A.

are therefore held to be subject to the protection of the sovereign. The privilege of taking, killing, and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to, or control over, the gas in the ground. On the contrary, so far as it is susceptible of ownership, it belongs to the owners of the superincumbent lands in common, or, at least, such landowners have a limited and qualified ownership in it to the entire exclusion of the public. To the extent that the act of March 9, 1889, attempts to prohibit the owner of natural gas which has been reduced to possession by proper and lawful means from transporting it by safe and reasonable vehicles or conduits out of the state of Indiana, it contravenes the provisions of the Federal Constitution relating to interstate commerce, and is therefore void. No other foundation for the claim of the appellants to relief by way of injunction being disclosed, the complaint must be held insufficient. The demurrer thereto was properly sustained.

*Judgment affirmed.*

George D. HURLEY, Admr., etc., of Charlotte M. Burk, Deceased, Appt.,

v.

George W. EDDINGFIELD.

(.....Ind.....)

No obligation to respond to every call is imposed upon a physician by a state's license to practise medicine, so as to render him liable for arbitrarily refusing to attend a sick person, although no other physician is procurable.

(April 4, 1901.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have resulted from defendant's refusal to attend her professionally as a physician. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Hurley & Van Cleave and Dumont Kennedy* for appellant.

*Messrs. Clodfelter & Fine* for appellee.

**Baker, J.**, delivered the opinion of the court:

The appellant sued appellee for \$10,000 damages for wrongfully causing the death of his intestate. The court sustained appellee's demurrer to the complaint, and this ruling is assigned as error.

The material facts alleged may be summarized thus: At and for years before de-

**NOTE.**—It seems to be conceded in the above case that a physician is not liable at common law for refusing to attend a sick person who demands his services. The above decision seems to be the first direct authority on the question of such liability under statutes regulating the practice of medicine.

cedent's death appellee was a practising physician at Mace, in Montgomery county, duly licensed under the laws of the state. He held himself out to the public as a general practitioner of medicine. He had been decedent's family physician. Decedent became dangerously ill, and sent for appellee. The messenger informed appellee of decedent's violent sickness, tendered him his fee for his services, and stated to him that no other physician was procurable in time, and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee's immediate service, and he could have gone to the relief of decedent if he had been willing to do so. Death ensued, without decedent's fault, and wholly from appellee's wrongful act. The alleged wrongful act was appellee's refusal to enter

into a contract of employment. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to everyone who applied. Wharton, Neg. § 731. The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practising without license. Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventative, not a compulsive, measure. In obtaining the state's license (permission) to practise medicine, the state does not require, and the licensee does not engage, that he will practise at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark.

*Judgment affirmed.*

#### IOWA SUPREME COURT.

STATE TRUST COMPANY, Appt.,

v.

M. P. TURNER.

(111 Iowa, 664.)

1. An owner of stock in a corporation, issued in consideration of a transfer of property the valuation of which was wholly speculative, visionary, and imaginary, is liable to creditors of the corporation for the difference between the value of his stock and the real value of the property.
2. A creditor of a corporation who becomes such with full knowledge as to the payment for stock by property at an excessive valuation cannot claim that the holders of such stock are liable as stockholders for the difference between the actual value of the property and the par value of the stock which was issued for it.
3. An assignee of overdue notes of a corporation cannot hold a stockholder who paid for his stock only by a transfer of property at a grossly excessive valuation liable for the deficiency in payment, where his assignor could not have done so because he became a creditor of the company with full knowledge of all the facts relating to the issuance of, and payment for, the stock.

(May 24, 1900.)

**A**PPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendant in an action brought to recover of him as a stockholder in the Hess Electric Storage-Battery Company the amount alleged to be unpaid on the stock held by him, in satisfaction of a judgment against the company. *Affirmed.*

The facts are stated in the opinion.

**NOTE.**—As to how far payment for stock in a corporation by a transfer of property will protect the shareholder against creditors of the company, see *Van Cleve v. Berkey* (Mo.) 42 L. R. A. 593, and *note*.  
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*Messrs. Bowen & Brockett, for appellant:*

This court has, in effect, adopted the true-value rule, and repudiated the good-faith rule.

*Chisholm Bros. v. Forny*, 65 Iowa, 333, 21 N. W. 664.

The knowledge of the plaintiff's assignor that the stock was not fully paid stock was not a defense to the action.

*Stout v. Hubbell*, 104 Iowa, 499, 73 N. W. 1060; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 5 L. R. A. 649, 43 N. W. 290.

The question of knowledge or notice to the creditor can of necessity have no application whatever. It would be folly to say: "True, the law requires stock to be fully paid, but as everybody knows that it is not, therefore it is the same as if it were." The statute makes no exception as to creditors with notice, and there is no reason why the courts should.

7 Thomp. Corp. § 8648; *Sprague v. National Bank*, 172 Ill. 149, 42 L. R. A. 606, 50 N. E. 19; *Ball Electric Light Co. v. Child*, 68 Conn. 522, 37 Atl. 391.

While it is true that the plaintiff is not an innocent purchaser according to the law merchant, and in the original suit by plaintiff against the storage battery company that company might have interposed any equity in defense to the note which it had, if any, the law of dishonor goes no farther.

*Leightman v. Kadetska*, 58 Iowa, 676, 43 Am. Rep. 129, 12 N. W. 736; *Johns v. Bailcy*, 45 Iowa, 241; Dan. Neg. Inst. 4th ed. §§ 725, 726b.

This cause of action is entirely independent, and is not governed by the rules controlling commercial paper.

*Close v. Potter*, 155 N. Y. 145, 49 N. E. 686.

*On petition for rehearing.*

The true-value rule is not based, in any manner, upon the question of doctrine of fraud.

*Sprague v. National Bank*, 172 Ill. 149, 42 L. R. A. 821, 50 N. E. 19.

The liability amounts to an undertaking on the part of the stockholders to whom the franchise has been granted that they will fill up the stock to the amount of their several subscriptions, in money or property at its true value, and if they do not,—if they have failed to do so,—it is still a subsisting obligation on their part which may be, under the statute, enforced by the creditor, and that, too, without alleging or proving that there has been any element of fraud in the transaction whatever.

*Messrs. Phillips, Ryan, & Ryan*, for appellee:

To charge a stockholder upon stock issued upon and for the purchase of property, individually for the debts of the corporation, it is not enough to prove that the property was purchased at an overvaluation through mistake or error of judgment upon the part of the trustee, but it must be shown that the purchase was made in bad faith and to evade the statute.

*Douglass v. Ireland*, 73 N. Y. 100; *Young v. Erie Iron Co.* 65 Mich. 111, 31 N. W. 814; *Boynott v. Andrews*, 63 N. Y. 93; *Penfield v. Dawson Town & Gas Co.* 57 Neb. 231, 77 N. W. 672; *Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 68, 11 Sup. Ct. Rep. 468; *Clow v. Brown* (Ind.) 31 N. E. 361; *Troup v. Horbach*, 53 Neb. 795, 74 N. W. 326; *Gorder v. Plattsmouth Canning Co.* 36 Neb. 548, 54 N. W. 830; *Kelley Bros. v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *American Tube & Iron Co. v. Baden Gas Co.* 165 Pa. 489, 30 Atl. 937; *Gilkie & A. Co. v. Dawson Town & Gas Co.* 46 Neb. 333, 64 N. W. 978, 1097.

In order to maintain this action against the defendant as a stockholder, plaintiff must show:

1. That the patents and other property conveyed to the corporation by Porter, Hess, and Case were overvalued unreasonably by the corporation, as well as by the vendors.

*Cook, Stock & Stockholders*, § 44.

2. That the unreasonable valuation was so made intentionally and fraudulently, and that defendant has made a profit out of it.

*Ibid.*

Defendant had no interest in the patents or other property conveyed to the corporation. He was not the vendor of it to the company. He purchased this stock from the vendors as paid-up stock, and his liability cannot be increased above his liability as purchaser; nor could he in any event be made liable for the par value of the stock less the real value of the property.

*Cook, Stock & Stockholders*, §§ 44-48; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *Seovill v. Thayer*, 105 U. S. 143-146, 26 L. ed. 968; *New Albany v. Burke*, 11 Wall. 96, 20 L. ed. 155; *Van Cott v. Van Brunt*, 82 N. Y. 535, 53 L. R. A.

The plaintiff was not only affected with full notice of its assignor, but was itself chargeable with all the matters and things connected with the issuance of the stock as shown by the records of the corporation.

*Northwestern Mut. L. Ins. Co. v. Cotton Exchange Real Estate Co.* 46 Fed. 22; *Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Bank of Fort Madison v. Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; *Burke v. Smith*, 16 Wall. 390, *sub nom. Putnam v. New Albany & S. C. Junction R. Co.* 21 L. ed. 361; *Foster v. Belcher's Sugar Ref. Co.* 118 Mo. 238, 24 S. W. 68.

Deemer, J., delivered the opinion of the court:

The Hess Electric Storage-Battery Company is a corporation organized under the laws of this state in the year 1890. It was created "to perfect a storage-battery system patented by one H. K. Hess, and to adapt it to practical use for light and power; the buying and selling of the patent and any other necessary and proper article to be used herewith; to procure other letters patent; and to buy and sell electric-light plants, patents, batteries, etc.; and to lease, purchase, or sell electric current for any legitimate purpose." The capital stock was fixed at \$100,000, divided into 1,000 shares of \$100 each, of which not exceeding \$90,000 might be issued and used as fully paid for the purchase of patents or property to be used in the business. The balance of the stock was to remain as treasury stock, and sold to such persons and on such terms as the board of directors should determine; none of it to be issued, however, until fully paid. The articles were signed by H. C. Porter, H. K. Hess, A. R. Case, defendant, and others. Defendant was vice president and a director of the corporation. After the filing of the articles, Porter, Case, and Hess made a proposition to sell certain patents which they claimed to own and hold, to the corporation, for \$90,000 of its capital stock, fully paid up, and an additional sum of \$500 in cash as soon as the corporation was able to pay. The board of directors of the corporation accepted the proposition, and Porter, Case, and Hess made an assignment of their patents, and of such property as they had on hand for experimental and manufacturing purposes, to the corporation, and received from it \$90,000 of its fully-paid stock. The books of the corporation show that, the day before the aforesaid proposition was made, 10 shares of stock, of the face value of \$1,000, were issued to defendant, Turner. This stock recited that it was fully paid. Turner paid nothing to the corporation for the stock, but the same was treated by all parties as a part of the \$90,000 to be issued to Porter *et al.*, and was issued to him on their order. He paid Porter and his associates 20 cents on the dollar in cash for the stock, and has owned the same to this day. On the day the proposition was made, 20 shares of the stock were issued to Porter; but he never received them, and the books show that they

were canceled and reissued to D. H. Gouing and T. S. Catcart. Ten of these shares issued to Gouing were canceled, and new certificates for the same were issued to defendant. The other 10 of these 20 shares were also canceled and reissued to defendant. Neither Turner, Gouing, nor Porter paid anything to the corporation for this stock, but it was treated as a part of the \$90,000 hitherto mentioned. Turner paid Gouing 20 cents on the dollar for the stock issued to him. The remainder of the \$90,000 in stock was issued as follows: 10 shares to R. R. Ballis, 10 to F. B. Collins, 10 to George C. Boggs, 5 to O. L. F. Browne, 5 to D. W. Chase, 5 to A. I. Lee, 5 to J. H. Woods, 5 to F. A. Fields, and 5 to W. H. Langan, all of whom had signed the original articles of incorporation; and the balance was issued to Porter *et al.*, or to other persons on their order. The stockholders have never held a meeting, but the board of directors held meetings until the latter part of the year 1894, since which time it has held no meetings. It was also agreed as follows: "(6) That the chemicals, material, and property mentioned in the said written proposition, including tools and instruments intended or adapted to the manufacture of batteries and motors, or used or intended for experiment, were of the value of \$500, and at the time of the purchase of said property by the said Hess Electric Storage-Battery Company, as hereinbefore stated, the said patented articles had not been put largely into practical use, but many experiments and tests had been made with reference to its practical utility, all of which were known to the said Hess Electrical Storage-Battery Company, and its tests and experiments had shown satisfactory results; and the incorporators believed at the time of said purchase of said patent and property that the same was of very great value, and hoped and believed said company would realize therefor and thereon largely more than the \$90,000 paid therefor. (7) That the said incorporators and stockholders of said incorporation continued to experiment with and test said patented articles until late in the year 1894, receiving numerous offers for the purchase of territory and for the placing of the same in use upon cars and otherwise, many of which offers were rejected by said Hess Electric Storage-Battery Company because of the belief that said patents and the use of said patent articles were worth more than the offers made therefor, and for the use thereof; that during said period other inventions for the use and application of electricity as a motive power were discovered and invented, whereby and by reason whereof the Hess Electric Storage-Battery Company has not, so far, been able to realize revenues therefrom to any large extent,—that is to say, the said corporation has not been able to make any sales satisfactory to said company, and the said patents and property have never brought to the corporation any remuneration adequate to meet its entire expenditures." In September of the year 1893 the corporation borrowed of the 53 L. R. A.

Commercial Loan Association the sum of \$670, and executed its notes therefor, due one month after date. The loan association had knowledge of all the facts hitherto recited regarding the organization of the corporation, and of the manner in which it had issued and disposed of its stock, and was fully cognizant of all the facts regarding the purchase and sale of the patents and property, and of the value thereof. After the maturity of the note, the loan association transferred the same to plaintiff. Plaintiff recovered judgment thereon against the corporation, and after an execution had been issued, and returned "No property found," it commenced this action. On these facts the case was tried to the court, resulting in a judgment for defendant, and from that judgment the appeal is taken.

Involved primarily is the so-called "trust-fund doctrine," as applied to stockholders' obligations to creditors. This is founded on the proposition that as the state undertakes to relieve the stockholder in a corporation of general liability for the debts of the concern, to the amount that he has invested in the enterprise, he ought, in good faith, to pay in money or its equivalent the face value of the stock received; and, if he fails to do this, he should be treated as holding the remainder in trust for the benefit of the creditors of the corporation. From this proposition two apparently conflicting and inconsistent rules have grown up, one of which may be called the "true-value rule," and the other the "good-faith rule." Courts adopting the good-faith rule are also divided on the proposition as to what is necessary to be shown to constitute good faith. Some of them hold that, in the absence of an affirmative showing of fraud *aliunde* mere overvaluation of the property given in exchange for stock will not render the stockholder liable for the difference, while others hold that overvaluation itself, especially if gross, constitutes, or at least raises a strong presumption of, fraud. The development of the trust-fund doctrine may be gathered from a reading of the following: *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Sargy v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Handley v. Stutz*, 139 U. S. 427, 35 L. ed. 234, 11 Sup. Ct. Rep. 530, and cases cited therein; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *Osgood v. King*, 42 Iowa, 478. Cases holding to the true-value doctrine are as follows: *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; *Joseph v. Davis* (Ala.) 10 So. 830; *Gates v. Tippecanoe Stone Co.* 57 Ohio St. 60, 48 N. E. 285; *Haldenan v. Ainslie*, 82 Ky. 395; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Flyton Land Co. v. Birmingham Warehouse & Elevator Co.* 92 Ala. 407, 12 L. R. A. 307, 9 So. 129; *Clayton v. Ore Knob Copper Co.* 109 N. C. 385, 14 S. E. 36; *Gogebic Investment Co. v. Iron Chief Min. Co.* 78 Wis. 427, 47 N. W. 726. Some of those holding to the first division of the good-faith rule are *Smith v. Prior*, 58 Minn. 247, 59 N. W. 1016; *Schenck v. Andrews*, 57 N. Y. 147; *Van Cott v. Van Brunt*, 82 N. Y.

535; *Graves v. Brooks*, 117 Mich. 424, 75 N. W. 932; *Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Kelley Bros. v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co.* 23 C. C. A. 302, 43 U. S. App. 452, 75 Fed. 554; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 7 N. E. 773. And of those holding to the second division are *Douglass v. Ireland*, 73 N. Y. 104; *Boynton v. Andrews*, 63 N. Y. 96; *Hastings Malting Co. v. Iron Range Brewing Co.* 65 Minn. 28, 67 N. W. 652; *Kelly v. Clark*, 21 Mont. 291, *sub nom. Kelly v. Fourth of July Min. Co.* 42 L. R. A. 621, 53 Pac. 959; *Lloyd v. Preston*, 146 U. S. 630, 36 L. ed. 1111, 13 Sup. Ct. Rep. 131; *Wallace v. Carpenter Electric Heating Mfg. Co.* 70 Minn. 321, 73 N. W. 189. It will be noticed that there is some confusion in the New York and United States Supreme Court cases, and it is difficult to say just what rule prevails in Illinois. See *Sprague v. National Bank*, 172 Ill. 149, 42 L. R. A. 606, 50 N. E. 19. But the Supreme Court has never departed from the principles of *Sawyer v. Hoag*, and other like cases. See *Camden v. Stuart*, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. Rep. 585. Nothing further need be said regarding the attitude of the various courts of the country on these propositions. Some of the cases cited may not clearly fall to the places assigned them, but, on the whole, we think this as fair a classification of the authorities as can be made. In view of our previous holdings, this discussion may seem unnecessary; but, as counsel seem to think that the question is new to this court, we have attempted to state in brief some of the holdings in other jurisdictions.

We think our previous cases adopt the true-value rule,—perhaps not to its full extent; but such has been the drift of these cases. In *Osgood v. King*, 42 Iowa, 478, we said: "Every principle of honesty and justice requires that, as between the stockholder and a creditor, the stock shall be considered paid only to the extent of the fair value of the property conveyed, and that for the balance the stockholder shall be held individually liable." In *Jackson v. Traer*, 64 Iowa, 477, 52 Am. Rep. 453, 20 N. W. 767, quoting from Taylor on Corporations, we said: "If the property received is grossly unequal in value to the par value of the shares, the subscriber who received the shares originally, or his subsequent transferee with notice of the circumstances, may be compelled to make up the difference in value." In *Chisholm Bros. v. Forney*, 65 Iowa, 333, 21 N. W. 664, *Seever, J.*, speaking for the court, said: "Persons dealing with the corporation had the right to assume that it owned available assets to the amount of the capital stock; that is to say, that, in consideration for the stock issued, the corporation had received money or property which would be available to pay any indebtedness incurred in its business. A patent is, as has been said 'a property in no-

tion, and has no corporal, tangible substance,' and cannot be levied on and sold under execution issuing from the state courts; and whether it can be sold on executions issuing from the Federal courts is regarded as doubtful. . . . Until its usefulness has been established, the value of a patent right is purely speculative." Judge Robinson, in *Wishard v. Hansen*, 99 Iowa, 307, 68 N. W. 691, uses this language: "Where the capital stock of a corporation is issued to one of its promoters and organizers for property which is taken at a gross over-valuation, the transaction is fraudulent against creditors of the corporation, if it be insolvent; and the stockholder who receives such stock with the knowledge . . . will be liable to such creditors, on the stock he holds, for the difference between its par value . . . and the amount actually paid." In *Stout v. Hubbell*, 104 Iowa, 499, 73 N. W. 1060, it is said: "It is alleged . . . that the land was given and received under an agreement that it was a full payment for said stock. This, alone, would be no defense; for this court has held, as to creditors of a corporation, that, when property is received by the corporation at an excessive valuation in payment for shares of its capital stock, it is only a payment to the extent of the value of the property received, and the owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock." In *Boulton Carbon Co. v. Mills*, 78 Iowa, 465, 5 L. R. A. 649, 43 N. W. 290, we again quoted with approval the rule announced by Mr. Taylor in his work on Corporations, and said that no plea of fraud was necessary. From this review it is apparent that we have, in effect, adopted the true-value rule, although saying in some cases that the reason for so doing was to prevent fraud. There is nothing in these decisions or in the statutes that inhibits the taking of property in exchange for stock, providing it is taken at its true value; and this value we do not think should in all instances, if in any, be measured by results. The parties have the right in good faith to agree on the value of the property taken, but this should not be a speculative or fictitious one. An honest mistake in judgment will not necessarily destroy the value agreed upon, but it must be such a valuation as prudent and sensible business men would approve. Values based on visionary or speculative hopes, unwarranted by existing conditions or facts, and without reasonable evidence from present appearances, are not such as the law will tolerate, as against creditors. It is apparent that the patent and property sold the corporation by Porter *et al.* had no such value as the parties placed upon it. The valuation was wholly speculative, visionary, and imaginary, as experience has shown. Indeed, we doubt if the parties thought it had any such value as they fixed upon it. They say they hoped and believed the company would realize therefor and thereon more than \$90,000, but no one had the temerity to say that he regarded the patent and prop-

erty as of that value. The actual value received was but little over \$500.

But it is said that, as plaintiff's assignor had full knowledge and notice of all the facts, plaintiff cannot recover. This contention requires a little further examination of the *rationale* of the trust-fund doctrine. Consideration of the cases will show that it grew out of a desire on the part of courts to protect creditors who invested their funds on the faith that the capital stock was fully paid up, and represented the true assets of the corporation. Mr. Justice Miller, in *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731, said: "We think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation." He further said: "It is therefore but just that when the interests of the public or of strangers dealing with this corporation are to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed, intentionally and inequitably, to screen the stockholder from loss, at the expense of the general creditors, it should be disregarded or annulled so far as it may inequitably affect him." In *Upton v. Tribilcock*, 91 U. S. 45 23 L. ed. 203, this rule is announced: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. . . . The capital [stock] paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away." Justice Woods, in *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, says: "The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. . . . It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up; and, if it is not, a court of equity will, at his instance, require it to be paid." In further explanation of the doctrine, Justice Brewer, speaking for the court in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127, said: "Yet all that is meant by such expressions ['trust fund'] is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust." Quoting from *Pomeroy's Equity*, he further says: They "are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor." He further likens a creditor's rights in such a case to the rights of a creditor of a partnership. Justice Field, in *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721, 10 Sup. Ct. Rep. 338, also announced a similar doctrine. Justice

Woods, in *Scovill v. Thayer*, gives some of the reasons for the rule; and he says, in substance, that if a corporation sells its stock, as fully paid, for a discount, it cannot thereafter make calls for the purpose of increasing its business. "The shares were issued as full paid, on a fair understanding, and that bound the company. . . . But the doctrine of this court is that such a contract, though binding on the company, is a fraud, in law, on its creditors, which they can set aside; that when their rights intervene, and their claims are to be satisfied, the stockholders can be required to pay their stock in full." Following this doctrine to its logical conclusion, it was held in *Bank of Fort Madison v. Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332, that, where the creditor has full knowledge of the transaction between the corporation and its stockholder at the time he extends credit, he cannot be heard to complain, for the reason that no credit is given upon a representation of a different set of facts than those which actually existed. See also *Cott v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. Rep. 231; *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630; *Young v. Erie Iron Co.* 65 Mich. 111, 31 N. W. 814; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Robinson v. Bidwell*, 22 Cal. 379; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198. Indeed, we find no case to the contrary, unless it be *Sprague v. National Bank*, 172 Ill. 149, 42 L. R. A. 606, 50 N. E. 19. That decision was based on a statute, however, which is somewhat different from ours, in that it made each stockholder liable for the debts of the corporation to the extent of the amount that may be unpaid on the stock held by him. Our statute says that nothing in the chapter contained, and nothing in the articles of incorporation, shall relieve the stockholders from individual liability, etc. (Code, § 1631); leaving the liability to be determined under the general law. *Ball Electric Light Co. v. Child*, 68 Conn. 522, 37 Atl. 391, relied on by appellant, is not in point. There the statute imposed a liability on the stockholder to the extent of 25 per cent of the amount of stock held by him. We have heretofore recognized these rules. While saying, *arguendo*, that a sale of stock at a less rate than that fixed in the charter is a fraud upon the law and the stockholders (*Olyphant v. Woodburn Coal & Min. Co.* 63 Iowa, 332, 19 N. W. 212), yet in *Goff v. Hawkeye Pump & Windmill Co.* 62 Iowa, 691, 18 N. W. 307, we further said: "The public has a right to assume, when the stock of a company has all been issued as full-paid stock, that it has been paid for in full in money, or in property at a fair value. . . . [If it has not been paid, . . .] while this might be ground for a proceeding in the interest of the public to wind up the company, it is not ground on which the plaintiff can predicate his right to relief; and,

besides, he not only knew upon what basis the stock had been subscribed and paid for, but he subscribed and paid for his stock on the same basis." This, it will be observed, was also *dictum*. But in *Callanan v. Windsor*, 78 Iowa, 193, 42 N. W. 652, we held, in effect, that the assignee of a creditor of a corporation could not recover unpaid subscriptions to capital stock where the creditor knew when he extended credit that the stock, although issued as fully paid, had not in fact been so paid. Referring to the statute (Code 1873, § 1082), which is the same as § 1631 of the present Code, we said: "We are aware of the provisions of § 1082 of the Code. The primary object of those provisions was to protect creditors of the company. They should not be held to apply to a case of this kind, where, by virtue of a valid agreement, to which the original creditor was a party, nothing was due or collectible on the stock of the stockholder." In that case we approved the doctrine of *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, and *Robinson v. Bidwell*, 22 Cal. 379. In *Stout v. Hubbell*, 104 Iowa, 499, 73 N. W. 1060, the same rule is recognized and applied; but, as plaintiff in that case had no notice, he was permitted to recover. See also *Clark v. American Coal Co.* 86 Iowa, 436, 17 L. R. A. 557, 53 N. W. 291. As the Commercial Loan Association had full knowledge of all the facts relating to the issuance and payment for the stock owned by the defendant, it could not recover. Does plaintiff, its transferee after maturity, have any greater rights? We think not. Our statute (Code, § 3461) provides that "the assignment of a thing in action shall be without prejudice to any . . . defense . . . existing in favor of the defendant and against the assignor before notice of the assignment." But in *Richards v. Daily*, 34 Iowa, 427, we said the holder of a negotiable note transferred after maturity takes it subject to all equities arising out of the note itself, such as payment, etc., but not subject to an independent set-off, and that the section just quoted did not change the rule. Indeed, it is elementary doctrine that a transferee of

overdue negotiable paper takes it liable to all equities to which it was subject in the hands of the payee. But those equities must attach to the paper itself, and not arise from any collateral transaction. *Young Men's Christian Asso. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 46 L. R. A. 753, 54 N. E. 297; *Gibson v. McIntire*, 110 Iowa, 417, 81 N. W. 699. This rule has no application to the case at bar. The maker of the note (the corporation) is interposing no defense. Plaintiff had judgment on the note without defense on the part of the maker. Its present action is not on the note, but is an attempt to collect its judgment against a stockholder of the corporation. The law merchant has nothing to do with such a case. It is a mere right or chose in action incident to ownership of the note, acquired in virtue of a transfer thereof, and plaintiff has no other or greater rights with respect to defendant's liability than its assignor had at the time of the assignment. If defendant was in any sense a party to the note, then he may interpose any defense he held against plaintiff's assignor. But, if not a party, then his liability to plaintiff exists by reason of the assignment and transfer of the note. If a mere chose in action against defendant was transferred, then, under the statute, plaintiff has no greater rights than its assignor. In *Callanan v. Windsor*, 78 Iowa, 193, 42 N. W. 652, plaintiff was the assignee of the original creditor, and it was held that he had no greater rights than his assignor. That case is determinative of several of the questions presented by this record.

We have already said more, perhaps, than the case warrants; but as the questions are important, and the authorities are conflicting, we have attempted to lay down rules that may be followed in this class of actions, that are becoming more frequent in this age of corporations.

Our conclusion is that *the judgment of the Trial Court should be, and it is, affirmed.*

Rehearing denied.

## KANSAS SUPREME COURT.

J. A. SMITH, *Plff. in Err.*,  
v.

Charles F. BECKER *et al.*

(.....Kan.....)

\*Section 5583 of the General Statutes of 1899, which provides that, when a person shall be imprisoned under a sentence of imprisonment for life, his estate,

\*Headnote by SMITH, J.

NOTE.—As to effect of life imprisonment to cast descent of estate, see *Davis v. Laning* (Tex.) 13 L. R. A. 82, with note as to civil death; see also *Kenyon v. Saunders* (R. I.) 26 L. R. A. 232.  
53 L. R. A.

property, and effects shall be administered and disposed of in all respects as if he were naturally dead, does not cast the descent of his property upon his heirs, by the fact of such sentence and imprisonment.

(*Doster, Ch. J., and Greene and Pollock, JJ., dissent.*)

(March 9, 1901.)

ERROR to the District Court for Greenwood County to review a judgment in favor of plaintiff in an action brought to establish title to certain real estate and to recover possession thereof. *Reversed.*

The facts are stated in the opinion.

**Messrs. L. H. Johnson, J. B. Clogston, L. E. Clogston, and A. L. Redden,** for plaintiff in error:

The expression in the statute, "his estate, property, and effects shall be administered," applies to personal property, for administration can be applied only to personal property except where it becomes necessary to sell real estate for the payment of debts. Therefore, if the property descended, it must be under the other language used in the section, namely, " . . . his estate, property, and effects shall be . . . disposed of in all respects as if he were naturally dead."

The words "disposed of" do not mean the same as "descend."

*Phelps v. Harris*, 101 U. S. 380, 25 L. ed. 858; *Elston v. Schilling*, 42 N. Y. 79; *Fling v. Goodall*, 40 N. H. 209.

Words used in a statute are to be given the ordinary and natural meaning.

*Potter's Dwarrr. Stat.* 184; *Waller v. Harris*, 20 Wend. 561, 32 Am. Dec. 590.

One civilly dead under § 376 simply means a person sentenced to life imprisonment, but there is no forfeiture of property further than to wind up his affairs and pay his debts.

An estate does not necessarily descend when one is civilly dead.

24 Am. & Eng. Enc. Law, p. 362.

A person imprisoned for a specified number of years is not dead either civilly or naturally.

*State v. Conway*, 56 Kan. 683, 44 Pac. 627; *Prayer v. Fulcher*, 17 Ohio. 260; *Williams v. Shackleford*, 97 Mo. 322, 11 S. W. 222; *Avery v. Everett*, 110 N. Y. 317, 1 L. R. A. 264, 18 N. E. 148; *Davis v. Laning*, 85 Tex. 39, 18 L. R. A. 82, 19 S. W. 846; *Baltimore v. Chester*, 53 Vt. 315, 38 Am. Rep. 677; *Cannon v. Windsor*, 1 Houst. (Del.) 144; *Rankin v. Rankin*, 6 T. B. Mon. 532.

One civilly dead ought not to be deemed naturally dead so far as retaining his title to property and protecting it are concerned, and it ought not to descend to his heirs simply because of the disability of imprisonment.

2 Lawson, Rights, Rem. & Pr. § 899.

Equity never lends its aid to enforce a forfeiture.

*Marshall v. Vicksburg*, 15 Wall. 149, 21 L. ed. 122; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 167, 58 Am. Rep. 806, 5 N. E. 417.

A pardon restores to its recipient all rights of property lost by the offense pardoned, unless the property has by judicial process become vested in other persons, subject to the exceptions prescribed by the pardon itself.

*Osborn v. United States*, 91 U. S. 474, 23 L. ed. 388; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Armstrong's Foundry*, 6 Wall. 706, sub nom. *Armstrong's Foundry v. United States*, 18 L. ed. 882; *Norris v. Crocker*, 13 How. 429, 14 L. ed. 210; *Wallach v. Van Rinswick*, 92 U. S. 202, 23 L. ed. 473; *Illinois C. R. Co. v. Bosworth*, 133 U. S. 92, 33 L. ed. 550, 10 Sup. Ct. Rep. 231. 53 L. R. A.

The fee in realty rests with the original owner during his natural life.

The original owner had power to alienate by covenant of warranty, and such covenant of warranty estopped him, his heirs, and all persons claiming under him from claiming and asserting title to the premises.

*Jenkins v. Collard*, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; *United States v. Dunnington*, 146 U. S. 338, 36 L. ed. 996, 13 Sup. Ct. Rep. 79; *Menger v. Carruthers*, 3 Kan. App. 75, 44 Pac. 1096.

In realty no vested rights can be had until seizure, condemnation, and judgment of forfeiture by judicial process; until such proceedings are had the fee rests wholly with the original owner.

*Knote v. United States*, 95 U. S. 149, 24 L. ed. 442; *Brown v. United States*, McCahon, 229; *Avery v. Everett*, 110 N. Y. 317, 1 L. R. A. 264, 18 N. E. 148; *Davis v. Laning*, 85 Tex. 39, 18 L. R. A. 82, 19 S. W. 846; *Wilson v. King*, 59 Ark. 32, 22 L. R. A. 802, 26 S. W. 18; *Kenyon v. Saunders*, 18 R. I. 590, 26 L. R. A. 232, 30 Atl. 470.

The commutation of the sentence of Mrs. New was for her benefit.

3 Am. & Eng. Enc. Law, p. 365, notes; *Lee v. Murphy*, 22 Gratt. 799, 12 Am. Rep. 563; *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 4 N. E. 87.

While a commutation of sentence is not in one sense a pardon, yet in another it is.

*Re Victor*, 31 Ohio St. 206.

It is a universal rule in the interpretation of pardons to construe them most beneficially for the citizen.

1 Bishop Crim. Law, § 757; *Lee v. Murphy*, 22 Gratt. 800, 12 Am. Rep. 563.

**Messrs. Alfred E. Hodgson and Howard J. Hodgson,** for defendants in error:

Emelia New, by her conviction and sentence to imprisonment for life, became dead in law, and, as a necessary consequence, her property descended to her heirs.

1 Sharswood's Bl. Com. p. 132.

The term "death" cannot be aptly applied to the status of any person who retains capacity to own property, but can only be properly applied to the status of a person who, in the eye of the law, retains no power or capacity, whether that want of capacity results from actual physical death, or only from a status which the law deems equivalent to death.

The legislature intended that the status of a person sentenced to imprisonment for life should be that of death, and that his property should descend to his heirs as in case of natural death.

*State v. Conway*, 56 Kan. 684, 44 Pac. 627; *Re Nerac*, 35 Cal. 392, 95 Am. Dec. 111.

The alleged pardon of Emelia New was not properly pleaded, and the evidence in support of that defense, with the findings of the jury thereon, was insufficient, and ought not now to be considered by this court.

17 Am. & Eng. Enc. Law, pp. 329, 330; *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640; *State v. Blalock*, 61 N. C. (Phill. L.) 242; *Greathouse's Case*, 2 Abb. (U. S.) 382,



Fed. Cas. No. 5,741; *Spalding v. Saaton*, 6 Watts, 338.

When the sentence was passed on Emelia New the property passed at once to her heirs. 6 Lawson, Rights, Rem. & Pr. § 3115.

A pardon does not so much restore the convict to his former capacity as it gives him a new credit and capacity.

4 Bl. Com. p. 520; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

Smith, J., delivered the opinion of the court:

The following question is presented in this case: When a person is imprisoned under a sentence for life, does his property, by that fact, descend to his heirs in all respects as if he were naturally dead? Those sections of the statute necessary to be considered read: "A sentence of confinement and hard labor for a term less than life suspends all civil rights of the person so sentenced during the term thereof, and forfeits all public offices and trusts, authority and power; and a person sentenced to such confinement for life shall thereafter be deemed civilly dead." Gen. Stat. 1899, § 2254. "Whenever any person shall be imprisoned under a sentence of imprisonment for life, his estate, property and effects shall be administered and disposed of in all respects as if he were naturally dead." Id. § 5583. But for § 5583 of the statute *supra*, we are all agreed that the mere fact of a sentence and imprisonment for life would not cast the descent of the convict's estate. The declaration that a person in such condition shall be deemed civilly dead is to be interpreted as to its effect by a reference to the common law. In *Avery v. Everett*, 110 N. Y. 317, 1 L. R. A. 264, 18 N. E. 148, after an exhaustive review of all the authorities the court said: "It seems to be a necessary conclusion, from the rules of the common law governing rights of property as affected by forfeiture for crime, that civil death, one of the consequences of conviction for treason or felony, did not of itself, as a general rule, at least, operate to divest the offender of his title to his lands." See also *Frazer v. Fulcher*, 17 Ohio, 260; *Baltimore v. Chester*, 53 Vt. 315, 38 Am. Rep. 677. In Maine and Missouri statutory provisions similar to § 5583 exist, but they have received no judicial interpretation. The turning point is the construction to be placed on the words "administered and disposed of." Administration has relation to personal property, and it is only where the personalty is insufficient in value to pay the debts of the decedent that the administrator exercises any control over the real estate. It descends to the heirs *eo instanti* upon the death of the ancestor. We think that by the use of the word "administered" in this provision relating to the estate of convicts it was the intention of the law-makers to restrict the administrator to the control and disposition of personal property for the benefit of creditors, to the end that all debts of the convict may be speedily paid. The words "disposed of" are not, in our judgment, broad and com-

prehensive enough to reach to and embrace that act of the law which vests the ownership of property in an heir by inheritance. They can be more sensibly applied to affirmative action taken by a person either natural or artificial. It is an inapt expression to say that, when an estate is cast by descent on the heir by the death of the owner, it has been disposed of. It will be noticed, also, that the two sections of the law under consideration are not a part of the statutes relating to descents and distributions. One section is found under the title of *Crimes and Punishments*, and the other under *Criminal Procedure*. In the present case the property in controversy is real estate, and there are no debts owing by the convict. If such estate has already devolved upon the heirs, an administrator can do nothing which will affect the lands. As applied to this case, the use of the word "administered" can have no force, for the estate in controversy can never come to the hands of an administrator. In *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125, a statute was before the court for construction which related to the rights of husband and wife. It provided that "all property acquired by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." It was further provided that the husband should have the entire control of the common property, with absolute power to dispose of it, and, upon the dissolution of the community by death of either husband or wife, one half of the common property should go to the survivor. It was held that the words "with absolute power to dispose of" ought not to be extended to a disposition by devise. If descent is cast *ipso facto* by the sentence and imprisonment of a person for life, then such person may make testamentary disposition of his property before such sentence and imprisonment, which will take effect immediately thereafter. The incongruity of the convict's position in the event of a final acquittal or pardon may be noticed. From such sentence he may appeal to this court within two years after the judgment is rendered. If he be granted a new trial, and finally secure an acquittal, or his discharge from imprisonment be ordered, we may see a person formerly civilly dead living with heirs who have inherited his property. Again, it would be entirely legal for such person, though once pronounced dead in law, to be appointed administrator of his own estate, or to be called upon to prove the execution of his own will. In the event of the convicted person making two wills, one before sentence and imprisonment, and the other after his pardon or acquittal, and immediately prior to his natural death, a confusing question would arise as to which will should be given effect. In default of heirs, the application of the statute as contended for by counsel for defendants in error would cause the real estate of the convict to escheat to the state, involving a forfeiture of property, which ought not to be declared without express and unambiguous legisla-

tive direction. Such considerations might be immaterial if the law was plain and explicit; for we have no doubt of the power of the legislature, by express language, to cast the descent of a convict's property, in the event of his civil death, on such persons as would be heirs at law in case of natural death. In cases of doubt, however, the argument *ab inconvenienti* is of much force. In an exhaustive note to *Atery v. Everett* (N. Y.) 6 Am. St. Rep. 368-383, the author says: "We deduce, therefore, that, in those states where there is a statutory provision that one imprisoned for life shall be deemed civilly dead, the legislature could not have intended that such convict should labor under greater disabilities than those entailed by the common-law decisions; and, if the strict rule of the common law is not to be followed it must be assumed—and especially so in view of our institutions and tenures here, and also in view of the fact that such convict may be pardoned—that one *civilitur mortuus* under the statutes ought not to be deemed naturally dead, so far as retaining his title to property and protecting it is concerned, and that it ought not certainly to devolve upon his successors or heirs simply because of the disability of imprisonment. This construction of those statutes would, it seems to us, be founded in greater justice, and more in consonance with the reason of the law, and more in keeping with the spirit of our institutions, than a conclusion to the *contra*."

The convicted person whose property is involved in the case at bar is in fact no longer civilly dead. Her sentence was, within a year after it took effect, commuted by the governor to a term of forty years. Her life has been restored. It ought not to be held that she has been divested of her property by operation of law unless the statute, in clear and explicit terms, has so declared. The question raised by plaintiff in error, that the two sections of the statute under discussion are unconstitutional, has been decided against his contention in *Woodruff v. Baldwin*, 23 Kan. 491.

*The judgment of the court below will be reversed, and a new trial granted.*

**Johnston, Cunningham, and Ellis,**  
JJ., concur.

**Greene, J.,** dissenting:

I dissent from the opinion of the court in this case, and am authorized to say that Doster, Ch. J., and Pollock, J., also dissent. I agree with the court that § 2254 of the General Statutes of 1899, quoted in the opinion, does not, and was not intended to, cast descent. Under this section, one imprisoned for a period less than life is divested only of all civil rights, and I assume that the lawmakers knew this; hence the passage of § 5583 of the General Statutes of 1899: "Whenever any person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead." Gen. Stat. 53 L. R. A.

1899, § 5583. This section means that, when one is sentenced and imprisoned for life, he is, as to all property interests, actually dead. The language used in this section is sufficiently apt and appropriate to cast descent. The word "administered," therein used, as defined by Webster, means "to manage or conduct, as public affairs; to direct or superintend the execution, application, or conduct of; to settle, as the estate of one who dies without will, or whose will fails of an executor." Mr. Bouvier says it means "the management of the estate of an intestate or testator who has no executor." "Administrator," according to Bouvier, means "a person authorized to manage and distribute the estate of an intestate or of a testator who has no executor." An administrator in Kansas has absolute control, for the purpose of administering an estate, over real estate as well as personal property. It is true, the law requires an administrator in Kansas to dispose of the personal property first, and pay the debts, if there is sufficient; but this is not because the administration of the estate does not include the real as well as the personal property, nor because real estate is more sacred than personal property, but because the personal property is more liable to waste, and therefore it should be first cared for; and, if there is sufficient of the personal property to pay the outstanding liabilities and expenses of administration, the duty of the administrator there ends, but, if not, his power to dispose of real estate is equal to that granted him to dispose of personal property. The language used in § 5583 is "that the estate, property, and effects shall be administered and disposed of." "Disposed of," as defined by Bouvier, means "to alienate or direct the ownership of property as disposed by will." These words were used in this statute in their broad and generally accepted meaning, and are sufficiently apt and appropriate to cast descent. When the legislature passed this section, it meant that, when any person shall be sentenced and imprisoned for life, his property shall immediately descend as if he were dead, and that an administrator shall be appointed, whose duty it shall be to administer the entire estate in the usual and ordinary way. If it were necessary to make this plainer, a reference to Gen. Stat. 1899, art. 17, chap. 82 (Procedure—Criminal), where this section is found, will simplify it. That entire article, exclusive of § 5583, is directed to the care and management of the property of persons sentenced and imprisoned in the penitentiary for a period less than life, and ample provisions are there made for such cases; and § 5583 adds nothing to these provisions, nor is it claimed by the court that it does; so that, if this section is not susceptible to the construction we place upon it, then it is meaningless, and we find that we have a statute which makes ample provision for the care, custody, and control of the property of one who is sentenced and imprisoned in the penitentiary for a period less than life, but no provision whatever for the care or manage-

ment of the property of one who is sentenced and imprisoned for life. It is a cardinal principle in the interpretation of a statute that the entire statute or act must be construed together, and that each provision should be given full force and effect. The construction placed upon § 5583 by the court in its opinion rendered that section nugatory. Nor does this section work a forfeiture in a case of sentence and imprisonment for life of one without heirs, as indicated by the court. A forfeiture not only divests one of his estate, but invests it either in the party injured, as recompense for the wrong which he alone, or the public together with himself, has suffered, or invests it in the public. Under this section of the statute, if the person sentenced and imprisoned has no heirs to take, then his estate escheats exactly as it would if he died naturally. One anticipating death by imprisonment for life may dispose of his property by will as effectually as one who anticipates death by natural causes. The case of *Beard v. Know*, 5 Cal. 252, 63 Am. Dec. 125, cited by the court in its opinion as an authority for its position, when examined will not bear the construction claimed for it. The statute in that state provides that "all property, acquired by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." It is further provided that the husband shall have the entire control of the common property, with absolute power to dispose of it, and upon the dissolution of the community

by death, of either the husband or wife, one half of the common property shall go to the survivor. In the opinion the court said: "The words 'with absolute power to dispose of' ought not to be extended to a disposition by devise. The husband and wife during coverture are jointly seised of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it; for such a conveyance can only operate after death, upon the very happening of which the law of this state determines the estate, and the widow becomes seised of one half of the property." It is plain from this statute that it was only during the life of the husband and wife that the husband had absolute control and could dispose of the property. Our construction of § 5583 may seem harsh, and it may be subject to all the inconveniences and unpleasant things suggested by the court; but it is the plain and unmistakable meaning of the language used by the lawmakers, and we have nothing to do but to give it the interpretation intended by that department of government. Therefore, upon the sentence and imprisonment in the penitentiary of one for life, his property at once descends.

Rehearing denied.

## KENTUCKY COURT OF APPEALS.

City of HENDERSON, *Appt.*,

*v.*

Parmelia J. CLAYTON.

(.....Ky.....)

1. The establishment of a pesthouse by city authorities within 1 mile of the boundary line of the city, in violation of Stat. § 3909, renders the city, which was authorized by law to establish a pesthouse in a proper location, liable in damages to persons to whom smallpox was communicated by the pesthouse, although the statutes expressly impose both civil and criminal liability on the municipal officers for such illegal act, and are silent as to any remedy against the municipality.
2. A correction of an instruction during the argument is not ground for reversal, when it merely adds what was impliedly expressed in another instruction, although amendments should not ordinarily be made after the argument.
3. A verdict for \$2,775 damages on account of the communication of smallpox to the plaintiff and her family is not so

large as to justify the court in setting it aside on appeal, considering the loathsomeness of the disease and the anxiety and suffering it must have entailed.

(May 30, 1900.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Henderson County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused to plaintiff by the wrongful erection of a pesthouse near her residence. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Clay & Clay, John L. Dorsey, W. P. McClain, Yeaman & Lockett, and John F. Lockett*, for appellant:

There is no law requiring the city to establish a pesthouse for such cases, and, having none, it was under every moral obligation to act in the emergency in the interest of the people, and what it did was for the public, and not for its corporate advantage.

There is no proof that this house was intended for smallpox cases; it was the city poorhouse, in which the paupers of the city were maintained. It was made use of to

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53 L. R. A.

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The convicted person whose property is involved in the case at bar is in fact no longer civilly dead. Her sentence was, within a year after it took effect, commuted by the governor to a term of forty years. Her life has been restored. It ought not to be held that she has been divested of her property by operation of law unless the statute, in clear and explicit terms, has so declared. The question raised by plaintiff in error, that the two sections of the statute under discussion are unconstitutional, has been decided against his contention in *Woodruff v. Baldwin*, 23 Kan. 491.

*The judgment of the court below will be reversed, and a new trial granted.*

**Johnston, Cunningham, and Ellis,**  
Jl., concur.

**Greene, J., dissenting:**

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by death, of either the husband or wife, one half of the common property shall go to the survivor. In the opinion the court said: "The words 'with absolute power to dispose of' ought not to be extended to a disposition by devise. The husband and wife during coverture are jointly seised of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it; for such a conveyance can only operate after death, upon the very happening of which the law of this state determines the estate, and the widow becomes seised of one half of the property." It is plain from this statute that it was only during the life of the husband and wife that the husband had absolute control and could dispose of the property. Our construction of § 5583 may seem harsh, and it may be subject to all the inconveniences and unpleasant things suggested by the court; but it is the plain and unmistakable meaning of the language used by the lawmakers, and we have nothing to do but to give it the interpretation intended by that department of government. Therefore, upon the sentence and imprisonment in the penitentiary of one for life, his property at once descends.

Rehearing denied.

#### KENTUCKY COURT OF APPEALS.

City of *HENDERSON*, *Appt.*,

*v.*

*Parmelia J. CLAYTON.*

(.....Ky.....)

1. The establishment of a pesthouse by city authorities within 1 mile of the boundary line of the city, in violation of Stat. § 3909, renders the city, which was authorized by law to establish a pesthouse in a proper location, liable in damages to persons to whom smallpox was communicated by the pesthouse, although the statutes expressly impose both civil and criminal liability on the municipal officers for such illegal act, and are silent as to any remedy against the municipality.
2. A correction of an instruction during the argument is not ground for reversal, when it merely adds what was impliedly expressed in another instruction, although amendments should not ordinarily be made after the argument.
3. A verdict for \$2,775 damages on account of the communication of smallpox to the plaintiff and her family is not so

large as to justify the court in setting it aside on appeal, considering the loathsomeness of the disease and the anxiety and suffering it must have entailed.

(May 30, 1900.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Henderson County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused to plaintiff by the wrongful erection of a pesthouse near her residence. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Olney & Olney, John L. Dorsey, W. P. McClain, Yeaman & Lockett, and John F. Lockett*, for appellant:

There is no law requiring the city to establish a pesthouse for such cases, and, having none, it was under every moral obligation to act in the emergency in the interest of the people, and what it did was for the public, and not for its corporate advantage.

There is no proof that this house was intended for smallpox cases; it was the city poorhouse, in which the paupers of the city were maintained. It was made use of to

**NOTE.**—For report of former appeal in this same case, see *Clayton v. Henderson* (Ky.) 44 L. R. A. 474.

53 L. R. A.

avert a frightful scourge from the city, and not to establish a hospital "intended for the treatment of eruptive or other contagious diseases."

1 Wood, Nuisances, pp. 1, 2; Webb's Pollock, Torts, 4th ed. 1894, p. 493.

The city can remove a dangerous disease to its own property in obedience to the supreme law of self-protection, without liability should someone unfortunately suffer from its so doing.

Dill. Mun. Corp. § 955; *Wheatly v. Mercer*, 9 Bush, 704; *Prather v. Lexington*, 13 B. Mon. 563, 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Mon. 193.

The damage assessed is out of reason.

*Standard Oil Co. v. Tierney*, 92 Ky. 371, 14 L. R. A. 677, 17 S. W. 1025; *Heddles v. Chicago & N. W. R. Co.* 74 Wis. 239, 42 N. W. 237; *Louisville & N. R. Co. v. Long*, 94 Ky. 418, 22 S. W. 747.

On petition for rehearing.

The board of health of the city of Henderson "is a high governmental agency, endowed by law with distinct legal rights, and charged with corresponding important duties," whose appointment is provided for, and whose duties are imposed under, "and justifiable only under, the police power of the state" for the benefit of the public generally, "in which the city has no particular interest, and from which it derives no special benefit in its corporate capacity," and between which and the city *respondet superior* is not applicable.

*Clayton v. Henderson*, 103 Ky. 228, 44 L. R. A. 474, 44 S. W. 667; Ky. Stat. §§ 2055-2059; *Henderson County Bd. of Health v. Ward*, 21 Ky. L. Rep. 1193, 54 S. W. 725; *Cooley*, Taxn. 684; *Taylor v. Philadelphia Bd. of Health*, 31 Pa. 73; *Bamber v. Rochester*, 63 How. Pr. 103; *Boehm v. Baltimore*, 61 Md. 259; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Jolly v. Hacesville*, 80 Ky. 279, 12 S. W. 313; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Ward v. Louisville*, 16 B. Mon. 193; Dill. Mun. Corp. §§ 975-980; 4 Am. & Eng. Enc. Law, 2d ed. p. 607; *Boom v. Utica*, 2 Barb. 104; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Mitchell v. Rockland*, 52 Me. 118; *Lynde v. Rockland*, 66 Me. 309; *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 334; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220.

Messrs. S. B. Vance and R. D. Vance, with Mr. Montgomery Merritt, for appellee:

When a statute creates a new obligation, or makes unlawful that which was lawful before, a corresponding right is thereby impliedly given, either to the public, or to the individual injured by the breach of the enactment, and sometimes to both.

Endlich, Interpretation of Statutes, § 463.

The city has violated the statute, and § 53 L. R. A.

466 says any person injured thereby may recover of the offender.

Mrs. Clayton was only sick a week, was in bed only four days, but the amount of anxiety and mental and physical agony she must have suffered in that one week, who can measure?

*Cincinnati, etc., R. Co. v. Richardson*, 14 Ky. L. Rep. 367; *Illinois C. R. Co. v. Bayse*, 17 Ky. L. Rep. 105, 30 S. W. 600.

Hobson, J., delivered the opinion of the court:

Appellee filed suit to recover damages for the location of its pesthouse within 1 mile of the corporate limits of the city of Henderson, by reason of which she and her family took the smallpox. She sought to recover against the city and the municipal officers jointly. This is the second appeal of the case. The opinion on the former appeal will be found in *Clayton v. Henderson*, 103 Ky. 228, 44 L. R. A. 474, 44 S. W. 667. On that appeal it was held that she could not sue the city and its officers jointly, and on return of the case she elected to prosecute the action against the city alone. After this a trial was had, resulting in a verdict and judgment against the city for \$2,775. From this judgment the city prosecutes the appeal now before us. Ky. Stat. § 3909, is as follows: "It shall not be lawful to locate or maintain any pesthouse or other place intended for the treatment of eruptive diseases, or diseases which are contagious or infectious, within the corporate limits of any incorporated city or town, or within a distance of 1 mile of the boundary line thereof. Any officer of any city or town, or other person, who shall violate the provisions of this act, or in any wise aid or abet therein, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined not less than \$500 nor more than \$1,000, and be liable in damages to any person injured thereby, and if wilfully done, such person or his heirs or representatives may recover punitive damages." As the city was authorized by law to establish and maintain a pesthouse, the acts of its officers in establishing and maintaining the pesthouse in question were its acts, and it is responsible to the party aggrieved, as well as its agent through whose instrumentality it acted. This was expressly determined on the former appeal.

It will be observed that, while the statute imposes a duty upon the city, it provides a remedy by action only against the city officers in behalf of the person injured. While this court on the former appeal said that a common-law cause of action was stated against the city, it was not meant that the petition stated only a common-law cause of action independent of the statute. We think the averments sufficient to constitute a cause of action independent of the statute, and also a cause of action, which, according to the common law, arises from the violation of a

statute enacted for the protection of the citizen. From time immemorial, where a statutory duty for the protection of individuals had been violated, an action at common law might be maintained. The common-law rule referred to is thus stated in Comyns, Digest, title *Action upon Statutes*: "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Another common-law authority thus states the rule: "Whenever an act of Parliament doth prohibit anything, the party aggrieved shall have an action, and the offender shall be punished at the King's suit. It is written on the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong." Endlich, Interpretation of Statutes, § 463. The same common-law rule is laid down in Bishop, Noncontract Law, § 133, and in Cooley, Torts, p. 658. It is also recognized in Ky. Stat. § 466. "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed." While the statute involved here imposes on the municipal officers a criminal responsibility, and also makes them liable civilly to the party aggrieved for the injury or for punitive damages, if it is wilfully done, it is silent as to a remedy against the municipality, and, nothing being provided as to the remedy against it for its doing what the statute makes unlawful, the common-law rule applies; for the wrong is the act of the city whose orders the municipal officers execute, and as the remedy against the officers might in many cases, from insolvency and the like, be wholly inadequate, this provision of the statute, nothing to the contrary appearing, must be regarded as merely cumulative. The city of Henderson was therefore liable to appellee for such damages as she sustained by reason of the city's violation of Ky. Stat. § 3909, above quoted, although that statute did not in terms impose this liability on it, and the court below properly so instructed the jury.

There was no error in the admission or rejection of evidence to the prejudice of the city. The instructions fairly presented the law of the case. The addition that was made to the second instruction only stated what was impliedly expressed in the first instruction, and while amendments to instructions should not ordinarily be made after the argument of counsel, a correction like this during the argument is not ground for reversal. While the verdict is large, it is not so large as to justify us in setting it aside, considering the loathsomeness of the disease, and the anxiety and suffering it must have entailed upon appellee.

*Judgment affirmed.*

Rehearing denied.  
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Isaac THOMAS'S ADMINISTRATOR,  
Appt.,  
v.  
MAYSVILLE GAS COMPANY. Impleaded,  
etc.

(.....Ky.....)

1. An administrator of a person whose death was caused by negligence must elect between a common-law right of action for mental and physical suffering of the intestate, and a statutory cause of action for his death.
2. A corporation which generates and sends electricity into the wires of a street railway company is chargeable with the duty to see that such wires are properly insulated, and it, as well as the street railway company, is liable for failure to perform that duty, if a person is killed because the wires are not properly insulated.

(Burnam and Du Relle, JJ., dissent.)

(March 29, 1900.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Mason County in favor of defendant gas company in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. A. E. Cole & Son and Thomas R. Phister for appellant.

Mr. A. M. J. Cochran for appellee.

Paynter, J., delivered the opinion of the court:

This action was instituted by the appellant against the Maysville Street Railway Company and the appellee, the Maysville Gas Company. The street-railway company operated an electric car line in the city of Maysville, and the appellee, the Maysville Gas Company, was engaged in the business which its name suggests; and, in addition thereto, it had in its possession and control a dynamo, and thus supplied the street-rail-

**NOTE.**—The liability of a corporation which supplies electricity to the wires of a street railway company for the safety of the wires seems to be a new question on which we have had no controlling decisions before the present one.

As to liability for injuries by electric wires in highways generally, see *Denver Consol. Electric Co. v. Simpson* (Colo.) 31 L. R. A. 566, and note; also later cases in this series of *City Electric R. Co. v. Conery* (Ark.) 31 L. R. A. 570; *Western U. Teleg. Co. v. State use of Nelson* (Md.) 31 L. R. A. 572; *Mitchell v. Charleston Light & P. Co.* (S. C.) 31 L. R. A. 577; *McKay v. Southern Bell Teleph. & Teleg. Co.* (Ala.) 31 L. R. A. 589; *Huber v. La Crosse City E. Co.* (Wis.) 31 L. R. A. 583; *Suburban Electric Co. v. Nugent* (N. J. L.) 32 L. R. A. 700; *Atlanta Consol. Street R. Co. v. Owings* (Ga.) 33 L. R. A. 798; *Newark Electric Light & P. Co. v. Garden* (C. C. App. 3d C.) 37 L. R. A. 725; *Snyder v. Wheeling Electrical Co.* (W. Va.) 39 L. R. A. 490; *Bergin v. Southern New England Teleph. Co.* (Conn.) 39 L. R. A. 192; *Gannon v. Laclede Gaslight Co.* (Mo.) 43 L. R. A. 505; *Mooney v. Luzerne* (Pa.) 40 L. R. A. 811; *Brush Electric Light & P. Co. v. Lefevre* (Tex.) 49 L. R. A. 771; and *Boyd v. Portland General Electric Co.* (Or.) 52 L. R. A. 509.

way company with electricity to operate its car line. The wires of the street-railway company were constructed along the streets of the city, and a guy wire had been broken loose, and, not being properly insulated, it was charged with electricity; and as the plaintiff's intestate, a boy, was passing along, he came in contact with it, which resulted in producing his death. The trial resulted in a verdict against the street-railway company, from which no appeal seems to have been prosecuted. At the conclusion of the testimony for the plaintiff, the court instructed the jury to find for the appellee, the Maysville Gas Company, and it is to review the action of the court in that regard that this appeal is prosecuted. So the important question in this case is as to whether it is responsible for the death of the boy, if it was the result of negligence in failing to keep the wires charged by it with electricity properly insulated.

There are some minor questions raised, but it is sufficient to say that we agree with the court below in regard thereto. However, at this point we will add that the court properly compelled the appellant to elect which cause of action he would prosecute; his right to recover being restricted either to the common-law cause, for mental and physical suffering, or the statutory cause, for the death of his intestate. *Owensboro & N. R. Co. v. Barclay*, 102 Ky. 16, 43 S. W. 177. It is not necessary to consider the question as to whether the motion was made in time, as the case is reversed, and on the next trial the motion can be heard at the proper time.

The street-railway company owned and had charge of the wire, and the gas company generated and sent into the wire the electricity. The gas company received so much per month for supplying the wires of the street-railway company with electricity to operate its line of street cars, and it had no interest in the car line, except that its income might enable it to pay the bill for the electricity. That there was a duty imposed by law upon the street-railway company to keep its wires properly insulated, so that those whose business or pleasure brought them in dangerous proximity to them might be protected from the deadly current which they conducted, cannot be questioned. Without the electric current which the gas company sent through them, contact with them was harmless. When so charged, they became instruments of death, threatening the lives of those who perchance came in contact with them. Did the fact that the gas company supplied the harmless wires with the force which converted them into a death-dealing agency make it responsible for the injury which resulted in the death of the intestate? The exact question submitted has not, so far as we are aware, been answered by any court of last resort. Some cases are cited by counsel, but the facts of those cases are not similar to the facts of this case. Therefore we must find some signboard along the new road, and, if we cannot so find the way to a proper con-

clusion, we will be forced to swing a sickle into the field of reason, and there harvest a principle which can be crystallized into a just rule to apply to cases like this one. By the machinery in use by the gas company, it produced and controlled the electricity. It is presumed to, and did, know the dangerous force it was putting in motion, and that it constantly imperiled the lives of those who passed along the streets where the wires were in use, unless they were properly swung and insulated. Knowing the dangerous character of the force it supplied, it was bound to use the care commensurate with the danger of its employment, so as to protect those who passed along the streets or places where the wires were placed. The electric current went in a continuous stream from the power house through the wires. Its flow could only be stopped by the agency at its source. That agency controlled the electric current at the furthest point from the power house as it did at the point where the wires of the street-railway company connected with the generator. From the instant the force was generated, it remained under the control of the appellee. As it were, the hand that controlled the generator applied the deadly force to the body of the intestate. Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same whether the wires were owned by one or both of the companies. When one through the instrumentality of machinery can accumulate or produce such a deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety.

It is urged on behalf of the gas company that a manufacturer of electricity, who delivers it to another, and thus parts company with it,—its dangerous character not being concealed, and such other person being competent to look after and control it,—does not owe any duty to anyone. It is assumed if this be not true, that every person who delivers a dangerous substance into possession of another, under a contract of sale or hiring by which it parts with the control, would be liable for the negligent acts of the person to whom it is delivered, after the delivery. In the first place, electricity is unlike any other dangerous matter or force known to science. In the second place, it was not delivered to the street-railway company, and placed in its possession and control. The control of it, from the very nature of it, remained with the gas company. As an evidence of it, when the boy was held by the wire he could not be rescued until the gas company stopped the electric current. An example of the delivery of electricity is furnished when an electric company charges a battery, and delivers it to the owner of an automobile or an electric launch, in which event no duty would rest upon the company as to the manner of its use. There can be



actual delivery of powder, dynamite, or nitroglycerin, and a complete control transferred to another. Therefore it does not follow that, because it has been sold and delivered to another, there is a responsibility upon the seller to see that it is properly used. If A. should accumulate a great body of water above a city, and agree with B., to supply him with whatever quantity he desired, provided he would furnish a pipe to convey it to the place where he desired to use it, and thereupon B. connected with the body of water a pipe which was not properly constructed so as to convey the water safely, and in consequence thereof the water should escape from the pipe and destroy the property or lives of others, could A. escape liability by saying that he sold the water to B. for so much per gallon, and delivered it to him at the point of connection, and he no longer had any control over it, and consequently no liability? We think not. The case we have under consideration is even stronger than the illustration given. One must use his own property so as not to do injury to another. The use of the wires would have been harmless, except for the current of electricity; and that current was sent into the wires by the appellee, producing the death of plaintiff's intestate. Then it was the use of the force (its property) it generated which produced the injury. If the wires were not properly insulated, and the death resulted therefrom, then both companies are liable, as it was the duty of the street-railway company to have its wires properly insulated, and there was a duty resting on the gas company to see that it was done, before charging them with electricity. Wharton, Neg. § 851, announces the law to be as follows: "Wherever material, dangerous unless particularly guarded, is left unguarded, the party so leaving it is responsible for damages to another thereby produced. At common law a person using dangerous instruments or mechanisms does so at his peril, and is responsible for any damages not caused by extraordinary natural occurrences, or by the interposition of strangers." This court, in the case of *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L. R. A. 812, 37 S. W. 851, had under consideration a case where the wires of an electric company produced the injury, and the court said: "But by far the most important question involved is the law applicable to the case. Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public; nor is its presence easily determined or ascertained. Its use for private gain is very extensive, and becoming more and more so. The daily avocation of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force." From this it will be seen that the court is of the opinion that electric companies should use the utmost care to avoid in-

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juring persons who may be brought in contact with wires charged with electricity.

*The judgment is reversed for proceedings consistent with this opinion.*

**Du Relle and Burnam, JJ., dissent.**

Rehearing denied.

LOUISVILLE & NASHVILLE RAILROAD  
COMPANY, *Appt.*,

*v.*

COMMONWEALTH of Kentucky.

(102 Ky. 300.)

1. The duty to keep ticket offices and waiting rooms open at least thirty minutes before the departure of a passenger train from a "regular passenger depot" from which such trains start or at which they regularly stop, imposed by Stat. § 784, does not extend to the opening of such rooms for night trains for which the railroad company had never kept such rooms open for the sale of tickets, or charged passengers getting on them more than ticket rates.
2. The opening of ticket offices at depots during intervals when they are not regularly used as such is not required by Stat. § 784, requiring ticket offices and waiting rooms to be kept open thirty minutes before the departure of a regular passenger train "from every regular passenger depot from which such trains start or at which they regularly stop."
3. Causes of action for fines for failure to keep a ticket office and waiting room open at a depot cannot be joined to give the circuit court jurisdiction, under Stat. § 1093, giving justices exclusive jurisdiction in penal actions where the fine recoverable does not exceed \$20.

(November 30, 1897.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Whitley County in favor of plaintiff in a suit to recover the statutory penalty for failure to keep open a ticket office a certain time before the departure of trains. *Reversed.*

The facts are stated in the opinion.

**Messrs. J. W. Aleorn, R. D. Hill, Walker D. Hines, and H. W. Bruce** for appellant.

**Mr. C. W. Lester**, for appellee:

*On petition for rehearing.*

The people are the authors of the criminal and penal laws, and whenever they ask for and obtain the enactment of a statute, the evils to be remedied and the causes which brought about its enactment ought to govern its scope. This statute could not have been enacted at the request or demand of the railroad companies, because they did not need any such legislation.

There never was, and never will be, any complaint on the part of the people that railroad companies fail to open ticket of-

NOTE.—As to duty to keep depot open, see earlier case in this series of *Phillips v. Southern R. Co.* (N. C.) 45 L. R. A. 163.

fices and waiting rooms in ample time for each passenger to obtain his ticket for day trains, because they never fail in that respect. To say the statute in question means this and nothing more leaves it without force or effect.

That the people all over this state who travel by night trains have heretofore suffered, and do yet suffer, great hardship from the failure of railroad companies to keep their ticket offices, and more especially their waiting rooms, open and comfortably warm in cold weather at a great number of their important depots, for the accommodation of their patrons, is a fact so universally known as to be beyond dispute.

If it had been intended to apply to only such trains as railroad companies were then selling tickets for, the language of the statute would necessarily have been different. Instead of "schedule time of departure of all passenger trains," we would have "all passenger trains for which they sell tickets."

A depot becomes a regular passenger depot, within the meaning of the statute, when all trains stop at it, as at Williamsburg; and then the statute intervenes and compels them to keep their ticket offices and waiting rooms open for thirty minutes before the departure of every passenger train which stops there.

**Mr. W. S. Taylor** also for appellee.

**Burnam, J.**, delivered the opinion of the court:

This action was brought by the commonwealth against the appellant corporation to recover the penalty for having failed, for a period of 200 days, to keep its ticket office and waiting room at Williamsburg, Kentucky, open for passengers at its depot for thirty minutes immediately preceding the schedule time of departure of its regular passenger train going south, which regularly stopped at the depot at the hour of about 4 A. M. each day, and of its regular passenger train going north, which regularly stopped there between the hours of 11 P. M. and 12 midnight of each day. In the court below appellee recovered a verdict for \$4,000, upon which judgment was rendered. A number of errors are complained of. Defendant moved the court to require the plaintiff to elect which one of the 400 alleged causes of action set out in the petition it would prosecute, which motion was overruled by the court. A demurrer to the petition was then filed, which was also overruled. Defendant then moved the court to require the plaintiff to paragraph its petition, which motion was sustained; and the plaintiff filed an amended petition, containing 400 separate and distinct paragraphs, in each of which is alleged failure and refusal to keep defendant's ticket office and passenger room in Williamsburg open for thirty minutes preceding the arrival or departure of one or the other of the night trains, two offenses being alleged for each night. Defendant moved the court to require the plaintiff to elect which one of the 53 L. R. A.

paragraphs it would prosecute, which being overruled, defendant filed answer, which, in effect, admitted that it had not opened its ticket office or waiting room for passengers for thirty minutes preceding the arrival or departure of either of the night passenger trains, denying, in effect, that it had any passenger depot at Williamsburg for the through night trains in question. The testimony shows that defendant had never kept its ticket office or waiting room for passengers open at this depot during the night. The court instructed the jury to find for the plaintiff not less than \$10, nor more than \$20, for each time which they believed, from the evidence, the defendant, between the 10th of September, 1894, and the 28th day of March, 1895, failed to keep its ticket office open at Williamsburg for the sale of tickets for at least thirty minutes preceding the schedule time of the departure of the night passenger trains from its depot in Williamsburg, and failed to keep open and comfortably warm in cold weather its depot at that point for at least thirty minutes immediately preceding the schedule time of the departure of its night passenger trains.

The portion of § 784 of the Kentucky Statutes upon which this action is based reads as follows: "All companies shall keep their ticket offices open for the sale of tickets at least thirty minutes immediately preceding the schedule time of departure of all passenger trains from every regular passenger depot from which such trains start, or at which they regularly stop, and shall open the waiting room for passengers at the same time as the ticket office, and keep it open and comfortably warmed in cold weather, until the train departs." The statute further provides that any railroad company refusing or failing to comply with the provisions of this statute shall be fined not less than \$10 nor more than \$20 for each offense, to be collected in any court of competent jurisdiction.

Two questions arise on this appeal: First, is the depot building at Williamsburg a regular passenger depot for night trains, within the meaning of this statute, and does it require a ticket office at that point to be kept open for the sale of tickets for these two night trains? And, second, can circuit courts acquire jurisdiction by the joinder of separate offenses, the penalty for each separate offense being for a less amount than is necessary to give jurisdiction?

In § 203 of the original corporation act (Acts 1891-93, p. 704) the only requirement as to keeping open the waiting room for passengers was where a regular passenger train was delayed for thirty minutes in its arrival at a station which was a telegraph office, in which event the company was required to keep the waiting room open for passengers until the train arrived; but in the amendment to this section (found in Acts 1894, p. 57, and which is the statute upon which this suit was instituted) the waiting room was required to be kept open in all cases where the ticket offices were

kept open for the sale of tickets, and for the same length of time. If the statute required the ticket office to be kept open, then the waiting room had to be kept open also, but not otherwise. The amendment consists in the addition of the words "schedule time of" being inserted before the words "departure of all passenger trains," and the word "regularly" before the word "stop;" making it evident that the legislature did not intend in the amendment to enlarge the requirement in any way beyond the requirement as it existed in the original act, but intended to restrict and modify the meaning of the requirement, as the statute itself designates the purpose of the requirement when it says that "all companies shall keep their ticket offices open for the sale of tickets."

It will assist us in the determination of the legal question involved to consider for what purpose and for whose benefit tickets are sold for railway transportation, and why the public are specially interested in having ample opportunity to purchase them before the departure of trains from regular passenger depots. It is evident that the purpose of requiring passengers to pay their fare to ticket agents at regular depots, instead of conductors on the trains, is to protect the railroad company from its own employees, as the system affords a simple and effective check upon the carelessness or dishonesty of both classes of officers, and the reasonableness of this requirement on the part of the railroad is manifest; and, "to render the system effective and induce passengers to buy tickets, a higher fare is imposed on them when they neglect to do so and pay on the trains." In passing upon the legality and propriety of this regulation this court said, in the case of *Wilsey v. Louisville & N. R. Co.* 83 Ky. 511: "A higher rate may be collected of passengers who pay their fare upon the train than of those who purchase tickets before entering the cars. This discrimination is allowed because it tends to convenience in the transaction of the business and to the proper accountability of the company's agents. But it must be general or uniform as to the public, and be carried out in good faith by the railroad corporation, accompanied with a reasonable opportunity for those who desire to do so to purchase tickets before entering the cars. If they do not avail themselves of the privilege then they are at fault, and must pay conductors fare. Such a rule affords proper checks upon the accounting officers of the railroad, and protects it in a reasonable manner against possible fraud and dishonesty." And, in consequence of this requirement that passengers should buy tickets, the legislature passed the statute in question, by which it was made the duty of the railroad companies to keep the ticket offices open for a sufficient length of time immediately preceding the schedule time of departure of all passenger trains to enable the traveling public to buy their tickets conveniently; and, as this is the manifest purpose of the statute, the requirement does not

apply where the railroad regularly fails to maintain a ticket office for a particular train, as in such instance it is authorized to collect on the trains from passengers only the ticket rate of fare, precisely as at points where there are neither depots nor agents, and as the passenger has not been subjected to expense by not having had the opportunity to buy a ticket.

By an act of the Tennessee legislature it was made the duty "of every person who shall sell or be authorized to sell tickets to passengers to travel on any railroad in this state at any station or depot within the state to open his office for the sale of tickets at least one hour before the time of the departure of each passenger train from the depot, and keep the office open during the said space of one hour and until the departure of each passenger train, and be ready during said time to sell tickets to passengers as they may during said hour apply for them." One Brady was the sole agent of the company at a way station on the Louisville & Nashville Railroad, being ticket agent, freight agent, and telegraph operator, and it was his duty to sell tickets for the various trains that stopped at that station; but he was not required by the rules of the company to open the ticket office for the early morning train which passed the station before 6 o'clock, and the railroad company, in consequence thereof, instructed the conductor running that train not to charge passengers any other rate than the regular ticket rate. He failed to open his office for the sale of tickets before the time of the departure of the passenger train passing his station at 6 o'clock A. M., and this was, in effect, a violation of the letter of the statute, but the court held that the law had not been violated, because, it was held, the company might do away with its ticket office and its depot building, and require passengers to pay their fare on the cars; holding that the company might do for one train—not by mere caprice, but for reasons connected with the economic administration of its business—what it might do for all the trains, giving the public proper and reasonable notice; that the statute was to compel ticket sellers to perform the duties imposed upon them by their companies at the most convenient time for the passengers, and was not designed to compel them to do that from which they were expressly exempted by the rules of the company, without any detriment to the company, and without any notice to them; that the defendant was not, in fact, a ticket seller for the particular train, tickets for that train having been dispensed with by the company; that the intention of the act was to compel the performance of the duty only as to those trains as to which tickets were required to be purchased by the company; and that the reason and intention of the law, where obvious, would always prevail over the literal sense of the word. See *Brady v. State*, 15 Lea, 628. The effect of the decision in that case was that the case did not come within the intention of the

statute, and therefore the statute did not apply.

In the case of *Terre Haute & I. R. Co. v. State*, 13 Ind. App. 530, 41 N. E. 952, the court decided a question very similar to that raised here. The Indiana statute provides that "every corporation, company, or person operating a railroad within this state, shall, immediately after the taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state at which there is a telegraph office a black-board . . . upon which such company, or person, shall cause to be written at least twenty minutes before the scheduled time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on the schedule time or not, and if late, how much." The *Terre Haute & Indianapolis Railroad* had a telegraph office at a particular station, and did not maintain it at night, and omitted to post the information required by the statute for a train stopping during the night, and the court, in construing the statute, said: "The statute was designed to give information to those interested in the arrival of trains, so as to relieve the suspense so frequently occasioned to travelers and others thus interested by unexplained delays . . . This being the purpose of the law, it would seem that the solution of the question before us ought not to be a very difficult task. It is obvious that it was not the intention of the law-makers to entail upon railroad companies any additional burdens with regard to the establishment and maintenance of telegraph offices. Such companies are not required, by the statute under construction, to establish any telegraph office at a station where there was none prior to the enactment of the law, nor to maintain one already established, if unnecessary to the transaction of their business. . . . We take it that, if a railroad company chooses not to maintain a telegraph office at any one of its stations where one is now carried on, it may doubtless dispense with the same altogether, and that there is nothing in the statute to keep it from doing so; . . . and, if it is within the power of the company to dispense entirely with the telegraph office at any station, as we think it is, does it not follow that the company may dispense [entirely] with the maintenance or operation of such telegraph office at regular periods during any portion of a day of twenty-four hours when it deems it proper to do so?"—the court, in effect, holding that, because it was evidently not the purpose of the legislature to impose additional burdens in the maintenance of telegraph offices, it was only during the intervals that the telegraph office was regularly maintained by the company for its own purpose that it was a telegraph office within the meaning of the statute.

Our statute requires the ticket office to be open for the sale of tickets thirty minutes before the departure of passenger trains 53 L. R. A.

from a regular passenger depot. This means a depot regularly maintained and used by the company as a passenger depot at the time that the train regularly stops there, and it is only when the railroad company regularly uses the passenger depot as such that the statute applies. It was not intended and does not have the effect of requiring, in any and all cases, the opening of ticket offices at depots during intervals when they are not regularly used as such.

It is a rule that penal statutes are given a strict construction in favor of persons against whom they operate, and this rule is not violated by adopting that sense which best harmonizes with the object and intent of the legislature when the entire text of a statute is considered as a whole. See *State v. Indiana & I. S. R. Co.* 133 Ind. 69, 18 L. R. A. 502, 32 N. E. 817. The statute in question is simply a reasonable requirement as to the regulation of the regular existing agencies of the company, and such similar agencies as may hereafter come into existence, and was not intended to impose upon railroad companies of this state the burden of creating a new and distinct lot of facilities, regardless of the necessity of the cost thereof. In this case appellant had never maintained a night office in Williamsburg for the sale of tickets, there is no pretense that it ever charged passengers getting on these night trains more than ticket rates, and we do not think appellant was required to open its depot for the trains in question.

The second question raised by the appeal is one of practice. As our conclusions on the first question dispose of the appeal, it is not absolutely necessary that the second question should be passed upon; but, in view of the importance of the question and the desirability that it should be finally determined, we will consider it. The Criminal Code makes no provision for the joinder of separate offenses in the same penal action, in suits for the recovery of fines or forfeitures, and § 11 of the Criminal Code provides that proceedings in actions of this character are regulated by the Code of Practice in civil cases. Subsection 3 of § 113 of the Civil Code provides that, if there be more than one cause of action, each must be distinctly stated in a separate numbered paragraph. It is made the duty of the court to enforce this provision, and we think the court properly required appellee to paragraph its petition, as there is no question that appellee sought in this action to recover the penalty in one paragraph for 400 separate and distinct offenses, each of which could be, and was, properly required to be set up in a separate paragraph, and for recovery under each the commonwealth could have maintained its action in any court of competent jurisdiction. Section 83 of the Civil Code sets out the causes of action which may be united, but actions for the recovery of penalties for the violations of penal statutes are not included in the list. It therefore follows that they cannot be united in one suit. Section 1093 of the Kentucky Statutes provides that justices

shall have jurisdiction, exclusive of circuit courts, in all penal actions the punishment of which is limited to a fine of not exceeding \$20; and, as the offenses embraced in this suit are all cases in which the punishment is limited to a fine of not exceeding \$20, the circuit court had no jurisdiction thereof, and the motion of defendant to require the plaintiff to elect which of the causes of action it would prosecute should have been sustained. Counsel for the state, in support of their contention that the offenses could be united in one action, so as to give the circuit court jurisdiction, rely upon the case of *Louisville & N. R. Co. v. Com.* 92 Ky. 117, 17 S. W. 274. It is true that in that case the court sustained a petition in which it was alleged that the railroad company had employed thirty persons, whose names were unknown, to work for it on Sunday, and it was thus, as it is contended, allowing separate offenses to be recovered for in one action. No motion was made in that case in the lower court to require the petition to be paraphrased, and, not having been objected to there, of course the question could not have been raised in this court. It is also true that the petition was demurred to, but the fact that distinct offenses are not set out in separate paragraphs is not a cause of demurrer, but of motion to paraphrase (see *Williams v. Langford*, 15 B. Mon. 566, and *Mullikin v. Mullikin*, 15 Ky. L. Rep. 609, 23 S. W. 352); and an objection to a pleading because not properly paraphrased is waived by answering (see *Noel v. Hudson*, 13 B. Mon. 205).

But it seems to us that the facts of that case are so entirely unlike those of this that it affords no satisfactory guide. There the act complained of was the working of thirty men on Sunday by the same party, at the same time, and under the same circumstances. It was, in fact, so far as defendant was concerned, but one act; and, while the working of a single man on Sunday would have sustained the action, plaintiff had the right to allege all of them in the same paragraph, and if it failed to prove that as many as thirty men had worked, and yet proved enough to show a good cause of action, it would have been entitled to recover under the count (see Newman, Pl. & Pr. 410, and *Brewer v. Temple*, 15 How. Pr. 286), while here the acts complained of were entirely distinct and independent of each other. It is not the policy of the law, nor was it the intention of the legislature, to oust magistrates' courts of their exclusive jurisdiction, in cases in which the fine is limited to not exceeding \$20, by allowing a joinder of numberless separate offenses in one action. Public interest requires that violations of penal statutes of this character should be proceeded against as soon as the violations are committed, in courts having jurisdiction thereof.

We are therefore of the opinion that the facts relied on here make out a good defense, and the judgment of the Lower Court must be reversed, and judgment rendered herein for the appellant.

Rehearing denied.

## NEW YORK COURT OF APPEALS.

William MCCLURE, *Appt.*,  
v.

CENTRAL TRUST COMPANY of New  
York *et al.*, *Respts.*

(165 N. Y. 108.)

An implied warranty by a trust company that stock offered by it for sale, under an arrangement for the marketing of the stock of an English corporation, was marketable and free from lien, arises from the sale thereof and the giving of a certificate to the purchaser by such com-

pany acting as agent for the transfer of certificates for an undisclosed principal, upon the surrender of which shares and a deed of transfer held by it in trust were deliverable, where it knew, but such purchaser did not, that the shares in its possession were issued by the corporation subject, in express terms, to its articles of association and regulations, and the deed of transfer was likewise subject to the several conditions on which the transferrer held the shares immediately before the execution thereof, and that it also contained a covenant on the part of the transferee "to accept and take the said shares subject to the conditions aforesaid," since its position and

**NOTE.**—Implied warranty on sale of corporate stock.

The legal rules that obtain in the sale of corporate stock are in general the same that govern sales of tangible chattels, and there is, consequently, under ordinary circumstances, an implied warranty on the part of the vendor that the title to the stock sold is in him. *People's Bank v. Kurtz*, 99 Pa. 344, 44 Am. Rep. 112; *Allen v. Pegram*, 16 Iowa, 163; *State v. North Louisiana & T. R. Co.* 34 La. Ann. 947.

This implied warranty of title is regarded as necessarily importing the existence of the thing sold, and the vendor is therefore said to warrant the genuineness of the stock sold, or, 53 L. R. A.

In other words, that it is legally what it purports to be.

Thus, in *Titus v. Poole*, 73 Hun, 383, 26 N. Y. Supp. 451, Affirmed in 145 N. Y. 414, 40 N. E. 228, the vendor of what purported to be a certificate of stock in a bank organized under the laws of the state of Pennsylvania was held impliedly to warrant that the instrument was genuine, and what it purported to be.

And in *People's Bank v. Kurtz*, 99 Pa. 344, 44 Am. Rep. 112, the court said there could be no doubt that the vendor of shares of corporate stock would be liable to his vendee on the implied warranty of title if the certificate was forged, or the vendor is not such a bona fide holder as to have a claim on the corporation.

superior knowledge put it upon inquiry, and the law charges it with the knowledge, which proper inquiry would have disclosed, that the stock was, under the articles of association, subject to a lien in favor of the corporation for money owing by the transferrer, rendering it of no value.

(Gray, J., dissents.)

(November 27, 1900.)

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment entered in the office of the clerk of New York County upon the report of the referee dismissing the complaint in a suit to recover back money paid for stock in a corporation. *Reversed.*

And in *Allen v. Pegram*, 16 Iowa, 163, the court was of the opinion that the vendor of stock in a banking corporation "would be considered to warrant that it was legally what it purported to be in fact."

So, in *Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co.* 137 N. Y. 231, 19 L. R. A. 331, 33 N. E. 378, the court, in holding that the right of a bona fide pledgee of forged certificates of stock fraudulently issued by an officer of the corporation to recover damages from the corporation for its refusal to recognize the validity of such certificates was not affected by the sale of the certificates on account of the pledgee, and their redelivery to the pledgee upon a refund of the proceeds of the sale to the purchasers, said: "There was an implied guaranty of the genuineness of the certificates which the vendor might be required to make good, and as the plaintiff had received the fruits of the transaction, the consideration of which had failed, it could not lawfully withhold them from the purchasers when restoration was demanded."

And in *Ketchum v. Stevens*, 19 N. Y. 499, Strong, J., in dissenting from the conclusion of the majority of the court that a transaction by which the holder of a note secured by shares of stock as collateral delivered the note and stock to a creditor of the pledgee did not constitute a sale, said that he thought that the rule was well established that on a sale or transfer of corporate stock there is an implied warranty of its genuineness, and added: "I can see no reason why the implied warranty should not apply as well to cases where the assignor transfers property on which he has a lien only, or a supposed interest, as when he acts in the capacity of absolute owner; nor am I aware of any authority to show that there is any distinction."

But the rule that a vendor impliedly warrants his title to what he assumes to sell, and consequently warrants the existence of what he assumes to sell, has been said not to apply in New York to a contract for the sale of stocks on time since the passage of 4 Edm. N. Y. Rev. Stat. p. 110, providing that no contract for the purchase or sale of stocks shall be void because the vendor at the time of making the contract is not the owner of the shares. *Currie v. White*, 37 How. Pr. 330.

A vendor of shares of stock does not impliedly warrant that the corporation by which the certificates of stock were issued was a corporation *de jure*. If the company at the time the certificates of stock were issued was a *de facto* corporation that is sufficient to exonerate the vendor from liability on account of any im-

Statement by Vann, J.:

This action was brought to recover the sum of \$7,500 paid by the plaintiff upon a certain contract, which he seeks to rescind upon several grounds, and among them that he was induced to make it through fraud and deceit practised upon him by the defendants. The defendant Warner served no answer, but the Central Trust Company put at issue every allegation tending to show fraud or deceit on its part, either through false representation or fraudulent concealment.

The H. H. Warner Company, Limited, is a foreign corporation, organized in England, with its principal office in the city of London. It has a capital of £550,000, divided into 20,000 shares of preferred and 35,000 shares of common stock, each share being of the par value of £10. In 1889 Mr. Warner, who had for a long time and with great suc-

cess, procured the issue of stock certificates, filled warranty there may have been in the sale and transfer of the certificates of stock as to the existence of the corporation. *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129.

It has been held that the vendor of stock certificates does not impliedly warrant that the stock was not fraudulently issued by the officers of the corporation in excess of the amount authorized by the charter, where the certificates are in the usual form and regular on their face, and were issued by the duly constituted officers of the company, and sealed with the genuine seal of the corporation. *People's Bank v. Kurts*, 99 Pa. 344, 44 Am. Rep. 112.

A different result was reached in a case in the superior court of Cincinnati, in which the claim of the innocent vendor of fraudulently overissued stock, who had been induced to repurchase it from his vendee by the representations of the president of the corporation, to be reimbursed by the corporation, was denied on the ground that he would have been liable to his vendee on his implied warranty of the genuineness of the stock, and therefore had not changed his position to his prejudice by repurchasing such stock. *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 24 Ohio L. J. 198. The court pointed out that the decision in *People's Bank v. Kurts*, 99 Pa. 344, 44 Am. Rep. 112, *supra*, proceeded on the theory that bona fide holders of fraudulently overissued stock evidenced by certificates under the genuine seal of the corporation would have a right of action against the corporation, and said that, as he had already held in the case at bar that no recovery could be had against the corporation on this stock, the *Kurts* Case was inapplicable.

But this ground for distinguishing these cases was removed by the reversal of the judgment in the general term (*Citizens' Nat. Bank v. Cincinnati, N. O. & T. P. R. Co.* 29 Ohio L. J. 15) and the affirmation of the latter judgment in the supreme court on the ground that the corporation was liable on such overissued stock to an innocent holder for value, both for the reason that the issue of the fraudulent stock was an act done by the company in its corporate capacity, and that there was negligence on the part of the corporation and its agents in regard to the issue of spurious certificates by its secretary. *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 357, 43 L. R. A. 777, 47 N. E. 249.

There are *dicta* in several New York cases which support the view that the vendee of fraudulently overissued stock may maintain an action against his vendor for breach of his implied warranty.

cess dealt in proprietary medicines at Rochester, New York, sold his business to the English corporation, and received as part of the purchase price a large number of the shares of stock issued. He also purchased many other shares in the open market, and in 1891 he was the largest shareholder as well as the managing director. He wished to sell a part of his stock in this country, but as the books of transfer were kept in London, so that shares could not be transferred thereon without considerable delay, he devised a method of so placing his shares upon the market that they could be conveniently dealt in on this side of the Atlantic. This method was to sell shares through certificates, issued by a trust company, representing the number of shares sold, and through which in due time the shares could be transferred upon the books of the English com-

pany. He arranged with the Central Trust Company of New York to act as agent for the transfer of certificates, and with the Union Trust Company to act as the registrar of certificates. He employed S. V. White & Co., a firm of brokers, to act as promoters of the scheme; and they issued a prospectus to induce purchases, with the knowledge of the Central Trust Company, which allowed copies to remain on its counters for distribution. The prospectus was dated, "New York, April 28, 1891," and stated that "Messrs. S. V. White & Co., bankers, 36 Wall street, New York, are authorized to offer for subscription" a certain number of shares of each kind of the stock in question, describing it as the stock of an English corporation; setting forth the amount of capital, its division into preferred and common stock, the number of

Thus, in *Shotwell v. Mall*, 38 Barb. 445, the court, in holding that the officers of a corporation who are authorized to issue certificates to the stockholders as evidence of stock are liable, not only to the immediate purchaser of an overissue of stock falsely and fraudulently certified by them, but to any subsequent purchaser buying on the faith of the false certificate, said: "It is also true that the purchaser of the stock had a remedy against his vendor for a breach of the implied warranty of title."

And in another case arising out of the same transaction, *Peabody, J.*, in dissenting from a similar conclusion of the court as to the liability of the officers of the corporation to a purchaser of such overissued stock, said that the purchaser of such stock "certainly may have an action against the party from whom he received it, and so may each person who has received it have an action against his vendor. This action, however, in the absence of guilty knowledge in the vendor, would be on contract on the warranty, express or implied." *Cazeaux v. Mall*, 25 Barb. 578, 591.

And in *Selzer v. Mall*, 32 Barb. 76, Reversed without opinion in 41 N. Y. 619, the court, in holding that the liability of the officers of a corporation who have wrongfully and fraudulently issued and sold stock beyond the authorized capital extends only to their immediate vendees, said that the purchaser has his remedy against the party or parties of whom he purchased the pretended stock or false certificates for pretended stock.

The corporation itself violates the vendor's warranty of the existence and validity of the thing sold by its sale and delivery to an innocent purchaser who pays cash therefor, of stock which has no legal existence, because of non-compliance with the statutory prerequisites and mode of procedure prescribed for the increase of the corporation's capital stock. *Lincoln v. New Orleans Exp. Co.* 45 La. Ann. 729, 12 So. 937.

For a discussion of the liability of a corporation for fraud or forgery of its officers in the issue of stock, see note to *Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co.* (N. Y.) 19 L. R. A. 331.

A contract by a broker for the sale of shares upon and subject to the rules of the London stock exchange, which require the payment of the purchase price upon delivery of the transfer and certificate, does not import an absolute undertaking by the vendor that the company will register the transferee as a shareholder; and the directors' refusal to consent to the transfer gives the transferee no right of action against his vendor,—at least where the trans-

feree himself was in fault for not taking the proper steps to obtain the transfer. *Stray v. Russell*, 1 El. & El. 888, 29 L. J. Q. B. N. S. 1115, 6 Jur. N. S. 168, 8 Week. Rep. 240.

This case was followed in *London Founders' Asso. v. Clark*, L. R. 20 Q. B. Div. 576, 57 L. J. Q. B. N. S. 291, 59 L. T. N. S. 93, 36 Week. Rep. 489, in which the vendor of shares in a registered company, according to the rules and practice of the London stock exchange, which require payment of the price of the shares upon delivery of the transfer and before the time when application would be made by the transferee for registration, was held not to undertake that the company would accept the purchaser so as to make himself responsible for its failure so to do.

Where, however, the regulations of the company required an owner, desirous of transferring his shares, to inform the company of his intention to transfer, and made the consent of the directors a condition precedent to the validity of the transfer, the vendor was held bound to procure the assent of the directors, and to do everything necessary to invest his transferee with the property in the shares. *Wilkinson v. Lloyd*, 7 Q. B. 27, 14 L. J. Q. B. N. S. 165, 9 Jur. 328.

The vendor of corporate stock does not warrant its value. Here the rule of *caveat emptor* applies. *Renton v. Maryott*, 21 N. J. Eq. 123. In this case the fact that shares of stock which formed a portion of the consideration for a mortgage were worthless was held not to affect the validity of the mortgage or create an equity to have a deduction from the amount for which it was given, in the absence of any misrepresentation or fraud on the part of the mortgagee.

And the plea of want of value of corporate stock is no defense to an action on a note given for its purchase, as there is no implied warranty, either of its goodness or money value. *Jones v. Garlington*, 44 S. C. 533, 22 S. E. 741.

So, in *Allen v. Pegram*, 16 Iowa, 163, the court said that the vendor of stock in a banking corporation does not warrant its quality or value.

The vendor of shares of stock certainly does not warrant the solvency of the corporation. *People's Bank v. Kurtz*, 99 Pa. 344, 44 Am. Rep. 112.

And the principle that one who sells commercial paper payable to bearer warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the insolvency of the makers does not apply to the sale of the corporate stock so as to place the stockholder under any legal obligation to state

shares of each, and the par value of the shares. It then continued as follows: "The \$500,000 preferred cumulative 8 per cent stock now offered in this market consists of 10,000 full-paid and nonassessable shares, . . . represented by trust-company certificates of the Central Trust Company of New York, against which certificates a like number of preferred shares . . . of the English company have been deposited. Dividends payable at Central Trust Company, New York. . . . The foregoing offering of 10,000 shares preferred stock, for which trust-company certificates have been issued to comply with the requirements of this market, comprises all the stock held in this country for sale, with the exception of 5,000 shares of common stock. . . . Trust-company certificates will also be issued for the common stock. Both classes of stock are offered on the following terms," which were at the rate of \$48.50 per share for preferred

and \$75 per share for common, including "accrued dividend from February 1st, 1891." It announced that subscription lists would be opened on May 7 and closed May 9, 1891, by S. V. White & Co., the Central Trust Company, and the Bank of North America, "from whom prospectuses and blank forms of application can be obtained." Ten per cent of the subscription was payable on application, 30 per cent on allotment, 30 per cent on May 20th, and the remainder on June 1, 1891. The prospectus further stated that "receipts will be given for all payments made, and engraved trust-company certificates, issued by the Central Trust Company, will be delivered as soon as practicable after the making of the final payment. . . . Registrar of certificates, Union Trust Company, New York; transfer agents, Central Trust Company, New York; American committee of management, Hon. H. H. Warner, president," with a vice president, treasurer,

the fact that the corporation is insolvent, to a purchaser who seeks him of his own accord for the purpose of buying the stock without any previous offer to sell. *Rothmiller v. Stein*, 143 N. Y. 581, 28 L. E. A. 148, 38 N. E. 718. The court said that, in regard to a business corporation which is engaged in the transaction of business as a going concern, the mere fact that it is at the moment insolvent does not avoid the general rule of *caveat emptor*, and that the purchase of stock in such a corporation is made under so many different circumstances, and urged by so many different motives wholly apart from the present alleged or assumed insolvency of the corporation, that the sale of such stock could not be placed in the same class, and subject to the same rules, as the sale of commercial paper.

So, the transfer of shares of stock in a corporation by sale or exchange, without representation as to the particular property held by the corporation, warrants only his title to the stock, and not the title of the corporation to the corporate property held and possessed by it. *State v. North Louisiana & T. R. Co.* 34 La. Ann. 947. The court said: "The transferee of stock in a corporation, without specifying the particular property held by the corporation, simply warrants his right as a stockholder, or his title to the stock. The transferee simply acquires his rights as a stockholder, whatever they may be. Though it should subsequently transpire that the corporation was entitled to some valuable right or property, the ownership of which was not known or suspected at the time of the transfer, the transferee could not claim nullity on the ground of error,—at least in absence of concealment or fraud. Nor can the transferee annul, on the ground of error, because it turns out that some property which the corporation was supposed to own did not belong to it. Such error does not touch the nature, the object, or the cause of the contract. The right as stockholder was the sole object and cause of the contract, and that object and cause existed and remained perfect and complete with all the incidents and qualities which, in law, the transferee warranted."

There is a class of cases, which it may be well to notice in this connection, holding that the vendor of spurious stock may be required to return the purchase price to his vendee, not on the theory that there was any implied warranty of genuineness, but upon the ground that the consideration for the contract

of sale has failed, because the thing sold does not answer the description of that which the parties intended to be the object of the sale.

*Kempson v. Saunders*, 4 Bing. 5, 12 J. B. Moore, 44, 2 Car. & P. 366, is an example of this class of cases. Here the purchaser of shares in a projected company for constructing a railroad was held entitled to recover from his vendor the purchase price on the ground that the consideration for the payment had failed, where the undertaking was abandoned before any act of Parliament incorporating the company was obtained.

So, the purchaser of shares in a company which has dissolved was, in *Watkins v. Huntley*, 2 Car. & P. 410, note, held entitled to recover back the money paid on the ground that the consideration had failed.

But there can be no ground for complaint where the parties contracted for the sale of the identical thing sold. *Lambert v. Heath*, 15 Mees. & W. 486. In this case a customer had ordered his broker to buy scrip of the Kentish Coast Railway Company. The broker delivered scrip which had issued from the offices of the company, and had been the subject of purchase and sale in the market for several months, but which the directors then declared had been issued by the secretary without authority. In an action to recover back from the broker the price paid, on the ground that the scrip was not genuine, the court said that the question for the jury was whether what the parties contracted for was what was known in the market as Kentish Coast Railway scrip, and added: "It appears that it was signed by the secretary of the company; and if this was the only Kentish Coast Railway scrip in the market, as appears to have been the case, and one person chooses to sell and the other to buy that, then the latter has got all that he contracted to buy."

So, in *Peck Colorado Co. v. Stratton*, 95 Fed. 741, the worthlessness of shares of corporate stock, for which the purchaser was to pay a certain sum of money into the corporate treasury, was held to be no defense to a suit by the corporation against him for money had and received, in the absence of fraud or specific warranty, where there was no claim that the stock was invalid, or that the vendor did not transfer a good title to it. The court said that the stock was the definite thing which he purchased, and that therefore he received the consideration selected by him.

W. W. N.



and secretary. The rest of the prospectus was devoted to the nature of the business, the property conveyed to the English company by Mr. Warner, the earnings, prospects, etc. The prospectus was not signed, but appended thereto was a letter from Warner, dated April 23, 1891, addressed to S. V. White & Co., in which, purporting to answer their inquiry as to his opinion of the business of the English company, he said, "I have seen a copy of your proposed circular, in which you are about to offer for sale some of the preferred and common stock of said corporation." He then expressed his confidence in the business of the company, and predicted great prosperity for it.

On the 21st of May, 1891, the plaintiff subscribed for 100 shares of the common stock, and, upon paying the 10 per cent down as required by the prospectus, received therefor from the Central Trust Company what is known as a "temporary receipt," stating the amount paid, and describing it as the first instalment of 10 per cent on his application for 100 shares of common stock. The paper also stated that "said application is made in accordance with the terms of the prospectus of April 28th, 1891," and, after reciting the terms of payment, allotment, etc., as stated in the prospectus, continued: Upon payment of the last instalment, which completes the subscription price of \$75 per share, and the surrender of this receipt, the said William McClure shall receive a certificate of the Central Trust Co. of New York, representing the number of shares of the ordinary or common stock of H. H. Warner & Co., Limited, allotted and paid for under the said application, of the par value of £10 sterling per share, as soon as the same is ready for delivery." When this receipt was given, the shares of stock represented by it were on deposit with the trust company, in readiness to fulfil the contract. On the 23d of June, 1891, the plaintiff completed his payments, and received from the Central Trust Company two certificates, each of which, after stating that there had been deposited with said company, "in trust," 50 shares of the stock in question, continued: "Said shares, together with a deed of transfer thereof, will be delivered to William McClure or assigns on surrender of this trust receipt, properly indorsed. This receipt is transferable at the office of said trust company in New York, either in person or by power of attorney, and until surrender, all dividends collected upon said shares by said trust company will be paid to the registered holder of this receipt or to his order." Each certificate had indorsed thereon the usual blank form of transfer. On the 2d of June, 1891, Mr. Warner gave the Central Trust Company an order on H. H. Warner & Co. to pay it any dividends on 1,000 shares each of his ordinary and preferred stock standing in his name on the books of the company, and stated that "this order is irrevocable until changed by written consent of said Central Trust Company of New York." On the 13th of November, 1891, the Central Trust Company paid to the plaintiff a dividend on the 53 L. R. A.

stock which he had purchased, and at the same time gave him a "memorandum of dividend for six months ending July 31st, 1891, on stock of H. H. Warner & Co., Limited (a corporation), in name of William McClure, 10 per cent on one hundred shares, . . . \$485." A second dividend for six months ending January 31, 1892, but less in amount, was paid to the plaintiff, and a similar memorandum signed by the Central Trust Company delivered to him at the time. The deed of transfer referred to in the stock certificate was in the form of an ordinary assignment of shares of stock from Hulbert Harrington Warner to the transferee, except that the closing part was as follows: "Subject to the several conditions on which I held the same immediately before the execution hereof, and the said transferee doth hereby agree to accept and take the said share subject to the conditions aforesaid." Accompanying the deed of transfer were the shares of stock therein mentioned, which were in the form of a certificate under the seal of the corporation, stating that the owner was "the registered holder" of a certain number of shares of stock (describing it) "in H. H. Warner & Company, Limited, subject to the articles of association and regulations of the company; such shares being numbered . . . inclusive."

On the 29th of November, 1890, Mr. Warner was owing the English company over \$400,000, and in order to secure the payment thereof he transferred to two of the directors, as trustees for the company, 4,000 preferred and 12,820 common shares of his stock, as collateral security; and in the instrument of transfer he charged said shares with the payment of the debt and interest, and agreed that all dividends payable thereon, as well as those on any other shares registered in his name, should be applied upon his indebtedness. In case he did not pay the debt by the 1st of May, 1891, he authorized the company to sell "any of such shares upon such terms as they may think fit, and apply the proceeds in reduction of the debt." The instrument closed as follows: It is understood . . . that I shall be at liberty at any time to exchange any of the above-mentioned shares for other shares of the company of equal nominal value, should I wish to do so, and that as the debt is reduced a proportionate amount of shares shall be released and retransferred to me, or as I may direct, but so that the company shall at all times retain shares taken at this nominal or par value to double the amount of the debt and interest remaining owing." The articles of association of the English company, as originally adopted, provided that "the directors may refuse to register the transfer of any share not fully paid up, if the transfer is made by a member who is indebted to the company, or against whom the company has any unsatisfied claim or a lien on his shares, or if the directors shall not be satisfied that the proposed transferee is a responsible person." By another clause of the original articles it was provided that "the company shall have a first and para-

mount lien upon all the shares not fully paid up, registered in the name of any member (whether solely or jointly with others), for his debts, liabilities, and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment or discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends declared on such shares." An independent article authorized the directors to retain all dividends declared upon any share, and apply them upon any lien held by the company on any shares. On the 26th of April, 1893, the articles of association were amended by striking out the words "not fully paid up" in each of the foregoing clauses. The plaintiff did not know when he made his subscription or accepted the certificate that the stock belonged to Mr. Warner or stood in his name. The Central Trust Company knew it, however, but did not know that there was any lien or charge upon the stock until about 1894. It received \$1,200 a year from Warner for acting as transfer agent. The shares of stock deposited with the Central Trust Company before it issued any certificates were sent by the English company to their attorneys in New York, who delivered them to S. V. White & Co., by whom they were delivered to the Central Trust Company. Some of the money paid by purchasers of certificates went back through the same hands to the English company, but the subscriptions received in May and June, 1891, were paid by the Central Trust Company to Mr. Warner individually. The plaintiff testified that the statements set forth in the prospectus were believed and relied upon by him, and that they induced him to make the investment. He had not seen the form of the deed of transfer or of the certificate of stock in the English company when he purchased, nor did he ask to see either. The Central Trust Company did not state "as to whom they were acting as agents for." The plaintiff has been a stockbroker since 1868, and for some years was vice chairman and chairman of the New York Stock Exchange. On the 8th of May, 1893, Mr. Warner made a general assignment for the benefit of creditors, which covered a large number of shares of both common and preferred stock standing in his name; and the assignee testified that neither kind had any value, because Warner's interest had been encumbered by obligations created by him to the English company, which since 1892 has refused to pay dividends upon or to transfer any stock registered in his name until their liens are discharged. In January, 1894, the plaintiff presented his certificates to the Central Trust Company, and demanded the shares of stock purchased by him, refusing to accept the deed of transfer from Mr. Warner, with a certificate of the requisite number of shares standing in his name attached thereto. Shortly afterwards he commenced this action, having first offered to return the dividends which he had received. At the close of the evidence for the plaintiff the referee dismissed the complaint, holding that no

cause of action had been established against the Central Trust Company, either *ex delicto* or *ex contractu*. The judgment entered accordingly was affirmed by the appellate division without an opinion, and the plaintiff appealed to this court.

**Mr. Harry Van Ness Philip**, for appellant:

All representations made by defendant, or with its knowledge and consent, whether made before or after the delivery of the trust certificates, should have been considered by the referee.

*Sommer v. Oppenheim*, 19 Misc. 605, 44 N. Y. Supp. 396; *White v. Benjamin*, 150 N. Y. 258, 44 N. E. 956; *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197.

The defendant is answerable to the plaintiff for all concealments of fact and false representations.

A person who has been induced by fraudulent representations to become the purchaser of property has, upon discovery of the fraud, three remedies open to him, either of which he may elect. He may rescind the contract absolutely, and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party whatever may have been received by him by virtue of the contract.

*Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Thayer v. Turner*, 8 Met. 550; *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614.

He may bring an action in equity to rescind the contract, and in that action have full relief.

*Allerton v. Allerton*, 50 N. Y. 670.

Such an action is not founded upon a rescission, but is maintained for a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial.

Lastly, he may retain what he has received, and bring an action at law to recover the damages sustained. This action proceeds upon an affirmation of the contract, and the measure of the plaintiff's recovery is the difference between the article sold and what it should be according to the representations.

*Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301; *Currier v. Poor*, 84 Hun, 45, 32 N. Y. Supp. 74, Reversed in 155 N. Y. 344, 49 N. E. 937, on other grounds.

The action may be sustained for want of consideration, mistake of fact, or breach of warranty, as well as for fraud.

*Goodman v. Laborn*, 11 App. Div. 617, 42 N. Y. Supp. 166; *Crouce v. Levin*, 95 N. Y. 423; *McKnight v. Devlin*, 52 N. Y. 399, 11 Am. Rep. 715; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Jarvis v. Manhattan Beach Co.* 25 N. Y. S. R. 3, 6 N. Y. Supp. 703; *Hackins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Ledwich v. McKim*, 53 N. Y. 307; *Oberlander v. Spiess*, 45 N. Y. 178;

*Stone v. Frost*, 61 N. Y. 614; *Webb v. Odell*, 49 N. Y. 583; *Littauer v. Goldman*, 72 N. Y. 506, 28 Am. Rep. 171.

The Central Trust Company is liable to plaintiff as principal for its part in the transaction.

*Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Cunningham v. Wathen*, 14 App. Div. 553, 43 N. Y. Supp. 886; *Argersinger v. Macnaughton*, 114 N. Y. 539, 21 N. E. 1022; *Meriden Nat. Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994; *Nichols v. Weil*, 30 Misc. 441, 62 N. Y. Supp. 477.

The defendant must make good the representations in the several exhibits.

*Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Talmadge v. Sanitary Security Co.* 31 App. Div. 498, 52 N. Y. Supp. 139.

The allegations of fraud and conspiracy in the complaint do not render it necessary that the plaintiff establish or stand upon a cause of action *ex delicto*.

He may recover in equity for a rescission on the ground of fraud or mistake.

*Byxbie v. Wood*, 24 N. Y. 607; *Hubbell v. Meigs*, 50 N. Y. 487; *Ledwich v. McKim*, 53 N. Y. 307; *Freer v. Denton*, 61 N. Y. 492; *Woodbury v. Deloss*, 65 Barb. 501; *Campbell v. Wright*, 21 How. Pr. 9; *Russell v. Brounell*, 20 N. Y. Week. Dig. 504; *Granger's Ins. Co. v. Turner*, 61 Ga. 561; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188; *Pebbles v. Patapasco Guano Co.* 77 N. C. 233, 24 Am. Rep. 447; *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829; *Henderson v. San Antonio & M. G. R. Co.* 17 Tex. 560, 67 Am. Dec. 675; *Arkwright v. Newbold*, L. R. 17 Ch. Div. 301; *Gilbert v. Endran*, L. R. 9 Ch. Div. 259; *White v. Salisbury*, 33 Mo. 150; *Hammond v. Pennock*, 61 N. Y. 145; *Crump v. United States Min. Co.* 7 Gratt. 353, 56 Am. Dec. 116; *Thomp. Corp.* §§ 1382, 1470, 1484, 1486; *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414; *Talmadge v. Sanitary Security Co.* 31 App. Div. 498, 52 N. Y. Supp. 139.

If sufficient facts are proved, they may be held to be conclusive evidence of *scienter*.

*Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726; *Daly v. Wise*, 132 N. Y. 312, 16 L. R. A. 236, 30 N. E. 837; *Babcock v. Eckler*, 24 N. Y. 623; *Bennett v. Judson*, 21 N. Y. 238; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Dawson v. Chisolm*, 15 N. Y. S. R. 984, 1 N. Y. Supp. 171; *Bigler v. Atkins*, 7 N. Y. S. R. 235; *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414.

**Mr. Adrian H. Joline**, for respondents:

The action was at law to recover money paid, based upon a rescission of the transaction on the ground of fraud, with an offer to restore what had been received. In order to recover, the plaintiff was bound to show representation, falsity, *scienter*, deception, and injury.

*Arthur v. Griswold*, 55 N. Y. 400; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

In this form of action the plaintiff cannot recover as upon contract.

*Barnes v. Quigley*, 59 N. Y. 265; *South-53 L. R. A.*

*wick v. First Nat. Bank*, 84 N. Y. 420; *Mea v. Picroe*, 63 Hun, 400, 18 N. Y. Supp. 293; *Patterson v. Patterson*, 1 Abb. Pr. N. S. 262; *Ransom v. Wetmore*, 39 Barb. 104; *Walter v. Bennett*, 16 N. Y. 250; *Sibley v. Hastings*, 21 Hun, 110; *Bernhard v. Seligman*, 54 N. Y. 661; *Dudley v. Scranton*, 57 N. Y. 424; *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562.

The character of the action is determined by the complaint.

*Neudecker v. Kohlberg*, 81 N. Y. 296; *Allen v. Allen*, 52 Hun, 398, 5 N. Y. Supp. 518.

The appellant has not sustained any injury by any act of respondent. He has an absolute right to the shares, and the refusal of the English company to permit a transfer of the shares is without justification.

There never was any lien on the shares deposited with the trust company, which anyone was entitled to assert.

A bona fide purchaser for value of a non-negotiable chose in action from one upon whom the owner has imposed the apparent absolute ownership where its purchase is made on the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting title in hostility thereto.

*Moore v. Metropolitan Nat. Bank*, 55 N. Y. 43, 14 Am. Rep. 173; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96.

Under a general denial defendant may controvert by evidence any and every fact by which the plaintiff seeks to establish his cause of action, and may also show that the plaintiff never had a cause of action.

*Benton v. Hatch*, 43 Hun, 142; *Donai v. Metropolitan Elev. R. Co.* 14 N. Y. S. R. 264; *Hier v. Grant*, 47 N. Y. 278. See also *Marsh v. Dodge*, 66 N. Y. 533; *Schwarz v. Oppold*, 74 N. Y. 307; *Van Alstyne v. Norton*, 1 Hun, 537.

At common law a corporation had no lien upon its stock for debts due to the company.

*Weston's Case*, L. R. 4 Ch. 20; *Hamilton, Manual of Company Law*, ed. 1891, 144; *Re Kingstown Yacht Club*, Ir. L. R. 21 Eq. 199; *Pinkett v. Wright*, 2 Hare, 120; *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183; *Philadelphia S. S. Dock Co. v. Heron*, 52 Pa. 280; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Kinnan v. Sullivan County Club*, 26 App. Div. 216, 50 N. Y. Supp. 95.

It is contrary to the policy of English law, as of American law, to countenance restrictions on the right to sell stock.

*Moffatt v. Farquhar*, L. R. 7 Ch. Div. 591; *Gilbert's Case*, L. R. 5 Ch. 559; 1 Cook, Stock & Stockholders, § 520; 2 Thomp. Corp. § 2317; *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447, 24 S. W. 129; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Bank of Attica v. Manufacturers' & T. Bank*, 20 N. Y. 501; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; *Conklin v. Second Nat. Bank*, 45 N. Y. 655; *Pyron v. Carter*, 22 La. Ann. 98; *Plymouth Bank v. Bank of Norfolk*, 10

Pick. 454; *Merchants' Bank v. Shouse*, 102 Pa. 488; *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359; *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. ed. 923.

Vann, J., delivered the opinion of the court:

The Central Trust Company (henceforth called the defendant) did not sell the stock as its own, but only as agent for an undisclosed principal. The prospectus did not purport to have been issued by it, but by S. V. White & Co., who, as bankers, announced that they were authorized to offer the stock for subscription, which, in view of what followed, meant for sale by subscription. The necessary inference is that they were thus authorized, not by themselves, which would be absurd, but by an undisclosed owner. This is confirmed by Warner's letter to them, which was part of the prospectus, wherein he said, "I have seen a copy of your proposed circular, in which you are about to offer for sale some of the preferred and common stock of said corporation." According to the statements of the prospectus, the shares of stock thus offered for sale could not have been shares not yet issued by the English company, as claimed by the plaintiff; for they are not only described as "full paid and nonassessable," but are declared to comprise "all stock held in this country for sale." The prospectus contained no representation that the defendant was the transfer agent of stock, as is further claimed by the plaintiff, for there is no express statement as to what it was an agent to transfer, while the context shows that the agency was for the transfer of certificates, the same as the Union Trust Company was in terms, and in the same connection, stated to be the "registrar of certificates." Moreover, it was distinctly announced that trust-company certificates had been issued by the defendant "to comply with the requirements of this market," and that the shares offered were represented by such certificates, against which a like number of shares had been deposited. The certificates stated that they were transferable at the office of the defendant. "The requirements of this market" refer to the obvious impossibility of transferring, in this country, shares upon the books of a foreign corporation, which are necessarily kept abroad. It was to meet this difficulty, as is fairly to be inferred from the language used, that the scheme of issuing certificates was devised, so that something which stood for shares and was capable of immediate transfer could be handled in this market with the facility belonging to dealings on the stock exchange, for the privileges of which, as the prospectus also stated, application would be made. Thus the position of the defendant, according to the prospectus, was as follows: It was the depository of certain shares of stock in the English corporation offered for sale by S. V. White & Co. for an undisclosed owner, against which it was to issue certificates for the

purpose of making the stock marketable in this country, and was to act as agent for the transfer of the same, as well as to receive applications for the sale of stock. This was all that the defendant represented to the plaintiff; for he asked no questions, and it made no statements, except those which appeared in the various writings. When he first dealt with the defendant he knew all that it knew, except that Warner owned the stock, which was an immaterial fact, and the form of the deed of transfer, and of the shares of stock as issued by the English company. Under these circumstances, on the 21st of May, 1891, he entered the office of the defendant and subscribed for 100 shares of stock, made the payment required in advance, and accepted the temporary receipt, which became the first contract between the parties. By that instrument the defendant agreed that upon payment of the last instalment and the surrender of the receipt the plaintiff should receive a certificate issued by it, representing the number of shares on deposit with it in trust, which he subscribed and paid for under the application. He made no inquiry either as to the form of the certificate or upon any other subject. The next step was when he completed his payments on the 23d of June, 1891, and the preliminary contract was performed by the defendant through the delivery of the certificate as it had agreed. Thereafter the certificate was the only unperformed contract between the parties. The plaintiff still made no inquiry, but accepted the certificate as the completion of the contract without complaint or question. Upon the delivery and acceptance of the certificate the transaction between the parties was complete, except that performance was still due from the defendant of its promise as contained in the certificate. If that promise was satisfied by the delivery or tender of the deed of transfer signed by Warner, and attached to a certificate issued by the English company for the number of shares required, no breach thereof by the defendant has been shown. If, on the other hand, it was the duty of the defendant, under all the circumstances, to deliver an effective deed of transfer of marketable stock, free from lien, then the contract has not been performed. While the complaint may be multifarious, if the evidence established a cause of action of any kind the motion to nonsuit should not have been granted.

We thus reach the question whether the defendant tendered to the plaintiff what it agreed to sell him. Disregarding the mere form of the transaction, the thing sold was stock, and did the stock tendered answer the description of the stock sold? Did the minds of the parties meet simply upon shares of stock that were marketable, or upon any shares of stock, whether marketable or not? Did the defendant understand that shares of stock lawfully issued in proper form, with genuine signatures, was all that was required, regardless of whether they were worthless, owing to a lien thereon, or not? In answer to these questions the

defendant invokes the venerable rule of *caveat emptor*, and holds it up as a shield to protect it from liability to the plaintiff. That rule was rigidly enforced for many years, but, as it was found at times to promote injustice, its severity was, to some extent, gradually but cautiously relaxed. Thus, if one sold, as his own, goods belonging to a stranger, it was at first held that the purchaser had no remedy unless the seller affirmed that the goods were his. *Dale's Case*, Cro. Eliz. pt. 1, p. 44; *Chandelor v. Lopus*, Cro. Jac. 4; *Roswel v. Vaughan*, Cro. Jac. 196. In the course of time this harsh application of the rule was overturned upon the ground that the act of selling was an implied affirmation of title, where the one selling was in possession of the thing sold. *Crosse v. Gardner*, Carth. 90; *Medina v. Stoughton*, 1 Salk. 210; *Defreeze v. Trumper*, 1 Johns. 274. The doctrine of implied warranty thus made its first inroad upon the rule of *caveat emptor*, owing, not to what the parties said, but to the nature of the transaction. Since then further inroads have been made, until the rule is now "regarded as upon the whole well adapted to protect right, to prevent wrong, and to provide a remedy for a wrong where it has occurred." 1 Parsons, Contr. 8th ed. \*577. Thus there is now, not only an implied warranty of title, but, under certain circumstances, of quality, also, as where the sale is by sample, or the buyer has no adequate opportunity to examine before purchasing, as well as in some other instances. *Carleton v. Lombard, A. & Co.* 149 N. Y. 137, 43 N. E. 422; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Leonard v. Fowler*, 44 N. Y. 289; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *Hibbert v. Shee*, 1 Camp. 113. While the obligation of the vendor is described by some courts as arising from an implied warranty, by others from a duty imputed by law, and by others still as an implied condition of existence or identity of the thing sold, all mean that the law imputes a duty to the seller, under certain circumstances, whether he actually intended to assume it or not. The modern tendency is to impute a duty whenever it is required by good faith in commercial dealings. *Fides servanda est*. When, from the nature of the transaction or the relative situation or circumstances of the parties, a legal duty should reasonably be imputed to the seller of personal property, in the interest of commerce, and to enable the purchaser to get what he paid for, the law will generally impute one, although progress in that direction has been slow and cautious, in view of the ancient rule of *caveat emptor*. The principle which governs sales of tangible chattels applies with equal force to sales of incorporeal chattels, such as a promissory note without indorsement, or a share of stock, where the thing actually sold is the right evidenced by a piece of paper with a particular name, though the form of sale is of the paper itself. An examination of

the leading authorities relating to this branch of the subject may be useful.

In *Delaware Bank v. Jarvis*, 20 N. Y. 226, the defendant had transferred to the plaintiff, without indorsement, a promissory note which had been taken at a usurious premium. The court held that whether the defendant had knowledge of the usury was not a material circumstance, and "that the vendor of a chose in action, in the absence of express stipulations, impliedly warrants its legal soundness and validity." Ten years later this case was followed and made the basis of judgment in *Fake v. Smith*, 2 Abb. App. Dec. 76. *Webb v. Odell*, 49 N. Y. 583, was a similar case, and the same result was reached, but upon a somewhat different ground. The court said: "It is a general rule that upon the sale and delivery of personal property, without fraud or warranty, no action will lie against the vendor to recover damages for any defects which may exist; and this rule applies when the article differs from the representations of the seller as to quality, unless such representations were fraudulent. But when the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, and the difference in subject-matter is so substantial and essential in character as to amount to a failure of consideration, there is no contract, and the purchaser may recover back the money paid. *Kerr, Fraud & Mistake*, 58 et seq." In *Ledwich v. McKim*, 53 N. Y. 307, some railroad bonds turned out to be worthless because they were not perfect when they passed from the possession of the defendants to that of the plaintiff's assignor, for the want of an indorsement by the company as to where they were to be paid. It was held that there was an implied warranty of title in the assignor, and that upon failure of title he was liable. In the course of its opinion the court said: "It is not to be disputed that, if these papers are other than negotiable instruments, there was in the sale of them by the defendants an implied warranty of their title to them, and that on a failure of title they are liable. The defendants insist, however, that they only impliedly warrant the genuineness of the execution of the instrument. In this they err. *Murray v. Judah*, 6 Cow. 484. The seller warrants the genuineness of the instrument, and that it is what it purports to be. *Gurney v. Womersley*, 28 Eng. L. & Eq. 256; see *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682." In *Ross v. Terry*, 63 N. Y. 613, the rule of implied warranty on the part of the vendor was applied to the sale of a bond and mortgage which were usurious and void, but the defendant knew it at the time of the sale. There was no question of usury in *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481, where it was held that there was no implied warranty or representation on the part of the vendor of a bill, valid in the hands of an indorsee, that it was drawn against funds, or that it was not accommodation paper, because accommodation acceptances "are certainly not

unusual commercial transactions," and are not necessarily "inconsistent with good faith or solvency." So, in *Mandeville v. Newton*, 119 N. Y. 10, 23 N. E. 920, where a party held certain notes, and other indebtedness against the maker of the notes, and also held certain claims as collateral security therefor, but after making various collections on the collaterals, sufficient to pay the notes, no application having been made in payment of any specific items of indebtedness, at the instance of the debtor, and on payment of the balance due him, the holder assigned his claims and transferred the notes, with the collaterals, to another creditor, without any express warranty that the notes were valid outstanding obligations, it was held that no warranty could be implied, because it was not in any proper sense a purchase of the notes, except in so far as they, with the other claims transferred at the same time, represented the balance which after the application of what had been collected would remain due on the claims transferred. In *Littauer v. Goldman*, 72 N. Y. 506, 28 Am. Rep. 171, it was held that upon the transfer, without indorsement or representation, of a promissory note tainted with usury, in the absence of knowledge of the fact on the part of the seller at the time of the transfer, no warranty against the defect will be implied, because a *scienter* is essential to establish an implied warranty as to the validity of a promissory note. This authority, which apparently controlled the referee in deciding the case now before us, has not escaped criticism. Thus, in *Meyer v. Richards*, 163 U. S. 385, 411, 41 L. ed. 199, 209, 16 Sup. Ct. Rep. 1148, 1158, after a thorough review of the leading authorities in this country and England, the court said: "There is an exceptional case, *Littauer v. Goldman*, (1878) 72 N. Y. 506, 28 Am. Rep. 171, which holds that the common-law obligation as to the implied warranty of identity in the thing sold, in the case of commercial paper, extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper, differing from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented here by the argument of the defendant in error, to which we have just called attention; that is, that it admits the common-law rule, and then denies its essential result, by eliminating conditions of nonexistence which are necessarily embraced by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to, for either the principle of warranty of identity must be accepted or rejected. It cannot be accepted, and its legitimate and inevitable results be denied. The rule there announced was in conflict with previous de-

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cisions in New York, and the decision is strongly criticised by the court of errors and appeals of New Jersey in *Wood v. Sheldon*, 42 N. J. L. 421, 425, 36 Am. Rep. 523." In *Meyer v. Richards* it was held that, in a sale of commercial paper without indorsement, the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell; this rule being designated in England as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold. In view of the latest case in this court upon the subject of implied warranty, *Littauer v. Goldman* may properly be limited to commercial paper, as it is the policy of the law to throw special safeguards around the transfer of such property. Although cited in the case of *Flandrow v. Hammond*, 148 N. Y. 129, 42 N. E. 511, it was not allowed to control the decision. In the *Flandrow Case*, on the sale of a judgment by a party who had levied upon it and bought it on execution sale, in pursuance of an agreement to bid it off in satisfaction of the execution and transfer it to the other party, who advanced the money for the expenses of the proceedings, it was held that there was an implied warranty, not only of the existence of a valid judgment, but that a valid lien had been acquired thereon by the levy, under which title could be acquired by sale upon execution. This case rests upon the principle that, where one sells as his own an incorporeal chattel, a warranty will be implied whenever and to the extent required by good faith. See also *Stone v. Frost*, 61 N. Y. 614; *Roberts v. Fisher*, 43 N. Y. 159, 3 Am. Rep. 680; *McCoy v. Archer*, 3 Barb. 323; *Dresser v. Ainsworth*, 9 Barb. 619; *Carman v. Trude*, 25 How. Pr. 440.

The cases in other states, with few exceptions, hold that upon the sale of stock, bonds, etc., there is an implied warranty that the thing sold is what it purports to be. *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523; *Thrall v. Newell*, 19 Vt. 208, 47 Am. Dec. 682; *Allen v. Olark*, 49 Vt. 390; *Flynn v. Allen*, 57 Pa. 482; *Brown v. Ames*, 59 Minn. 476, 61 N. W. 448; *Ware v. McCormack*, 96 Ky. 139, 28 S. W. 157, 959; *Bell v. Cafferty*, 21 Ind. 411; *Lyons v. Miller*, 6 Gratt. 427, 52 Am. Dec. 129; *Aldrich v. Jackson*, 5 R. I. 218; *Merrim v. Wolcott*, 3 Allen, 258, 80 Am. Dec. 69; *Loddell v. Baker*, 3 Met. 472; *Giffert v. West*, 33 Wis. 617, 37 Wis. 115; *Daskam v. Ullman*, 74 Wis. 474, 43 N. W. 321; *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117; *Rogers v. Walsh*, 12 Neb. 28, 10 N. W. 467; *Hussey v. Sibley*, 66 Me. 192, 22 Am. Rep. 557; *Terry v. Bissell*, 26 Conn. 23. The position of the English courts is fairly stated in Benjamin on Sales, when he says: "Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes shares, certificates, and other securities, is

bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver, as a condition precedent, that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it." Benjamin, Sales, 7th ed. § 607; *Young v. Cole*, 3 Bing. N. C. 724; *Westropp v. Solomon*, 8 C. B. 345; *Gompertz v. Bartlett*, 23 L. J. Q. B. N. S. 65; *Gurney v. Womersley*, 24 L. J. Q. B. N. S. 46. Story, in his work on Promissory Notes (§§ 118 *et seq.*), says that the seller of a note warrants, by implication, unless otherwise agreed, that he is the lawful holder and has a just and valid title to the instrument, and a right to transfer it by delivery; that the instrument is genuine, and not forged or fictitious; that it is of the kind and description it purports on its face to be; and that he has no knowledge of any facts which prove the instrument, if originally valid, to be worthless, either by failure of the maker, or by its being already paid, or otherwise to have become void or defunct. He further says, however, that the authorities are in conflict when a fact exists which makes the note of no value, but both parties are equally ignorant and equally innocent. Under these circumstances the learned author declares that the weight of reasoning and the weight of authority seem to be in favor of holding that the seller in such cases must bear the loss. See also Schouler, Pers. Prop. § 318; Dan. Neg. Inst. § 730; Byles, Bills, 278; Biddle, Stockbrokers, 265; 2 Randolph, Com. Paper, § 757.

We think it was a condition of the sale, whether called an "implied warranty" or any other name, that the defendant was to deliver marketable stock free from lien; for that alone would meet the description of the thing sold, under the circumstances surrounding the parties when the sale was made. Shares of stock so covered with liens as to be of no value are not what the parties meant; for such shares would be worth no more than if the signatures to the certificates had been forged, although but for the liens the stock would have been worth the sum paid for it. The substance of the thing sold was not stock of any particular market value, but unencumbered stock, of the same value as free shares, such as persons of ordinary intelligence would understand was meant by the general description of stock. By a "share of stock" the parties did not mean half a share or any fraction of a share representing an equity of redemption, but an entire share not cut down by a charge. They meant a share, the owner of which, and not the lienor, would be entitled to the dividends thereon, and which was worth as much as any other share of the same class.

The defendant cannot escape liability by claiming that it sold as agent, for it did not disclose the name of its principal. The same claim was made in *Holt v. Ross*, 54 N. Y. 472, 474, 13 Am. Rep. 615, but the court said: "The express company, when it presented the draft to the plaintiffs for payment and received payment, did not disclose

its agency. Therefore it is liable as if actually principal in the transaction. It was so decided in *Canal Bank v. Bank of Albany*, 1 Hill, 287. It was not sufficient that the defendant acted as agent. To shield itself from liability, it should have disclosed its agency. Such is the rule as to all agents. To shield themselves from liability for their acts, they must give the names of their principals." This is true even if the plaintiff knew that the defendant was acting as agent for someone, but did not know for whom. *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Argersinger v. McNaughton*, 114 N. Y. 535, 21 N. E. 1022; *Cabot Bank v. Morton*, 4 Gray, 156. The defendant was the central figure in a plan to make shares issued by an English corporation readily marketable in this country. For that purpose it issued the certificates of transfer, and accepted the position of agent to transfer certificates in consideration of an annual salary. It held out the shares in its possession for sale as marketable. The acts of certifying, offering for sale, and selling were in substance an assertion to that effect. Its position was one of trust, and invited the confidence of the public. What a trust company sells, even for a third person, under such circumstances, the purchaser may reasonably expect to receive in essence and substance, and not its mere shadow. It held the shares and the deeds of transfer in trust for purchasers, and expressly agreed to make delivery upon demand. It was to deliver something which it knew purchasers would expect, and which of necessity it must itself have expected, would result in the transfer of marketable shares. The position which it occupied and the circumstances surrounding it when it contracted with the plaintiff cast upon it the duty of exercising due care in discharging the trust relation which it had assumed. It knew, but the plaintiff did not know, that the shares in its possession were issued by the English company subject, in express terms, to its articles of association and regulations; that the deed of transfer was likewise "subject to the several conditions on which" the transferor held the shares "immediately before the execution" thereof; and that it also contained a covenant on the part of the transferee "to accept and take the said shares subject to the conditions aforesaid." Under these circumstances the law imputed to the defendant the duty of inquiring to see whether there was anything behind the conditions appearing on the face of the papers in its possession which would make the shares unmarketable, before it undertook to place them on the market under the sanction of its name and the confidence invited by its standing. Its position and superior knowledge put it upon inquiry, and the law charges it with knowing whatever proper inquiry at the proper place would have disclosed. Inquiry at the office of the English company, in person or by letter, would have disclosed the lien, and prevented the defendant from being imposed upon itself and from unintentionally imposing upon oth-

ers. Whether the lien has been waived by the English company, or discharged according to the terms of the instrument which created it, were matters of defense, which were not entered upon by the defendant, because a nonsuit was granted. While some facts bearing upon these questions were brought out upon cross-examination, the referee did not pass upon them, because, in the view he took of the case, it was unnecessary, as he was of the opinion that the defendant was not under the legal duty of delivering shares free from liens. We have taken the opposite view, which renders a new trial necessary, when the facts can be fully developed, and any alleged defense intelligently passed upon.

*We discharge our present duty by reversing the judgments below and ordering a new trial, with costs to abide the event.*

**Parker, Ch. J., and Bartlett, Martin, Cullen, and Werner, JJ., concur.**

**Gray, J., dissenting:**

I dissent, and for these reasons, briefly: Assuming that the plaintiff can recover as for a breach of contract, notwithstanding that his complaint is based solely upon fraud and deceit, I think that he failed to make out any case against the respondent, the trust company. The latter did not sell the stock, either as its own, or as agent for an undisclosed principal. It was not in any strict sense Warner's agent. It was merely an agency selected by him for the safe deposit and custody of the English stock and of the moneys, and for the convenient transferring of the interests of those who might deal in the stock. It made no representations as to the value or character of the stock. Its undertaking was contained in the "trust receipts" which it issued, and that was to act as the agent for their transfer, and, upon their surrender, to deliver the shares theretofore deposited with it, to the amount called for by the trust receipts, with the deeds of transfer thereof. Whatever material representations were made concerning the stock were contained in the prospectus issued by S. V. White & Co. It behooved the plaintiff, if he desired to satisfy himself further upon the subject of the shares as issued by the English corporation, to make proper inquiries. He knew he was buying the stock of a foreign corporation, and that he was to receive it under a deed of transfer which accompanied the deposit of the stock. In such a case prudence would seem to dictate the duty of inquiry concerning the terms

of the deed of transfer, if not, perhaps, also, concerning the by-laws or regulations of the foreign corporation. He could not saddle the trust company with an unexpected and unusual liability by mere assumptions concerning the shares deposited with it. It was not bound to volunteer information, and the plaintiff was no novice in such matters. He knew that the shares offered for sale had been issued by the English company, that the trust company was not placing them upon the market, that the trust receipts expressed the obligations of the trust company towards him, and that the functions assumed by it were to hold certain shares of stock delivered to it, until the surrender in exchange therefor of the trust receipts, acting meanwhile as an agent for the convenient transfer of the receipts. Nor could the trust company be made responsible for the acts of the directors or managing agents of the English corporation in attempting to reserve or provide for a lien upon the fully paid-up shares of stock at a time subsequent to their delivery to the trust company. If conceivable that that was permissible under English laws, it was at most a secret arrangement with the stockholder, and it could have no retroactive effect. But, as it was, why or how is the trust company to be held responsible? As before remarked, it made no representations about the stock, it sustained no contractual relation with the English company, and it was not called upon to do anything. It was powerless to change the situation, and whatever remedy the plaintiff had was against White & Co., or their principal, Warner, if not against the English company. I think the trust company met its obligation to the plaintiff, and that, if he has sustained any legal damage at all, it is due to his own failure to inform himself concerning his proposed investment, and not to any act of omission by the trust company. I not only doubt the soundness of the doctrine upon which it is sought to impute to the trust company a liability akin to that which it would be under as a vendor, but I doubt its wisdom. The trust company is one of a number of like institutions, which afford the community safe and convenient agencies in financial transactions of magnitude, where responsibility for the safety of values confided to them, as well as a complete and effective machinery, are demanded. It is sought to impute to this trust company duties and liabilities which its conduct did not suggest, and which were not within the strict terms of its undertaking. I think that the judgment should be affirmed.

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## LOUISIANA SUPREME COURT.

City of NEW ORLEANS

v.

August FABER, Appt.

(105 La. 208.)

\*1. The ordinance of the New Orleans city council, No. 312, N. C. S., adopted under the authority of act No. 34 of 1900, in prohibiting private markets within 3,200 feet of the public markets, violates none of the provisions of the state or Federal Constitutions which are here invoked.

2. It is within the police power and legislative discretion of the city of New Orleans, under said act of the general assembly, to require certain food commodities to be sold only in the public markets; and the fact that the ordinance in question may have the effect of compelling dealers in such commodities to go into the public markets, or else to go out of business, does not affect the validity of the ordinance.

3. It is competent for the city, under existing laws, to authorize persons to build markets and to collect the revenues thereof for a fixed period, in consideration of their conveying the property to the city; such markets to be under the control of the city, and to be, in all respects, governed by the regulations applicable to other public markets.

(March 5, 1901.)

**A**PPEAL by defendant from a judgment of the Recorder's Court of the City of New Orleans convicting him of violating the provisions of the city ordinance regulating private markets. *Affirmed.*

The facts are stated in the opinion.

**Messrs. E. Howard McCaleb and E. H. McCaleb, Jr.,** for appellant:

Ordinance No. 312, N. C. S., is illegal, because even the police power does not extend to the destruction or driving to inconvenient or unprofitable localities of necessary or useful occupations carried on in such manner as to be harmless.

*Stockton Laundry Case*, 26 Fed. 614; *Rc Hong Wah*, 82 Fed. 623.

Courts look at the substance of things, and where a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is their duty to so adjudge, and thereby give effect to the Constitution.

*Mugler v. Kansas*, 123 U. S. 611, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *State v. Blaser*, 36 La. Ann. 366; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707.

The power to regulate does not include the power to prohibit and suppress a lawful occupation.

\*Headnotes by MONROE, J.

NOTE.—As to market regulations restricting sales, see also *State v. Saradat* (La.) 24 L. R. A. 584, and note.  
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*State v. Owen*, 50 La. Ann. 1181, 24 So. 187; *Horr & B. Mun. Pol. Ord.* pp. 31, 32; *Dill. Mun. Corp.* 2d ed. §§ 257, 259, 261.

When the power to legislate on a given subject is conferred upon a municipal corporation, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.

*Dill. Mun. Corp.* 2d ed. § 262; *State v. Dubarry*, 46 La. Ann. 33, 14 So. 298.

Regulations enacted under the power to regulate markets, or under the police power, whether directed to the proper internal police, or to the conditions, methods, and times of conducting traffic in marketable articles outside the public market itself, in order to be valid must be of a police or sanitary character in fact, and not merely an attempt to restrain trade under the color of regulating it.

*St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89; *Burlington v. Dankwardt*, 73 Iowa, 170, 34 N. W. 801; *Spellman v. New Orleans*, 3 Inters. Com. Rep. 575, 45 Fed. 3.

The ordinance is unreasonable and against common right.

*Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277; *Crowley v. West*, 52 La. Ann. 526, 47 L. R. A. 652, 27 So. 53; *Senior v. Pierce*, 31 Fed. 630.

Prohibiting sales by certain persons or certain places creates a partial or entire monopoly.

*Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Mulford v. Beveridge*, 78 Ill. 455.

A municipal corporation cannot confer upon private individuals the right to collect market revenues, and prohibit others from keeping private markets within the limits of the markets constructed and operated by the municipal grantees.

*Bloomington v. Wahl*, 46 Ill. 492; *Bethune v. Hughes*, 28 Ga. 563, 73 Am. Dec. 789; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 50; *Caldwell v. Alton*, 33 Ill. 416, 75 Am. Dec. 282.

The city cannot create a monopoly in favor of those who sell in her public markets.

La. Const. art. 48; *Tiedeman, Pol. Power*, p. 318.

A private market is not an offensive trade, and is as legitimate as any other business.

*State v. Dubarry*, 46 La. Ann. 33, 14 So. 298, 44 La. Ann. 1117, 11 So. 718; *State v. Deffes*, 45 La. Ann. 658, 12 So. 841; *Crowley v. West*, 52 La. Ann. 533, 47 L. R. A. 652, 27 So. 53.

The accused having complied with all the ordinances of the city relative to the construction and sanitation of his market house, and all the requirements of the act of 1888, and invested his labor and money therein, the city cannot compel him to break up his business and go to another place, without assigning any good, sufficient, or reasonable cause therefor.

*Berthin v. Crescent City L. S. L. & S. H. Co.* 28 La. Ann. 210.

*Messrs. Samuel L. Gilmore and H. Garland Dupree* for appellee.

**Monroe, J.**, delivered the opinion of the court:

Defendant, having been charged with the violation of city ordinance No. 312, New Council Series, undertook to defend himself by setting up the unconstitutionality of the ordinance and of the law under the authority of which it was adopted, and, having been convicted and sentenced, has appealed directly to this court. The ordinance in question makes it unlawful for any person "to conduct a private market, or to sell at retail any fresh meat, fresh fish, game, poultry or vegetables, except potatoes and onions, in any building, place, store, or stand, within thirty-two hundred feet, walking distance, from any public market, in the city of New Orleans," prohibits the sale of oysters and groceries in the public markets, and contains some other provisions which need not be specially noticed. The act of the general assembly referred to (being act No. 34 of 1900) authorizes the council of the city of New Orleans "to pass such ordinances for the government and regulation of private markets, in the city of New Orleans, as they, in their discretion, may deem proper," and to provide for the enforcement of the same, especially authorizing said council to "prescribe the manner in which such private markets shall be kept, and the distance at which they may be located from all public markets." There is no dispute as to the facts, and the questions of law which are presented are not unfamiliar to this court.

1. It is said that the defendant had complied with the pre-existing law (act No. 116 of 1888, and ordinance No. 7607), and had established his business, in conformity thereto, within the populous district of the city; that he had thereby acquired rights which cannot be divested by subsequent legislation; and that, in so far as act No. 34 of 1900 requires the removal of said business beyond said district, it is unconstitutional. Stated in other words, the proposition is that, because the defendant had established his business in conformity to the law and the ordinances in force prior to the adoption of act No. 34 of 1900, he had thereby placed said business beyond the reach of the law-making power, and had acquired a vested right to conduct the same business in the same place and in the same manner forever. This proposition is untenable, and ignores the very premise upon which it rests. Thus, the defendant had established his business in conformity to act No. 116 of 1888 and the city ordinance adopted under its authority. But that legislation was but the reassertion by the state and the city of the power to control, at discretion, the question of the location and regulation of private markets. In 1806 the general assembly by act No. 134 of the session of that year, had authorized the establishment of private markets everywhere, subject to the police ordinances of the city. In 1874, by act No. 31, private markets were prohibited within 12 squares of

the public markets. In 1878, by act No. 100, they were prohibited "within a radius of 6 squares" of the public markets. But the use of the word "radius" gave rise to some trouble, as a question of construction, and in 1888 act No. 116 was passed, prohibiting private markets "within a walking distance of 6 blocks from any public market; the said distance to be interpreted as meaning that represented by 6 blocks in a walk from the public market to a private market." When, therefore, the defendant established his market agreeably to the provisions of this last-mentioned act, and of the ordinance adopted under its authority, he conformed to a law which changed the pre-existing regulations upon the subject, with presumed knowledge of that fact, and of the further fact that the authority to make and unmake such law had always been exercised by the state and city, as part of the police power, and had been uniformly recognized and enforced by the courts. In the case of *New Orleans v. Stafford*, 27 La. Ann. 417, it was said: "There is in the defendant's case no room for any well-grounded complaint of the violation of a vested private right; for the privilege, if he really possessed it, of keeping a private market was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. . . . We presume it will not be denied that, under circumstances of peril and emergency, the law-maker would have the right to abolish or suspend an occupation imperilling the public safety. This power is inherent in him. He may exercise it prospectively, for prevention, as well as, *pro re nata*, for immediate effect. It is within his discretion when to exercise this power, and persons under license to pursue such occupations as may in the public need and interest, be affected by the police power, embark in those occupations subject to the disadvantages which may result from a legal exercise of that power." See also *Morano v. New Orleans*, 2 La. 219; *First Municipality v. Cutting*, 4 La. Ann. 335; *State v. Gisch*, 31 La. Ann. 544; *New Orleans v. Wolf*, 36 La. Ann. 986; *State v. Natal*, 38 La. Ann. 967, 39 La. Ann. 439, 1 So. 923; *Gossigi v. New Orleans*, 41 La. Ann. 522, 6 So. 534; *State v. Garibaldi*, 44 La. Ann. 809, 11 So. 30; *Natal v. Louisiana*, 139 U. S. 621, 35 L. ed. 288, 11 Sup. Ct. Rep. 636. Judge Dillon says upon this subject: "Many of the powers exercised by municipalities fall within what is known as the 'police power' of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. . . . Every citizen holds his property subject to the proper exercise of this power either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it." 1 Dill. Mun. Corp. 4th ed. § 141.

2. It is urged that ordinance No. 312, N.

C. S., is unconstitutional, in that it deprives the defendant of his liberty and of his property without due process of law. This objection is answered by the opinion of the Supreme Court of the United States in the case of *Natal v. Louisiana*, 139 U. S. 621, 35 L. ed. 288, 11 Sup. Ct. Rep. 636, as follows, to wit: "The plaintiffs in error were severally complained of, tried, convicted, and sentenced in a recorder's court of the city of New Orleans for keeping a private market . . . in violation of § 4 of an ordinance of the city copied in the margin, and passed under the authority conferred by the statute of Louisiana of 1878 (chap. 100) as follows [quoting the statute]. The cases were consolidated, and on appeal to the supreme court of the state the judgments were affirmed. 39 La. Ann. 439, 1 So. 923. The plaintiffs in error contended in the recorder's court, and afterwards assigned for error, that their privileges and immunities as citizens of the United States had been abridged, and that they had been deprived of liberty and property without due process of law, and had been denied the equal protection of the law, contrary to the 14th Amendment of the Constitution of the United States. The case is too plain for discussion. By the law of Louisiana, as in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as, in its discretion, the public health and convenience may require. [Citing authorities.] The ordinance of the city of New Orleans prohibiting the keeping of a private market within 6 squares of any public market of the city, under penalty of a fine of \$25 and of imprisonment of not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the state. A breach of such an ordinance is one of those petty offenses against municipal regulations of police which, in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. . . . Judgment affirmed."

3. But it is said that the defendant in this case, and others similarly situated, will be compelled to abandon the private-market business, because the ordinance complained of will force them into the uninhabited sections of the city, where such business will be unprofitable. The act of 1874, as we have seen, prohibited private markets within 12 squares of the public markets,—a greater distance, as compared with a smaller population, than the 3,200 feet prescribed by the present ordinance. The act was, however, held by our predecessors in this court to be constitutional. *New Orleans v. Stafford*, 27 La. Ann. 417. And if it be true, as was said by the Supreme Court of the United States in the case cited above, that "the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which

they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as, in its discretion, the public health and convenience may require," it is plain that the distance between public and private markets may as well be fixed at 3,200 feet as at 12 or 9 or 6 squares; and the fact that a particular individual is unable to find in a place beyond the prescribed limit within which he can conduct his business profitably does not affect the question, since, in the exercise of the power and discretion vested in it, the council might at once, and in direct terms, prohibit the sale of provisions elsewhere than in the public markets. Mr. Tiedeman, in a late work, entitled "State and Federal Control of Persons & Property" (vol. 1, p. 557), says: "Not only has the legislature exercised the power of confining the prosecution of certain trades to certain localities, but it has very often, particularly in respect to the vending of fresh meat and vegetables, prohibited the plying of the trade in any other place than the market which is established and regulated by the government. This regulation is very common in all parts of this country, and has frequently been the source of litigation, but it has generally been held to be reasonable." And he cites a number of authorities in support of the view thus expressed, and quotes *in extenso* from the opinion in *New Orleans v. Stafford*, as forcibly presenting the "reasons which justify this police regulation." Judge Dillon writes to the same effect, *viz.*: "The states, under their police power, may delegate to municipal corporations the authority to establish or authorize the establishment of markets, and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles except at designated market places. . . . In England the regulation of markets by by-laws has long been exercised, and such by-laws are sustained as being reasonable and conducive to the health and good government of the municipality. In this country the practice is almost universal on the part of the legislature to confer upon the municipal agencies more or less authority with respect to markets and market places, and such grants are not so strictly construed as those which invest the corporation with powers of a more extraordinary or unusual character. At least, such is the case unless a monopoly in favor of private individuals is sought to be sustained, against which the courts strongly lean." 1 Dill. Mun. Corp. 4th ed. § 380. "There can be no doubt," said this court, "that the city, under legislative permission, can forbid the opening of markets except at designated places, and such forbidding is an exercise of its power to regulate markets." *State v. Gisch*, 31 La. Ann. 544.

4. It is claimed that the ordinance in question unjustly discriminates in favor of certain persons who have obtained contracts to establish markets within 3,200 feet of the public markets. It appears from the record that the city saw proper to arrange for the

establishment of markets in a few localities where they were presumably needed, by making contracts whereby certain individuals agreed to build such markets and to convey the same, with such ground as they were to be built upon, to the city, and thereafter to maintain such markets, subject to all the regulations applicable to public markets, on condition that, in lieu of a sum of money to be paid by the city in cash, such persons should be allowed to recover the price or value of the property by collecting the revenues of the markets, as fixed and regulated by the city, during a certain number of years. In other words, they are lessees who give the property in consideration of their leases, instead of paying a fixed amount per annum or a proportion of the revenue. The validity of a contract such as that described has been affirmed by this court in the following terms, to wit: "A municipal corporation has the power to contract with an individual to authorize him to build a market house, rent stalls, and collect dues during a specified period, with the consideration that the land, which is his property, and the improvements upon it, shall be conveyed to the city, and that the same at the expiration of the term shall be turned over, absolutely, in good order, to the corporation. The land and constructions become municipal property at the signing of the contract, and the ownership becomes absolute at the expiration of the time, in the city. The market thus put up is a public market, and any private market found within the prohibited distance of 6 squares from it is there kept in violation of law." *State v. Natal*, 41 La. Ann. 887, 6 So. 722; *State v. Gisch*, 31 La. Ann. 544; *State v. Sarrahat*, 46 La. Ann. 700, 24 L. R. A. 584, 15 So. 87; *New Orleans v. Kientz*, 52 La. Ann. 950, 27 So. 344. Judge Dillon refers to the case of *Le Claire v. Davenport*, 13 Iowa, 210, in which, overruling *Davenport v. Kelley*, 7 Iowa, 102, it was held that a corporation invested by its charter with power "to erect market houses, to establish markets and market places, and to provide for the government and regulation thereof," was authorized to pass an ordinance delegating to individuals the right to erect market houses and to charge rent for the stalls, without reserving to itself the control of the same, and he dissents from that doctrine. 1 Dill. Mun. Corp. 4th ed. § 385. But neither he nor any writer, nor any adjudged case, so far as we are informed, questions the authority of a corporation having the power to regulate markets to farm them out, provided the control of the rates charged and of the markets is reserved to the corporation. The counsel for the defendant, in arguing that the provisions of the city charter of 1870 authorizing the city to establish markets and to farm out the revenues thereof have been repealed by the charters of 1882 and 1896, and in referring to the latter acts as governing the validity of the ordinances, which are in evidence, authorizing the building of markets by individuals, have apparently lost sight of the existence of act No. 116 of 1888, which they nevertheless invoke 53 L. R. A.

in behalf of their client, and which does not appear to be in conflict with, and hence does not appear to have been repealed by, either of the acts last above mentioned. *State v. Natal*, 39 La. Ann. 439, 1 So. 923. The right of the city of New Orleans to farm out the markets has, however, always been recognized as resulting from provisions more general than those contained in the acts of 1882 and 1896, and, in the case of *State v. Natal*, 41 La. Ann. 887, 6 So. 722, it was held to have been included among the powers conferred by the charter of 1866 as "necessary for the proper administration of a municipal government."

5. It is said that it is the purpose of the ordinance which is here complained of to force the defendant into one of the markets last above referred to, or into a market operated by the city, in order to create a monopoly in favor of the grantee of such market, or to increase the revenue of such grantee or of the city. The answer to this is that the establishment of public markets and the prohibition of private markets are within the legislative discretion, and the exercise of such discretion cannot be inquired into by the courts, unless the lawmaker has exceeded his power, or fraud is imputed, or there is a manifest invasion of private right. That neither the state, in the adoption of act No. 34 of 1900, nor the city, in the adoption of ordinance No. 312, N. C. S., have exceeded their powers, respectively, is perhaps sufficiently evident from what has already been said and from the authorities cited. More than fifty years ago, Chief Justice Eustis, as the organ of this court, said: "The right to establish markets is a branch of the sovereign power, and the right of regulating them is necessarily a power of municipal police;" citing 1 Bl. Com. p. 274; 1 Domat, Droit Pub. § 3; *First Municipality v. Cutting*, 4 La. Ann. 336. And as far back, almost, as our jurisprudence goes, there are reported cases between the city of New Orleans and the farmers of the markets, or of the duties imposed upon vendors of provisions. *Griffon v. Mayor*, 8 Mart. N. S. 279; *New Orleans v. Peyroux*, 6 Mart. N. S. 155. "But," asks the learned counsel for the defendant, "why is it within the legislative discretion to deal with persons engaged in the lawful business of private market keeping, otherwise than with those engaged in any other lawful business, and do we not reach the limit of legislative power before reaching the point at which such business is suppressed?" The answer to this, we think, is also to be found in the authorities cited. There are certain trades and occupations which, for various reasons, by consensus of opinion among all civilized peoples, fall within what is called the "police power," and the reason for their doing so is so deepseated as to have become a matter of law as well as of fact. Quoting again from an author who has already been referred to, he says, speaking of police regulations: "The instances of this kind of regulation are very numerous. Slaughter houses have been confined to certain localities. The sale of fresh meat and

vegetables has been prohibited, except in the public markets, where the article exposed for sale may be conveniently inspected. In the same way may the manufacture of pressed hay, the maintenance of dairies, the cultivation of land within the limits of a town, and the storage of cotton and of other combustible material, such as oil and gunpowder, be prohibited in the densely-settled parts of the city, and the prosecution of such trades be confined to less dangerous localities. In the same way," etc. 2 Tiedeman, State & Federal Control of Persons & Property, p. 740. It follows from this that the question whether it is advisable, from a sanitary point of view, to restrict the sale of fresh meat and vegetables in New Orleans to markets which are controlled by the government, and which are subject to police inspection, is not one which, for the purposes of a case pending in court, can be affected by the opinion of this individual or that one, since, as a matter of law and of settled jurisprudence, it is a question the determination of which, from the foundation of the state, and under the dominion of seven Constitutions, has uniformly been held to belong to the legislative department of the government. If it were shown, as is claimed by the defendant, that the purpose

and effect of the ordinance under which he is prosecuted is to establish a monopoly, the courts, by the terms of the act authorizing said ordinance, and under the Constitution, might come to his relief. But the fact that all dealers in the commodities specified in the ordinance may be obliged to transact their business in the public markets is not the establishment of a monopoly, within the meaning either of the act in question or of the Constitution, since the markets are open to them all, upon the same terms, and the charges are regulated by law. It might with equal propriety be said that the state or city enjoys a monopoly in exercising any other governmental function, as in the administration of the wharves or of the system of quarantine; and the claim would be well founded in a limited sense, but not, as we apprehend, in the sense in which the term is used in the argument which we are now considering. How far this court would feel authorized to interfere, upon a claim, supported by evidence, that the revenues derived from the markets are larger than are necessary for their maintenance, is a matter which need not be considered, as we find no such evidence in the record.

*Judgment affirmed.*

#### MARYLAND COURT OF APPEALS.

Mary QUINN *et al.*, *Appts.*,

v.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE.

(.....Md.....)

**Dividends on stock held in trust under a will to pay the income to life tenants are to be distributed as income, although made from a sinking fund which had been mostly accumulated during the testator's lifetime for the purpose of meeting the corporation's obligation as indorser on bonds, from which it was finally relieved.**

(April 10, 1901.)

**A** PPEAL by plaintiffs from a decree of the Circuit Court, No. 2, of Baltimore City in their favor for less than demanded in a proceeding to determine to what portion of the dividends on certain stock given by the will of John Quinn, deceased, plaintiffs were entitled. *Reversed.*

The facts are stated in the opinion.

Mr. William Pinkney Whyte for appellants.

Messrs. Arthur George Brown and R. E. Lee Marshall, for appellee:

Where the facts of a case show that a

**NOTE.**—On the general question of the right to stock dividends as between life tenants and remaindermen, or parties holding similar relations, see *Spooner v. Phillips* (Conn.) 16 L. R. A. 461, and *note*; *Hite v. Hite* (Ky.) 19 L. R. A. 173; *Pritchett v. Nashville Trust Co.* (Tenn.) 33 L. R. A. 856; and *McLouth v. Hunt* (N. Y.) 39 L. R. A. 230.  
53 L. R. A.

dividend was earned before the death of a testator, and, consequently, before the life estate commenced, such a dividend, even if declared out of the profits and net earnings of the corporation, constitutes, as between the life tenant and remaindermen, capital; because, in contemplation of law (in the absence of any express direction by the testator), such undivided earnings are to be regarded as capital, and not income of the estate.

*Thomas v. Gregg*, 78 Md. 560, 28 Atl. 565; *Taylor*, Priv. Corp. 4th ed. 1898, § 799; 2 *Beach*, Priv. Corp. ed. 1891, § 600; *Clark*, Corp. p. 308; 2 *Cook*, Corp. 4th ed. 1898, § 552.

**Briscoe, J.**, delivered the opinion of the court:

The object of the proceedings in this case is to obtain a construction of certain clauses of the last will and testament of John Quinn, late of Baltimore city, deceased. The appeal is from a decree of the circuit court, No. 2, of Baltimore city, passed in a special case stated, under the forty-seventh general equity rule of that court. John Quinn, the testator, died on the 7th of December, 1890, leaving a last will and testament, which was duly admitted to probate in the orphan's court of Baltimore city. By the third clause of his will he provided (among other things) as follows: "I give, devise, and bequeath all the rest and residue of my property, real, personal, and mixed, of every kind and description and wheresoever situate, unto the Safe-Deposit and Trust Company of Balti-

more, a body corporate, duly incorporated under the laws of the state of Maryland, in trust and confidence nevertheless, that is to say, in trust to hold the same, and take, collect, and receive the dividend and income thereof, and, after deducting the necessary and proper costs and expenses, to pay over, out of the net income of my said estate, the sum of twelve hundred dollars per year to my wife, Mary Quinn, for and during the period after my death that she may remain unmarried, and, if she shall not marry, then for and during the term of her natural life, to be drawn by her in such sums as she may desire and at such times as she may see fit, and also to permit my said wife to have for her home during her life, or as long as she may remain unmarried, my present dwelling and all furniture and personal effects contained therein; and upon her death and marriage, which ever shall first occur, then this trust to cease so far as relates to her: and upon the further trust to pay the entire net income arising from my estate (after deducting the sum of twelve hundred dollars, payable as aforesaid unto my said wife, Mary Quinn, during the period she shall remain unmarried, and, if she should not marry, then for and during the term of her natural life) annually among my children, share and share alike, for and during the term of their respective natural lives, and, when each of my children shall arrive at the age of forty-five years, I direct that he or she shall be paid the sum of five thousand dollars out of the principal of my estate; and I will and direct that the income set apart for my said children shall be paid only upon the personal and separate receipt of each of my said children, or of their legal guardian or guardians, so that neither the said income nor the said sum of five thousand dollars payable to each of my said children shall be liable for their debts or contracts or to be taken in execution or attachment however, and so that they, nor any of them, shall not make any assignment or anticipation of said income or sum of money to be given them. If my said sons or daughters, or either of them, should die, then the part or portion of such decedents shall be paid to the respective legal heirs of such decedent or decedents, subject to the conditions and limitations herein contained as to the manner of payment and taking of receipt for such income. And I hereby direct that this trust shall cease upon the death of my last surviving child, when my property shall be divided, *per stirpes*, and not *per capita*, among the decedents of my said children."

The testator left surviving him a widow and six children. The widow is now living and is unmarried, and all of the children are now living.

There is no dispute as to the facts of the case, and the questions under the special case stated relate solely to the disposition of certain dividends, declared since the testator's death, upon 400 shares of the capital stock of the Canton Company of Baltimore, owned by the testator at the time of his death, and which are now held by the trustee. It is

contended upon the part of the appellants, the children of the testator, that the whole of the dividend on the shares of stock of the Canton Company should be paid to them, as net income, share and share alike, as life tenants, under the third clause of the testator's will. The appellee, on the other hand, contends that only the accumulations which accrued subsequent to the death of the testator constitute net income which is to be paid to the children, and the trustee is to receive, as capital, that part of the \$4,000 which fell due during the life of the testator. The court below decreed, under the facts of the case stated: "First, that the whole of the net amount of the dividend on 400 shares of the capital stock of the Canton Company of Baltimore belonging to the said trust estate and mentioned in the proceedings, to wit, \$4,000, less the commissions of the trustee, is not to be and shall not be paid as income to and among the children of the said testator, share and share alike; and, second, that the sum of \$186, mentioned in paragraph 13 of the case stated (out of the total dividend of \$4,000 which has been declared and paid upon and in respect to the said 400 shares of stock), less the commission of the trustees on the said sum, is to be and shall be paid to the children of the testator, to wit, Mary Quinn, Agnes Quinn, Joseph E. Quinn, Augustine Quinn, Paul J. Quinn, and Peter Quinn, and shall be equally divided among them; and the residue of the net amount of the said dividend is to be and shall be retained by the Safe-Deposit & Trust Company of Baltimore (after payment thereof of the costs and expenses mentioned in paragraph fourth of this decree) as a part of all the rest and residue of the testator's property which he gave, devised, and bequeathed to it as trustee in and by clause third of his last will and testament." It is from this decree that the appellants have appealed.

The facts of the case bearing upon the question of the declaration of the dividend are stated in the record to be as follows: "On May 1, 1900, the second mortgage of the Union Railroad became due, and under an agreement with the Canton Company this mortgage was paid off by the Northern Central Railway Company, leaving the sinking fund, which has been amassed for the protection of this mortgage, the property of your company. The directors at their meeting in February decided to declare a dividend from these proceeds of \$10 per share, which had been done. The remainder of the sinking fund is invested in ground rents on the company's property and some cash. It has been decided by your board of directors that the ground rents, which represent a very handsome investment, shall be retained, and the rents accruing therefrom shall be put to our income account, which will enable us to increase our dividends. The resolution declaring said dividend was passed February 14, 1900, and is as follows: 'Whereas, a sinking fund of the Union Railroad Company matures on the 1st day of May next amounting to about \$600,000, which consists of both cash and ground

rents, be it therefore voted that the cash on hand and received for Union Railroad bonds shall be distributed to the stockholders of record on the 1st of May to the amount of ten (\$10) dollars per share as a dividend, and the balance of cash and the ground rents take the course which has been heretofore adopted as the policy of the company."

The question here presented is an interesting one, and is not free from difficulty. The rule of law controlling questions such as are now presented is thus stated by the English courts in the case of *Bouch v. Sproule*, L. R. 12 App. Cas. 385: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividends or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital." In a word, what the company says is income shall be income, and what it says is capital shall be capital. In *Gibbons v. Mahon*, 136 U. S. 559, 34 L. ed. 527, 10 Sup. Ct. Rep. 1057, the Supreme Court, in an elaborate discussion of this question says: "When a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution, and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of each share." The same principle is maintained in *Bates v. Mackinley*, 31 Beav. 280; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Richardson v. Richardson*, 75 Me. 570. Such, then, being the present state of the law upon this question, and applying it to the case now before us, we think the court below committed an error in apportioning the dividend, under the facts and circumstances of this case, between the time of the testator's death and its declaration by the Canton Company, but should have directed the whole of the \$4,000 dividend to have been paid to the testator's children, the life tenants, less expenses of administering the trust.

But it has been urged upon the part of the appellee that this case falls within the principle established by this court in the recent case of *Thomas v. Gregg*, 78 Md. 560, 28 Atl. 565, and that case is conclusive of the present controversy. The present case we do not think is like that of *Thomas v. Gregg*, 78 Md. 560, 28 Atl. 565, where a dividend of 20 per cent was declared upon 53 L. R. A.

the common stock of the Baltimore & Ohio Railroad Company for the period ending September 30, 1891, payable on and after the 31st day of December, 1891, in common stock of the company, at the office of the treasurer, to the stockholders of record on the 30th of November, 1891. In that case it was held that "as the earnings for the year ending September 30, 1889, can be easily told, and that was before the life estate commenced, it was but just and in accordance with the intention of the testator, so far as is shown, that such earnings be treated as capital." The facts of the present case are very different. The sinking fund in this case, which was created under the deed dated April 25, 1873, was a special fund, and held by the trustees for the purpose of paying at maturity the bonds of the Union Railroad Company, which were indorsed by the Canton Company. By a subsequent agreement, dated on February 14, 1882, the Northern Central Railway Company agreed to pay the interest on the bonds of the Union Railroad Company, and also the principal of the said bonds at their maturity, and on the 1st of May, 1900, actually paid these bonds. By reason of this payment the sinking fund became the property of the Canton Company, and to be disposed of by that company for the best interest of those interested. Subsequently, at a meeting of the directors of the company, on the 14th of February, 1900, it was declared by resolution what part of this fund should be carried to capital, and what portion should be distributed as a dividend to the stockholders. It will also be seen that the fund constituting the sinking fund had been held by the trustees for the purpose of paying the bonds at their maturity, and had not been capitalized, as was the fund in the case of *Thomas v. Gregg*, 78 Md. 560, 28 Atl. 565. It was paid to the Canton Company as its property, and was distributed by it, after the death of the testator, Quinn.

We find nothing in the case of *Thomas v. Gregg* in conflict with the conclusion which we have reached in this case. The directors of the Canton Company determined, by resolution passed on February 14, 1900, how and in what manner this fund should be distributed, and their discretion in this respect, having been properly and validly exercised, should not be interfered with nor controlled by the courts. *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209; *Gibbons v. Mahon*, 136 U. S. 558, 34 L. ed. 527, 10 Sup. Ct. Rep. 1057. For these reasons, and under the special facts and circumstances of this case, we are all of the opinion that the whole \$4,000 dividend, less commissions, is to be paid to the testator's children, share and share alike. It therefore follows that the decree of the court below will be reversed, and the cause remanded so that a decree may be passed in accordance with the views herein expressed.

*Decree reversed and cause remanded, with costs.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

May P. BOOMER

v.

Josephus W. L. WILBUR *et al.*

(176 Mass. 482.)

1. One who employs a competent independent contractor to repair chimneys of a house, without any dictation or supervision on the part of the owner over the details of the work or the manner in which it shall be done, is not answerable for the failure of the contractor to take proper precautions to protect travelers upon a highway from falling bricks, as the work, if properly done, does not create a peril, and the negligence, if any, is a mere detail of the work not contemplated by the contract.
2. Exclusion of questions with reference to prior ailments of the plaintiff, in an action for personal injuries, is within the discretion of the court, where a physician who has treated the plaintiff has testified that he does not think there was any connection between prior ailments and the condition after the accident, although it might be possible that other physicians, if examined, would have a different opinion.

(September 4, 1900.)

**E**XCEPTIONS by defendants to rulings of the Supreme Judicial Court for Bristol County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence, which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

*Messrs. L. E. White and F. S. Hall*, for defendants:

In the case at bar the contract was an entire one to repair four chimneys, the chimney expert to furnish his own men, his staging, and his own material, the defendants not to have anything to do with it in any way, shape, or fashion, excepting to approve the work when finished.

The chimney expert stood in relation to the defendants as an independent contractor.

*Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Forsyth v. Hooper*, 11 Allen, 419; *Harding v. Boston*, 163 Mass. 18, 39 N. E. 411; *Connors v. Hennessey*, 112 Mass. 96.

The exclusion of the defendants' inquiry into the former physical condition of the

plaintiff, propounded to her physician, was not a matter within the discretion of the court. Other physicians present at the trial might well have connected the present physical condition of the plaintiff with her former ailment, and the defendants were entitled to go into that matter. It was not a matter of discretion, and the defendants were injured by the exclusion of this evidence.

*Com. v. Trefethen*, 157 Mass. 180, 24 L. R. A. 235, 31 N. E. 961; *Shailer v. Bumstead*, 99 Mass. 112.

*Mr. H. J. Fuller*, for plaintiff:

The chimney was in a ruinous and dangerous condition, from which brick were liable to fall, and had been so for a long time, as the defendants well knew. It was their duty to keep it in such safe condition that it would not be liable to fall and injure people lawfully upon the sidewalk.

*Gorham v. Gross*, 125 Mass. 239, 28 Am. Rep. 224; *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367; *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L. R. A. 500, 77 N. W. 948; 2 Shearm. & Redf. Neg. 4th ed. § 714.

The condition of the chimney was the proximate cause of the injury; if the acts of Smith in attempting to remove the brick to prevent them from falling contributed to the injury, it is no defense to this action.

*Eaton v. Boston & L. R. Co.* 11 Allen, 505, 87 Am. Dec. 730; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; 16 Am. & Eng. Enc. Law, 1st ed. p. 440.

The repairing of the chimney, considering its dangerous and ruinous condition and its proximity to the sidewalk, very probably would, was almost certain to, cause injury to persons upon the sidewalk, by the falling of brick, mortar, and debris. It was the duty of the defendants to guard the public against such injury. The defendants were not relieved from performing this duty, and from taking all reasonable precautions, by employing an independent contractor. They should have seen to it that all reasonable precautions were taken.

*Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 21 N. E. 482; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Cabot v. Kingman*, 166 Mass. 403, 33 L. R. A. 45, 44 N. E. 344; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345,

As to liability for acts or negligence of independent contractor generally, see, in this series, *St. Louis, I. M. & S. R. Co. v. Yonly* (Ark.) 9 L. R. A. 604, and note; *Leavitt v. Bangor & A. R. Co. (Me.)* 36 L. R. A. 382; *Berg v. Parsons* (N. Y.) 41 L. R. A. 391; *Norfolk & W. R. Co. v. Stevens* (Va.) 46 L. R. A. 367; *Sanford v. Pawtucket Street R. Co. (R. I.)* 33 L. R. A. 564; and *Smith v. Benick* (Md.) 42 L. R. A. 277.

For exceptions to the rule that employer is not liable for acts of independent contractor, see *Hawver v. Whalen* (Ohio) 14 L. R. A. 828, and note; *Carrico v. West Virginia C. & P. R. Co.* (W. Va.) 24 L. R. A. 50; *Larson v.* 53 L. R. A.

*Metropolitan Street R. Co. (Mo.)* 16 L. R. A. 330; *Ketcham v. Newman* (N. Y.) 24 L. R. A. 102; *Negus v. Becker* (N. Y.) 25 L. R. A. 667; *Colgrove v. Smith* (Cal.) 27 L. R. A. 590; *Smith v. Milwaukee Builder's & T. Exchange* (Wis.) 30 L. R. A. 504; *Wertheimer v. Saunders* (Wis.) 37 L. R. A. 146; *Cabot v. Kingman* (Mass.) 33 L. R. A. 45; *Richmond & M. R. Co. v. Moore* (Va.) 37 L. R. A. 258; *Thompson v. Lowell, L. & H. Street R. Co. (Mass.)* 40 L. R. A. 345; *Bonaparte v. Wiseman* (Md.) 44 L. R. A. 482; *Moran v. Corliss Steam-Engine Co. (R. I.)* 45 L. R. A. 267; (N. J. L.) 50 L. R. A. 199; *Peerless Mfg. Co. v. Bagley* (Mich.) post 285.



49 N. E. 913; *Hawver v. Whalen* (Ohio) 14 L. R. A. 828, and note; *Wertheimer v. Saunders* (Wis.) 37 L. R. A. 146, and note.

**Hammond, J.**, delivered the opinion of the court:

The court instructed the jury, in substance, that where, under a contract between the owner of a house and the person doing the work, work is done upon the house, and the owner retains the right of access to and the control of the premises, and such work is ordinarily attended with danger to the public unless proper precautions are taken to avoid it, the owner is bound to the exercise of due care to see that such precautions are taken for the safety of the public; and if, by reason of the failure to take such precautions, a person lawfully on the street and in the exercise of due care is injured, the owner is answerable notwithstanding the work is being done under a contract between him and the contractor. Having stated this as a general rule, the court applied it to this case as follows: "If the defendants employed a person to repair the chimneys on their buildings adjoining the highway under the contract, to repair them for a fixed sum, and the defendants retained the right, retained control, and the right of access to the building, and such work on the chimneys would ordinarily be attended with danger to the public, unless proper precautions to avoid it were taken, the defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public; and, if the plaintiff was injured while she was lawfully on the street adjoining the defendant's premises, and in the exercise of due care, by reason of the failure of the defendants to take proper precautions, or by reason of their failure to see that proper precautions were taken, to avoid such injury, then the defendants are liable for the injury." We understand these instructions to mean that, even if the defendants employed a competent independent contractor to repair these chimneys, who was to do the work without any dictation or supervision on the part of the defendants over the details of the work, or the manner in which it should be done, the defendants would be answerable for the failure of the contractor to take proper precautions to protect travelers upon the highway from falling bricks. While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Forsyth v. Hooper*, 11 Allen, 419; *Conners* 53 L. R. A.

*v. Hennessey*, 112 Mass. 96; *Harding v. Boston*, 163 Mass. 18, 39 N. E. 411. There are, however, some well-known exceptions to the rule. If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the right of the employer who retains the right of access, the law may hold the employer answerable for negligence in the performance of the work. *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 21 N. E. 482, was such a case, and the defendant was held liable for the act of an independent contractor hired by it to dig up and obstruct the streets for the purpose of laying down the track, upon the ground that the contract called for an obstruction to the highway which necessarily would be a nuisance unless properly guarded against. The same principle is further illustrated in *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421, and *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L. R. A. 345, 49 N. E. 913. Again, if the contract calls for the construction of a nuisance upon the land of the employer, he may be held answerable for the consequences. In *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, the defendant had caused to be constructed by an independent contractor a party wall, half on the defendant's land and half upon adjoining land; and after it was completed and accepted it fell, causing damage to the property of the adjoining landowner. There was evidence that the fall of the wall was occasioned by negligence in its construction. The court said that the wall as constructed was a nuisance "likely to do mischief," and held the defendant answerable for the damage caused by its fall. To the same effect is *Cork v. Blossom*, 162 Mass. 330, 26 L. R. A. 256, 38 N. E. 495. The instructions to the jury allowed them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair called for by the contract was necessarily a nuisance, within the rule stated in *Woodman v. Metropolitan R. Co. ubi supra*, and other similar cases. The work called for was the repair of chimneys. At most, the brick were to be taken off for a few feet, and relaid. The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. It is plain that, unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveler. The case very much resembles *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640. The plaintiff in that case, being the tenant of a house, sued the owner of an adjoining lot for trespasses alleged to have been committed upon the plaintiff's estate by the defendant while engaged in constructing a large building on his lot. It appeared from the testimony that the wall next to the plaintiff's house was not built on the boundary line, but was several inches from it, and

that the staging used in building it was placed upon the inside; that the brick, when laid, pressed out the mortar, which was then scraped off by the trowels of the masons, and some of it dropped upon the plaintiff's land, upon her rear windows, and upon the clothes hanging in her back yard. At the trial the presiding judge instructed the jury that, if the dropping of the mortar was from the carelessness of the workmen, the defendant was not liable, but, if it was something necessarily involved in the building of the wall, then he might be liable; and these instructions were held to be correct. This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but, as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is

the only one to be held. The case is clearly distinguishable from *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 21 N. E. 482, and others of a like character, and must be classed with *Connors v. Hennessy*, 112 Mass. 96, and others like it.

Smith's circular was properly excluded. His competency, even if it was material, was not in dispute, and the kind of staging he advertised to use was immaterial.

The exclusion of the questions with reference to the prior ailments of the plaintiff was within the discretion of the court. The physician who had treated her for them testified that he did not think there was any reason to believe that they were in any way connected with her condition after the accident; and although, as stated by the counsel for the defendant, that might not be the opinion of another physician, who was present at the suggestion of the defendant, to hear the evidence, and although, in accordance with experience in such matters, very likely it would not be, still the court may have concluded that he could not assume this contradiction in the expert testimony until it actually occurred, and that upon the evidence before him he was justified in looking at the prior ailments as in no way connected with her condition at the trial, and therefore immaterial. It does not appear that in this there was error.

*Exceptions sustained.*

## MINNESOTA SUPREME COURT.

NATIONAL CITIZENS' BANK, *Respt.*,  
v.

Conrad J. ERTZ, *Appt.*

(.....Minn.....)

- \*1. When an agreement is entered into between a mortgagor of chattels and the mortgagee, that the former may sell the property for the purpose of applying the proceeds in payment of the mortgage debt, the mortgagor is constituted the agent of the mortgagee; and if, in a proper case, he represents or warrants the quality or condition of the property sold, the mortgagee is bound by such representations and warranty.
2. If such property is paid for by check payable to the mortgagor, who thereupon indorses and delivers it to the mortgagee for the purpose of having the proceeds applied upon the debt, the latter is not a bona fide holder for value and without notice of the equities which may have grown out of the falsity of the representations or failure of the warranty.

(April 19, 1901.)

**A** PPEAL by defendant from an order of the Municipal Court of Minneapolis overruling a motion for new trial after verdict in favor of plaintiff in an action against the

\*Headnotes by COLLINS, J.

NOTE.—On the question of the liability of a mortgagee of chattels on sales made by the mortgagor as his agent, the above case seems, after very careful search for precedents, to be one of first impression.

53 L. R. A.

drawer of a check to recover the amount due thereon. *Reversed.*

The facts are stated in the opinion.

**Messrs. Brady & Robertson**, for appellant:

There can be no question but that the Cassidy Packing Company was the agent of the plaintiff in the sale of these meats.

*Brckett v. Harvey*, 91 N. Y. 221; *Turner v. Killian*, 12 Neb. 585, 12 N. W. 101; *Dayton v. People's Sav. Bank*, 23 Kan. 421; *Hawkins v. Hastings Bank*, 1 Dill. 463, Fed. Cas. No. 6244; *Jones, Chatt. Mortg.* 181.

Where fraud or want of consideration is shown, the burden is then on the plaintiff to show that it took the note for value and without notice of the fraud.

*Bank of Montreal v. Richter*, 55 Minn. 362, 57 N. W. 61; *MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408.

The choice of the medium through which he sells rests with the seller, and he must assume the consequences.

*Story, Agency*, §§ 134, 137; *Elwell v. Chamberlain*, 2 Bosw. 230; *McKinnon v. Vollmar*, 75 Wis. 82, 6 L. R. A. 121, 43 N. W. 558; *Renwick v. Bancroft*, 56 Iowa, 527, 9 N. W. 367.

**Mr. Everett Moon**, for respondent:

The parties may, if they wish, so draw their chattel mortgage as to make the mortgagee the principal and the mortgagor the agent in whatever is to be done with the goods.

*Dayton v. People's Sav. Bank*, 23 Kan.

421; *Gleason v. Wilson*, 48 Kan. 500, 26 Pac. 698.

The cases cited by appellant show nothing more than that such contracts may be given effect by law according to their terms.

Which party is the real principal, and the limits of the agency, and the fact of any agency, and the respective liabilities *inter se* and with outsiders, are to be found in the facts of each case, no two of which are likely to be identical.

The mortgagor may sell the mortgaged property by consent of the mortgagee, clear of the lien.

*Partridge v. Minnesota & D. Elevator Co.* 75 Minn. 496, 78 N. W. 85.

This mere consent does not make the mortgagee the principal in all that the mortgagor in possession and acting in his own name may happen to do with the mortgaged property, in the conduct of his own business.

*Liddell v. Crain*, 53 Tex. 549.

*Collins, J.*, delivered the opinion of the court:

One Cassiday, doing business in Mankato, Minnesota, as the Cassiday Packing Company, was indebted to plaintiff in the month of December, 1894, in the sum of \$9,500. On account of this indebtedness, Cassiday indorsed and guaranteed the promissory note of one Johnson, payable to himself, for the same amount, and delivered it to the plaintiff. He also executed a bill of sale or chattel mortgage upon certain meats in his possession to secure the payment of this note, and it was agreed between him and the plaintiff that he should have the right to sell the property thus mortgaged, and pay over to the plaintiff the moneys received from such sales; the amounts thereof to be applied upon Johnson's note. A part of the mortgaged meats were thereafter shipped to St. Paul and sold to defendant, upon the representations and warranty of Cassiday's salesman that the same were of good quality and in good condition. The defendant gave his check for the amount agreed on, inspected the meats at the first opportunity, and found the same spoiled and worthless. He thereupon returned the articles to Cassiday, and was advised that the check had been sent to Mankato, but that it would be returned to him without delay. Cassiday thereupon again sold the meats, and appropriated the proceeds to his own use. The bank upon which the check was drawn refused payment, and the plaintiff, to whom the check had been delivered in part payment of the Johnson note, brought this suit to recover the amount. Judgment was ordered against defendant, and the appeal is from an order denying the motion for a new trial.

It was found by the court below that Cassiday sold and transferred the check to plaintiff for a good and valuable consideration, and that the plaintiff was a purchaser of the same for value. The real question is whether the representations and warranty made in behalf of Cassiday can be ascribed to plaintiff, and thus render the check subject to the equities which actually existed be-

tween Cassiday and defendant. The sale was made in pursuance of an agreement between Cassiday, mortgagor, and plaintiff, mortgagee, that the mortgaged property might be sold and the proceeds turned over to the latter. The sale and application of the proceeds as agreed upon were perfectly proper, if the parties saw fit to make such an agreement. Its legal effect was to substitute the mortgagor, Cassiday, as the agent of the mortgagee, to do exactly what the latter had a right to do; that is, to sell the mortgaged property, and thus devote it to the payment of the mortgage debt. It was really a sale by the mortgagee, and legally was precisely as if the mortgagee had taken possession and placed a third person in charge, as agent, to sell the property and account for the proceeds. *Conkling v. Shelley*, 28 N. Y. 363, 84 Am. Dec. 348; *Brackett v. Harvey*, 91 N. Y. 221; *Dayton v. People's Sav. Bank*, 23 Kan. 421.

It follows that the representations and warranty made by Cassiday's salesman as to the good quality and condition of the meats were binding upon the plaintiff mortgagee, whose agent he was, as fully as if it had itself made the sale, with the same representations and warranty. Under the circumstances, the plaintiff was not and could not have been a bona fide holder of the check, for value, without notice of the existing equities. Its effort to collect the amount in question is simply an attempt to adopt a part of the acts of its agent (the sale at a stipulated price), and to repudiate the balance (the representations and warranty as to quality and condition).

*Order reversed*, and a new trial granted.

#### NORTHWESTERN TELEPHONE EXCHANGE COMPANY, Appt.,

*City of MINNEAPOLIS et al., Respts.*

(.....Minn.....)

- \*1. The city council or governing body of a municipality has the undoubted right in the exercise of the police power to order the placing of telegraph and telephone wires under ground whenever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot act arbitrarily in the premises.
2. An ordinance of a municipal corpor-

\*Headnotes by LOVELY, J.

NOTE.—As to power of municipal corporation or state to impair or destroy contract with telephone company, see, in this series, *Michigan Teleph. Co. v. St. Joseph (Mich.)* 47 L. R. A. 87.

As to exercise of police power to compel the placing of telegraph wires underground, see *Western U. Teleg. Co. v. New York (C. C. S. D. N. Y.)* 3 L. R. A. 449; and *American Rapid Teleg. Co. v. Hess (N. Y.)* 13 L. R. A. 454, with note as to police power over telegraph companies.

For municipal regulation of poles and wires as nuisance in street, see cases in note to *State v. New Orleans City & L. R. Co. (La.)* 89 L. R. A. on page 619.

ation granting a telephone company the right to use its streets for the erection of poles and overhead lines, under conditions as to permits and directions where the same shall be placed, when accepted and acted upon by the company, is a contract which the municipality cannot unreasonably or arbitrarily repeal or amend so as to impair rights acquired under it.

3. When such an ordinance has invited investments and expenditures made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose by subsequent regulations, without necessity or the demands of public convenience, additional burdens upon the company, which are clearly beyond the reasonable exercise of the police power.

4. In this case an ordinance of the city of Minneapolis construed, and held, upon the facts set forth in the complaint and admitted by the demurrer, to constitute a contract with the plaintiff authorizing its use of streets, subject only to the reasonable and necessary restrictions of its exercise of the police power.

*On rehearing.*

5. Held, that under the general laws of this state (Gen. Stat. 1888, chap. 34, § 28), as amended by Gen. Laws 1881, chap. 73 (Gen. Stat. 1894, § 2614), telephone companies are given the right to erect poles and wires within the urban ways and streets of this state, as well as upon rural highways.

6. That the provisions of the charter of Minneapolis confer upon that city no authority to arbitrarily order a removal of such poles and wires, but only the right to regulate the placing of the same in its streets, and to compel the telephone companies to put their wires in subsurface conduits when reason, convenience, or the good government of the municipality requires.

(Start, Ch. J., dissents.)

(August 6, 1900.)

**A** PPEAL by plaintiff from an order of the District Court for Hennepin County sustaining a demurrer to the complaint in an action to restrain the enforcement of certain ordinances relating to telephone wires in the streets of the defendant city. *Reversed.*

The facts are stated in the opinion.

**Messrs. D. F. Morgan, A. H. Noyes, and George D. Emery,** for appellant:

Under the statutes there is a direct grant to plaintiff of power from the legislature to be a corporation and to do a telephone business, and to use and occupy the highways in the state for its corporate purposes, subject only to the condition that its use of the same shall be so ordered as not to interfere with the safety or convenience of ordinary travel over said highways.

The term "highways" includes the streets of incorporated cities.

*Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Assn.* 48 Ohio St. 390, 12 L. R. A. 534, 27 N. E. 890; *Cater v. Northwestern Teleg. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111.

The term "highway" is the generic term for all kinds of public ways, including county and township roads, streets, and alleys. 53 L. R. A.

*Elliott, Roads & Streets*, chap. 1; *Brace v. New York C. R. Co.* 27 N. Y. 269; *State v. Moriarty*, 74 Ind. 104; *People v. Lockfelm*, 102 N. Y. 1, 5 N. E. 783; *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 118; *Respublica v. Arnold*, 3 Yeates, 422; *Reed v. Erie*, 79 Pa. 346; *Hamlin v. Norwich*, 40 Conn. 25; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Cincinnati v. Cameron*, 33 Ohio St. 367; *State, Hudson Teleg. Co., Prosecutor, v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *Wisconsin Teleg. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Krueger v. Wisconsin Teleg. Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1044; *Marshfield v. Wisconsin Teleg. Co.* 102 Wis. 604, 44 L. R. A. 565, 73 N. W. 736; *Re Road from Fitzwater Street*, 4 Serg. & R. 106; *Stormfeltz v. Manor Turnp. Co.* 13 Pa. 555; *Re Sharett's Road*, 8 Pa. 89; *Taylor v. Portsmouth, K. & Y. Street R. Co.* 91 Me. 193, 39 Atl. 560; *Dickey v. Maine Teleg. Co.* 46 Me. 483; *Angell, Highways*, 3d ed. §§ 2 et seq.; *Detroit v. Blackeby*, 21 Mich. 106, 4 Am. Rep. 450; *People v. Jackson*, 7 Mich. 446, 74 Am. Dec. 729; *General Electric R. Co. v. Chicago & W. I. R. Co.* 184 Ill. 588, 56 N. E. 963; *Osw v. Louisville, N. A. & C. R. Co.* 48 Ind. 182; *Indianapolis v. Croas*, 7 Ind. 9; *Conner v. New Albany*, 1 Blackf. 43; *State v. Mathias*, 21 Ind. 277; *Com. v. Boston, B. & G. E. Co.* 135 Mass. 550; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Elfelt v. Stillwater Street R. Co.* 53 Minn. 68, 55 N. W. 116; *Carki v. Stillwater Street R. & Transfer Co.* 28 Minn. 375, 41 Am. Rep. 290, 10 N. W. 205; *Hall v. St. Paul*, 56 Minn. 428, 57 N. W. 928; *State v. Waddell*, 49 Minn. 500, 52 N. W. 213; *Magee v. Overshiner*, 150 Ind. 127, 40 L. R. A. 370, 49 N. E. 951.

The city has no proprietary interest in the highways within its limits; they belong to all the people, and the only authority possessed by the city is to prescribe reasonable rules and regulations to govern their use by those having the right to such use.

2 Dill. Mun. Corp. § 656; *Keasbey, Electric Wires*, 2d ed. § 37.

The legislature, having full and paramount authority over all the highways within the state, may restrict the general public use by granting a right to erect poles and other obstructions in the highways, without the permission of the local authorities; or it may delegate to the municipalities authority to make such grant; or it may grant to such municipalities only the power of regulation or control over the manner of using such grant.

*Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *State, Montgomery, Prosecutor, v. Trenton*, 36 N. J. L. 79; *Cater v. Northwestern Teleg. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111; *Michigan Teleg. Co. v. Benton Harbor*, 121 Mich. 512, 47 L. R. A. 104, 80 N. W. 388.

This police authority is not a despotic power that may be exercised without a sufficient purpose.

*Burlington v. Burlington Street R. Co.* 49

Iowa, 144, 31 Am. Rep. 145; Elliott, Roads & Streets, 58-60.

Every grant of right by the sovereign is subject to the police power of the state, but when accepted and acted upon such grant becomes a contract, and, except for the exercise of the police power, it is protected from impairment by both the state and the Federal Constitutions.

*Citizens' Street R. Co. v. Memphis*, 53 Fed. 732; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Michigan Teleph. Co. v. Benton Harbor*, 121 Mich. 512, 47 L. R. A. 104, 80 N. W. 388; *Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227; *State v. Addington*, 12 Mo. App. 214.

The use of a highway for the placing therein of telephone poles is a "proper street use."

*Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 34 L. R. A. 369, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Michigan Teleph. Co. v. St. Joseph*, 121 Mich. 502, 47 L. R. A. 87, 80 N. W. 386; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *Cooley, Const. Lim.* 588; *Keasbey, Electric Wires*, 2d ed. § 46; *Washington Bridge Co. v. State ex rel. Colborn*, 18 Conn. 53; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 307.

To prohibit the extension of appellant's system in the only practical manner, forbid and prevent the repair and maintenance of existing lines, and require their removal as already erected, is not the reasonable and lawful exercise of police power, but is absolute confiscation of appellant's property and a serious and unlawful impairment of its vested rights.

*Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *Evison v. Chicago*, *St. P. M. & O. R. Co.* 45 Minn. 375, 11 L. R. A. 434, 48 N. W. 6; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *State v. Chicago, M. & St. P. R. Co.* 68 Minn. 381, 38 L. R. A. 672, 71 N. W. 400.

The grant by the legislature of the right to use "public roads and highways within the state," the consent of the city by its ordinance of January 24, 1893, the acceptance thereof by appellant, and its investment of large capital in establishing its telephone exchange system throughout the city in reliance thereon,—constitute a contract which neither the state nor the municipality can impair or destroy.

The consideration for the grant consists in the public duty which the company assumes, the expected benefits to be enjoyed by the public from the exercise of the franchise, and the power of legislative control over the corporate property and its uses.

*Cooley, Const. Lim.* 5th ed. § 337; *Coast-Line R. Co. v. Savannah*, 30 Fed. 649; *The 53 L. R. A.*

*Binghamton Bridge* 3 Wall. 73, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 142; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *Hookett v. State*, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; 4 *Thomp. Corp.* § 5388; *Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339.

In granting to the appellant the right to use its streets so far as it possessed the power to do so, and thus furnishing to its citizens the conveniences of inter-communication, the city council exercised, not a legislative, but a business, power; and while it can never surrender those legislative powers of government with which it has been clothed, yet, in the exercise of its business powers, it may be bound as firmly and irrevocably as an individual or a private corporation.

*Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 34; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *New York v. Second Ave. R. Co.* 32 N. Y. 261; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 160, 66 Fed. 140; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 469; *Cincinnati v. Cameron*, 33 Ohio St. 367; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 394; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 548; *Vincennes v. Citizens' Gas Light Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 577; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 560; *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 663; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Munger v. St. Paul*, 57 Minn. 9, 58 N. W. 601; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628.

The powers of the council consist of the general powers to "have the care, supervision, and control of all highways, streets, alleys, public squares, and grounds within the limits of the city." They undoubtedly include the power to consent to and to regulate, for the safety and convenience of the citizens, all proper "street uses." They do not include the power to grant any franchise, but only to regulate the use and enjoyment of such as may come within the purview of these provisions.

*Elliott, Roads & Streets*, p. 333; *Baltimore Trust & Guarantees Co. v. Baltimore*, 64 Fed. 153; *Atchison Street R. Co. v. Missouri P. R. Co.* 31 Kan. 660, 3 Pac. 284; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 10 S. W. 197; *Julia Bldg.*

*Asso. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398.

The city, having induced and permitted the appellant to go on from day to day, and erect its plant and expend large sums of money upon the mutual understanding that it had such a franchise, and having assumed, under the authority given by the act of 1893, to direct and control the appellant in the exercise of these recognized and existing rights, cannot now deny the validity and existence of that franchise and those rights.

*Nash v. Lowry*, 37 Minn. 264, 33 N. W. 787; *Chesapeake & P. Teleph. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 788, 44 Atl. 1033; *Cooley, Const. Lim. 4th ed.* 474; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 131; *O'Brien v. Baltimore County Comrs.* 51 Md. 24; *State ex rel. Atty. Gen. v. Miller*, 66 Mo. 342; *Ashland v. Wheeler*, 88 Wis. 614, 60 N. W. 818; *McMillen v. Boyles*, 6 Iowa, 310; *Boone County v. Burlington & M. River R. Co.* 139 U. S. 693, 35 L. ed. 322, 11 Sup. Ct. Rep. 687; *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 393, 49 N. W. 259; *State v. Deffes*, 45 La. Ann. 658, 12 So. 841.

The statute, ordinance, and acceptance constitute a contract, and ordinances which impair its obligation or rights vested thereunder contravene the state and Federal Constitutions, and are void.

*Cleveland City R. Co. v. Cleveland*, 94 Fed. 385; *Cincinnati & S. R. Co. v. Carthage*, 38 Ohio St. 634; *City R. Co. v. Citizens' Street R. Co.* 160 U. S. 567, 41 L. ed. 1117, 17 Sup. Ct. Rep. 653; *Chesapeake & P. Teleph. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; *New Orleans v. Great Southern Teleph. & Tel. Co.* 40 La. Ann. 41, 3 So. 533; *Burlington v. Burlington Street R. Co.* 49 Iowa, 144, 31 Am. Rep. 145; *Com. v. Boston*, 97 Mass. 555; *State, Hudson Teleph. Co., Prosecutor, v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *Suburban Electric Light & Power Co. v. East Orange Twp.* (N. J. Eq.) 41 Atl. 865; *Western U. Tele. Co. v. Syracuse*, 24 Misc. 338, 53 N. Y. Supp. 690; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 159; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. 218; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 694, 42 L. ed. 630, 18 Sup. Ct. Rep. 223; *Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227.

Extensive as the police power is, it must be conceded that any act by the common council in restraint of the use of property, which is in fact not an exercise of the police power, but a capricious invasion of private rights, is unconstitutional and void.

*State v. Addington*, 12 Mo. App. 214; *Com. v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189; *Saginaw v. Swift Electric Light Co.* 113 Mich. 660, 72 N. W. 6; *Michigan Teleph. Co. v. St. Joseph*, 121 Mich. 502, 47 L. R. A. 87, 80 N. W. 383; *Grand Rapids v. Grand* 53 L. R. A.

*Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749; *Hershfield v. Rocky Mountain Bell Teleph. Co.* 12 Mont. 102, 29 Pac. 883; *Arcata v. Arcata & M. River R. Co.* 92 Cal. 639, 28 Pac. 676; *East Louisiana R. Co. v. New Orleans*, 46 La. Ann. 526, 15 So. 157; *Levis v. Newton*, 75 Fed. 884; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787; *New York v. Second Ave. R. Co.* 32 N. Y. 272; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 18 N. E. 692; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Chicago, M. & St. P. R. Co. v. Minnesota C. R. Co.* 4 McCrary, 606, 14 Fed. 530; *Quincy v. Bull*, 106 Ill. 337; *Highland Park v. Detroit & B. Pl. Road Co.* 95 Mich. 489, 55 N. W. 382; *St. Louis v. Western U. Tele. Co.* 63 Fed. 68; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.* 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Milhou v. Sharp*, 27 N. Y. 622, 84 Am. Dec. 314; *Com. v. Erie & W. Transp. Co.* 107 Pa. 112; *Washington Bridge Co. v. State*, 18 Conn. 53; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 65 Vt. 377, 20 L. R. A. 821, 26 Atl. 635; *Chicago General R. Co. v. Chicago City R. Co.* 62 Ill. App. 523; *Denver v. Denver City Cable R. Co.* 22 Colo. 565, 45 Pac. 439; *Africa v. Knoxville*, 70 Fed. 730; *Summit Twp. v. New York & N. J. Teleph. Co.* 57 N. J. Eq. 123, 41 Atl. 146; *Hovelman v. Kansas City Horse R. Co.* 79 Mo. 642; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339; *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 153; *Citizens' Street R. Co. v. Memphis*, 53 Fed. 732; *Michigan Teleph. Co. v. Charlotte*, 93 Fed. 11; *Citizens' Water Co. v. Bridgeport Hydraulic Co.* 55 Conn. 1, 10 Atl. 170; *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. 1, 13 Atl. 496; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994.

Municipal ordinances passed by virtue of either express or implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state.

*Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 57 N. W. 680; *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6; *Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110, 19 Pac. 719; *Re Frazee*, 63 Mich. 396, 30 N. W. 72.

Municipalities have no power to repeal, directly or indirectly, the laws of the state, and their legislation must accord with the policy of the legislation of the state.

*Horr & B. Mun. Pol. Ord. § 88; McFarlane v. Chicago*, 185 Ill. 242, 57 N. E. 12; *Red Wing v. Chicago, M. & St. P. R. Co.*

72 Minn. 240, 75 N. W. 223; *State v. Hammond*, 40 Minn. 43, 41 N. W. 243; *Green v. Eastern R. Co.* 52 Minn. 79, 53 N. W. 808.

The ordinances in question lay an unnecessary and unreasonable obstruction and burden upon interstate commerce.

*Western U. Teleg. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 472, sub. nom. *Western U. Teleg. Co. v. Seay*, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Minn. Gen. Stat. 1894, § 2635; *Leipold v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. Rep. 1126; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Mercantile Trust Co. v. Atlantic & P. R. Co.* 63 Fed. 513; *Moore v. Eufaula*, 97 Ala. 670, 11 So. 921; *American U. Teleg. Co. v. Western U. Teleg. Co.* 67 Ala. 26, 42 Am. Rep. 90; *San Francisco v. Western U. Teleg. Co.* 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10; *Central U. Teleph. Co. v. State ex rel. Falley*, 118 Ind. 194, 19 N. E. 604; *Chicago & A. Bridge Co. v. Pacific Mut. Teleg. Co.* 36 Kan. 113, 12 Pac. 535; *Union Trust Co. v. Atchison, T. & S. F. R. Co.* 8 N. M. 329, 43 Pac. 701; *Western U. Teleg. Co. v. Atlantic & P. States Teleg. Co.* 5 Nev. 106; *Re Pennsylvania Teleg. Co.* 48 N. J. Eq. 91, 20 Atl. 846; *Western U. Teleg. Co. v. Tyler*, 90 Va. 297, 4 Inters. Com. Rep. 481, 18 S. E. 280; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 2 Woods, 643, Fed. Cas. No. 10,960; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Philadelphia v. Western U. Teleg. Co.* 2 Inters. Com. Rep. 723, 40 Fed. 615; *Ex parte Kieffer*, 40 Fed. 399.

The ordinance, without limitation, vests in the common council power to exercise a wilful discretion. The granting of such power renders an ordinance illegal and void.

*Re Frazer*, 63 Mich. 396, 30 N. W. 72; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749; *People ex rel. Maybury v. Mutual Gaslight Co.* 38 Mich. 154; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 N. E. 312; *Barthel v. New Orleans*, 24 Fed. 563; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L. R. A. 696, 51 N. E. 758; *Bessonies v. Indianapolis*, 71 Ind. 189; *Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *State v. Finch*, 78 Minn. 118, 46 L. R. A. 437, 80 N. W. 856.

**Mr. Frank Healy**, for respondents:

Section 2641 does not apply to the streets, alleys, and public grounds of a municipality, but is limited in its operations to rural roads and highways in the state. If the legislature had intended to include streets it would have so expressed its intention in the act.

The rule of construction in this class of 53 L. R. A.

cases is that it shall be most strongly against the corporation.

*Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Long v. Duluth*, 49 Minn. 280, 51 N. W. 913.

Even where the words "highways or roads" are not defined by statute the same as they are by our statute, the courts have uniformly held that they have reference, and are applicable, only to rural ways; and, unless the intention is clearly expressed in the law itself, or is necessarily inferable from the scope of the statute, to include urban ways, they will be restricted to their usual and common meaning as applying only to rural ways.

*Re Woolsey*, 95 N. Y. 135; *Weinckie v. New York C. & H. R. R. Co.* 39 N. Y. S. R. 584, 15 N. Y. Supp. 689; *Vanderkar v. Rensselaer & S. R. Co.* 13 Barb. 390; *Parker v. Rensselaer & S. R. Co.* 16 Barb. 319; *Heiple v. East Portland*, 13 Or. 97, 8 Pac. 907; *Cleaves v. Jordan*, 34 Me. 9; *Waterford v. Oxford County Comrs.* 59 Me. 450; *Huddelston v. Eugene (Or.)* 1 Mun. Corp. Cas. 334, note; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 778, 43 L. ed. 1169, 19 Sup. Ct. Rep. 778; *Utica v. Utica Teleph. Co.* 24 App. Div. 361, 48 N. Y. Supp. 916; *Monongahela v. Monongahela Electric Light Co.* 12 Pa. Co. Ct. 529; *Philadelphia v. Western U. Teleg. Co.* 11 Phila. 327; *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424; *Mutual U. Teleg. Co. v. Chicago*, 11 Biss. 539, 16 Fed. 309.

The legislature cannot irrevocably limit or control the legislative action of its successors.

*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Brick Presby. Church v. New York*, 5 Cow. 538; *Stone v. Mississippi*, 101 U. S. 819, 25 L. ed. 1080; *Wabasha R. Co. v. Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 22 N. E. 670; *Sinking Fund Cases*, 99 U. S. 700, sub nom. *Union P. R. Co. v. United States*, 25 L. ed. 496; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

A municipal corporation has no proprietary rights in the streets, levees or other public grounds within its limits.

A grant of power to a city to grant any privileges or rights in streets or other public grounds is to be strictly construed, and not enlarged by construction; and if there is a fair or reasonable doubt as to the existence of its power, it will be resolved against the municipality.

*St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 346, 34 L. R. A. 184, 63 N. W. 267.

65 N. W. 649, 68 N. W. 458; Dill. Mun. Corp. § 55.

The grant of power to the city council did not authorize it to enter into a contract such as the one which appellant insists was made.

*Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787; *Wabaska Electric Co. v. Wymore* (Neb.) 82 N. W. 626; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

The right to compel the change from an overhead to an underground system has uniformly been sustained.

*New York ex rel. New York Electric Lines Co. v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880.

The city council had the authority to prohibit the placing of any poles on the surface of the streets, and to require all poles already there throughout the entire city to be placed underground.

*St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 495; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454, 26 N. E. 919; *Western U. Teleg. Co. v. New York*, 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552.

Where the legislature authorizes a city council to act, and defines the limits within which it may act, no ordinance passed that keeps within the limits of the legislative act can be attacked on the ground of its unreasonableness.

*Elliott, Mun. Corp.* § 220; 1 Dill. Mun. Corp. 4th ed. § 328; Beach, Pub. Corp. § 512; *Western U. Teleg. Co. v. New York*, 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231; *Ex parte Chin Yan*, 60 Cal. 78; *St. Paul v. Colter*, 12 Minn. 41, Gil. 16, 90 Am. Dec. 278; *State ex rel. Spangenberg v. McMahon*, 62 Minn. 110, 64 N. W. 92; *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 14 N. E. 820; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454, 26 N. E. 919; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Mutual U. Teleg. Co. v. Chicago*, 11 Biss. 539, 16 Fed. 309.

On petition for rehearing.

Mr. William A. Lancaster, also for respondents:

The term "highway" in its ordinary and popular sense refers to the country roads under the management and control of the local authorities of the several towns or counties of the state.

*Re Burns*, 155 N. Y. 23, 49 N. E. 246; *Re Woolsey*, 95 N. Y. 135. 53 L. R. A.

The mere incorporation of the appellant company under the general laws of this state, and while § 2641 was in full force, would not give it an absolute and continuing right to use the streets of Minneapolis, in the face of subsequent amendments and modifications by the legislature, regardless of whether or not the streets had been occupied by the appellant previous to such amendments.

*St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 352, 20 L. R. A. 126, 26 Atl. 510.

Every reasonable presumption is against the granting of any contract rights, for it is a cardinal rule of construction of alleged legislative or municipal grants to construe them strictly in favor of the sovereign.

*Mobile v. Louisville & N. R. Co.* 124 Ala. 132, 26 So. 905; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32; *State, Domestic Teleg. & Teleph. Co., Prosecutor, v. Newark*, 49 N. J. L. 344, 8 Atl. 128; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 38, 19 L. ed. 844.

Where a municipality, under express power delegated to it by the legislature, makes regulations in reference to a matter confessedly within the legitimate scope of police power, and keeps within the express terms of the power delegated to it by the legislature, such regulations cannot be called in question by the courts.

Dill. Mun. Corp. 3d ed. § 328; *Sprigg v. Garrett Park*, 89 Md. 406, 43 Atl. 813; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 352, 20 L. R. A. 126, 26 Atl. 510; *Electric Improv. Co. v. San Francisco*, 13 L. R. A. 131, 45 Fed. 593.

The state, and the municipality under its delegated powers, hold the streets and avenues and alleys of a city in trust for the primary objects and purposes of their dedication, to wit, for the use and travel of the public, and any other occupation or encumbrance or obstruction of the streets, avenues, and alleys can only be had by the permission or sufferance of the state or municipality. And such secondary use and occupation must always be held subservient to the power of police regulation, which is inherent in the state, or, in the case of delegated power, in the municipality.

*State, Cape May, D. B. & S. P. R. Co. Prosecutor, v. Cape May*, 59 N. J. L. 396, 36 L. R. A. 653, 36 Atl. 696; *State, Consolidated Traction Co. Prosecutor, v. Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146; *Allen v. Jersey City*, 53 N. J. L. 522, 22 Atl. 257; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, 20 Atl. 1076; Booth, Street Railway Law, §§ 223-230; *Union R. Co. v. Cambridge*, 11 Allen, 287; *Ex parte Shrader*, 33 Cal. 279; *Ex parte Smith*, 38 Cal. 702;



*United States Illuminating Co. v. Hess*, 19 N. Y. S. R. 883, 3 N. Y. Supp. 777; *Geneva v. Geneva Teleph. Co.* 30 Misc. 236, 62 N. Y. Supp. 172; *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *State v. Smith*, 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545; *State, Raffetto, Prosecutor, v. Mott*, 60 N. J. L. 413, 38 Atl. 857; *Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985; *New York v. Dry Dock, E. B. & B. R. Co.* 39 N. Y. S. R. 105, 15 N. Y. Supp. 297; *Pittsburgh, O. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 35 L. R. A. 684, 45 N. E. 587; *Rund v. Fowler*, 142 Ind. 214, 41 N. E. 456; *Olympia v. Mann*, 1 Wash. 389, 12 L. R. A. 150, 25 Pac. 337; *Beiling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272, 42 N. E. 621; *Harrington v. Providence*, 20 R. I. 233, 38 L. R. A. 365, 38 Atl. 1; *A Coal-boat v. Jeffersonville*, 112 Ind. 15, 13 N. E. 115; *Skaggs v. Martinsville*, 140 Ind. 476, 33 L. R. A. 781, 39 N. E. 241; *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *Lindsay v. Anniston*, 104 Ala. 257, 27 L. R. A. 430, 16 So. 545; *Darlington v. Ward*, 48 S. C. 570, 38 L. R. A. 326, 26 S. E. 906; *District of Columbia v. Waggaman*, 4 Mackey, 328.

It has been uniformly held by the courts of New York that the underground ordinances passed under the authority of the laws of that state are a valid exercise of the police power.

*American Rapid Tele. Co. v. Hess*, 35 N. Y. S. R. 606, 12 N. Y. Supp. 536; *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 14 N. E. 820; *American Rapid Tele. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454, 26 N. E. 919; *United States Illuminating Co. v. Hess*, 19 N. Y. S. R. 883, 3 N. Y. Supp. 777; *United States Illuminating Co. v. Grant*, 55 Hun, 222, 7 N. Y. Supp. 788; *Utica v. Utica Teleph. Co.* 24 App. Div. 361, 48 N. Y. Supp. 916.

As far as the municipality acts in the exercise of its public political powers, and within the limits of its charter, it is vested with the largest discretion. And whether its laws are wise or unwise, whether they are passed from good or bad motives, it is not the province of this court to inquire.

*Milhan v. Sharp*, 15 Barb. 212; *People ex rel. Hotchkiss v. Broome County Supers.* 65 N. Y. 222; *Buffalo v. New York, L. E. & W. R. Co.* 152 N. Y. 276, 46 N. E. 496; *People ex rel. O'Connor v. Queens County Supers.* 153 N. Y. 370, 47 N. E. 790; *People ex rel. Wakeley v. McIntyre*, 154 N. Y. 629, 49 N. E. 70; *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Barhite v. Home Teleph. Co.* 50 App. Div. 25, 63 N. Y. Supp. 659; *Boison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 375, 11 L. R. A. 434, 48 N. W. 6.

The mere fact that the ordinance was void as applied to some portions of the city would not allow the defendant company to rely upon it as invalid in those portions of the city where it might well be regarded as a proper police regulation.

*Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106; *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350, 42 N. 53 L. R. A.

*W. 24; Missouri ex rel. Laeche Gaslight Co. v. Murphy*, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 506, 130 Mo. 10, 31 L. R. A. 798, 31 S. W. 594.

The valid portions of an ordinance may be sustained and enforced, although it contains some other provisions which may be invalid because in excess of power, or as being an unreasonable exercise of general or implied powers conferred by the legislature.

*Judson v. Bessemer*, 87 Ala. 240, 4 L. R. A. 742, 6 So. 267; *Reynolds v. State*, 53 Neb. 761, 74 N. W. 330; *Tims v. State*, 26 Ala. 165; *Shepardson v. Milwaukee & B. R. Co.* 6 Wis. 605; *State ex rel. Rogers v. La Crosse County Judge*, 11 Wis. 50; *Sullivan v. Adams*, 3 Gray, 476.

No person or corporation has the inherent right to make extraordinary use of the streets of Minneapolis; and, inasmuch as there has been conferred upon the city council authority to regulate and control, and even prohibit, the placing of poles and wires upon the streets, that power may be exercised by the city council in any manner it sees fit.

*Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *State, Consolidated Traction Co., Prosecutor, v. East Orange Trap.* 61 N. J. L. 202, 38 Atl. 803; *St. Paul v. Smith*, 25 Minn. 372; *Pedrick v. Bailey*, 12 Gray, 161; *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577; *Com. v. Abrahams*, 156 Mass. 57, 30 N. E. 79; *Sauyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27.

In the ordinances which were held to be invalid the municipalities had merely the authority from the legislature to regulate and control, but not to prohibit. Consequently, when a municipality passed an ordinance either reserving to itself or conferring on any other officer a discretion which was capable of being carried to the point of prohibition, there was a clear attempted exercise of legislation in excess of power.

*Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359.

Even if it could be held that appellant has the absolute right, by authority from the legislature, to erect its poles and string its wires upon the streets of Minneapolis, that right is necessarily subject to such reasonable rules of regulation and control as the city council, acting under authority of the state, as trustees of the streets for the public use, may adopt or ordain.

*Marshfield v. Wisconsin Teleph. Co.* 102 Wis. 604, 44 L. R. A. 565, 78 N. W. 735; *State ex rel. St. Paul v. St. Paul City E. Co.* 78 Minn. 331, 81 N. W. 200.

The right of municipalities to prohibit the use of the streets for the erection of poles and stringing of wires is generally conceded by the authorities.

*Marshfield v. Wisconsin Teleph. Co.* 102 Wis. 604, 44 L. R. A. 565, 78 N. W. 735; *Mutual U. Tele. Co. v. Chicago*, 11 Biss. 539, 16 Fed. 309; *Cater v. Northwestern Teleph.*

*Each. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111.

**Lovely, J.**, delivered the opinion of the court:

This action was brought to restrain the city of Minneapolis, its mayor, chief of police, and city engineer, from the threatened enforcement of certain ordinances, as illegal interferences with the rights of the plaintiff in the use of its telephone system and exchanges in that city. A demurrer was interposed by the defendants denying the sufficiency of the complaint to state a cause of action. The court below sustained the demurrer, from which order plaintiff appeals.

The complaint sets forth at length the grievances of which plaintiff complains, and facts which justify its fears that the defendants will, by the enforcement of two recent ordinances, practically destroy the value of its property, and asks for an injunction to restrain the threatened invasion of its vested rights. It is not necessary to set forth the complaint in full, but we shall call attention briefly to the facts pleaded, which have led us to the conclusion that the demurrer should have been overruled. The telephone exchange system of plaintiff has a central station in Minneapolis, with substations, switch boards, appliances, and many thousand miles of wire in subsurface conduits, as well as upon 110 miles of lines stretched on poles throughout the city, connected, through the central station, with each other and with similar exchanges in other cities in the state of Minnesota, as well as the adjacent states of North and South Dakota, Iowa, and Wisconsin. Its general system includes numerous toll lines extending into those states, and comprising more than 3,500 miles of pole lines and 27,000 miles of wire, with public stations to the number of 600 or more, all of which exchanges and toll stations are connected with the central office at Minneapolis and with each other, affording intercommunication with more than 12,000 individual subscribers, and is of great beneficial use to the public generally. This system was completed and has been extended from time to time since 1883, in reliance upon an ordinance of the city wherein the municipality authorized the use and occupation of its streets for such purpose, and prescribed the conditions governing the same. Section 1 of this ordinance provides that plaintiff "is hereby authorized to erect, establish, and maintain within the limits of the city of Minneapolis telephone poles, and to stretch and maintain thereon the necessary wires for a telephone exchange system, according to the conditions hereinafter stated." Section 2 provides that the plaintiff "shall file in the office of the said city engineer a statement of the streets and alleys of the said city which it has already occupied under permission of the city." Section 3 provides that the plaintiff "shall file with the city engineer written application for all streets or alleys it may hereafter wish to occupy

with its poles and wires," and, further, that "if such application shall be approved by the city engineer and the chief engineer of the fire department, such approval shall be deemed a permission of the city to so occupy said streets and alleys for the purpose above stated." Section 5 provides that "in case of a change of grade of any street or pavement so occupied by said company it shall reset its poles so as to conform to the grade of such street or pavement so changed, and in such manner as the city engineer shall direct; and said poles and wires shall be removed whenever, in the opinion of the city council, the public interest shall so require." After the plaintiff had accepted this ordinance, and had established a large part of its system, the city, by an ordinance approved December 10, 1886, required the company to remove its poles throughout a certain district defined therein, embracing business portions thereof, and including a total area of  $\frac{1}{10}$  of a square mile, and to place its wires throughout this district in cables laid in conduits beneath the surface of the streets, which requirement the plaintiff complied with at an additional cost of \$300,000. In May, 1899, a further ordinance was adopted, amending the last ordinance, whereby the original underground conduit district was enlarged to ten times its former area by the addition of 186 miles of streets not previously included therein, in which the plaintiff then maintained 70 miles of its pole line system, carrying over 3,000 miles of wire, costing \$125,000, and supplying its service to more than 2,000 subscribers residing in that territory. The complaint sets forth specifically that in the district included in the last ordinance the lines of plaintiff are so located and constructed as not to interfere with or obstruct the safety or convenience of ordinary travel upon such streets in any way, and that the whole of plaintiff's system as now extended and located therein is safe and convenient for the public use; also that the new district includes a large area of the city, very much of which is sparsely populated and settled, wherein many of the streets are not opened or graded, and that the expense of complying with such ordinance is so great that the plaintiff cannot conform thereto, but must abandon the maintenance of its system, and will, by the enforcement of the ordinance, be prohibited from the occupation of the streets within such district, except in accordance with the plan or mode prescribed, which is not required or demanded by public safety or convenience, and which is so expensive that it cannot be adopted, to the loss of that portion of its system and the value of the business it now conducts therein, and to the injury of the entire system and the public by largely curtailing its extent and service. The complaint also alleges that in October, 1899, the city again amended the underground ordinance of 1886, wherein, with reference to this subject, it in terms provided "that until the 1st of December, 1903, the city council of the city of

Minneapolis may permit the erection of poles, brackets, wires, and fixtures within the new territory, subject to the right of the city council to cause the removal of such poles, brackets, wires, and fixtures at any time it may order and direct the same to be removed," which is claimed to be an unreasonable and arbitrary discrimination in the granting and refusing of privileges before granted and provided for, without regard to the places or persons affected, or the public requirement, or the circumstances upon which the same may be desirable. It is alleged further that repairs, extensions, and renewals of lines throughout the telephone districts of the city are necessary, and must be made from time to time, to keep them safe and efficient for public service. It appears also that after the adoption of the last ordinance the plaintiff has requested from the proper authorities permission to make repairs and extensions of its lines, which privileges have been refused under the alleged authority of the last two ordinances, and plaintiff's servants, in attempting to make the same, have been arrested, and forbidden under penalty of arrest from making necessary repairs, in maintaining such lines.

It is asserted by plaintiff that the action of the city in the respects referred to and in its requirements thus brought under review constitutes an unlawful impairment and interference with its vested contract rights, and amounts to a destruction and confiscation of its property by a prohibition of the use and enjoyment of its franchises, for which damages are sought to be recovered, and it is asked that by injunctive order the defendant be restrained from further enforcement of the subsequent restrictions, or any interference with its legal contract rights and privileges secured under the ordinance of 1883. In view of the disposition which we deem it our duty to make of this appeal, we shall only consider the effect of the original ordinance under which the plaintiff was authorized to establish and maintain its system, in connection with the ordinances of May and October, 1899, under which the rights of the plaintiff, as set forth in the complaint, are and will be violated by the city unless restrained by injunction. It is claimed on the part of the defendant that under the charter of the city in the exercise of its governmental powers it had the right to enact and enforce the two ordinances referred to without reference to their reasonableness or effect upon the contract rights plaintiff possesses by reason of its prior acceptance of the ordinance under which its system was established. On the argument to support this theory, counsel for defendant put the issue as a contest between the authority of the common council to rule the city on the one hand, and of the telephone company to violate the restraints of municipal control on the other. Without discussion of principles that are fundamental, it is enough to say that such an issue is not raised by this demurrer. The questions presented doubt-

less involve the authority of the common council, but we need not cite authorities to support the self-evident elementary principles essential to any government that such authority must not be arbitrarily exercised. It is not a question of "rule or ruin" between the city and the telephone company. Neither may rule the other. Both are subject to "the law of the land;" and if the ordinance of 1883, which was accepted by the plaintiff, and large expenditures of money made in reliance thereon, is a contract between the city and the plaintiff, the latter cannot wrongfully, and in disregard of justice, without right or reason be deprived of its vested rights obtained thereby, without a plain and palpable violation both of the state and Federal Constitutions. That the effect of the first ordinance, and the acceptance and expenditures of large sums of money by plaintiff in reliance thereon, established such contractual rights between the parties, we have no right to question, either upon principle or authority. An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation who relied upon it, and the grantees cannot be arbitrarily deprived of the rights thus secured. They are protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law. *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 292; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 567, 41 L. ed. 1117, 17 Sup. Ct. Rep. 653; *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 634; *New Orleans v. Great Southern Teleph. & Telc. Co.* 40 La. Ann. 41, 3 So. 533; *Burlington v. Burlington Street R. Co.* 49 Iowa, 144, 31 Am. Rep. 145; *Com. v. Boston*, 97 Mass. 555; *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. These are but a few of the many authorities which clearly enunciate the rule above stated, the reason for which is founded upon the most obvious principles of justice, as well as sound policy and public necessity: for no one would invest his money to further any plan of improvement for his own as well as the general benefit if the right to the advantages which he as its promoter expects to derive from its success might be destroyed by the uncertain or capricious inclinations of the governing body of the municipality.

If the city could not arbitrarily violate the contract embraced in the ordinance of 1883, after its acceptance by the company, it must likewise be acknowledged that the plaintiff was subject to such reasonable regulations as might be, by the city authorities, adopted for the good government of

the municipality to secure the necessary advantages of urban control by its citizens, and their reasonable rights as such, of which it is the conservator. Unquestionably there is a continuing right by the city to regulate its local affairs. This right is what is universally known as the police power. It exists intact without reservation in the Constitution, and it cannot be surrendered, so that the franchises of private corporations must be conclusively presumed to be acquired with reference to its existence, and contract rights must yield to the proper burdens imposed by growth and development. Elliott, *Roads & Streets*, 58, 60. But this extensive power of regulation is not to be exercised at mere whim or caprice. It should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity, or convenience (*Burlington v. Burlington Street R. Co.*, 49 Iowa, 144-147, 31 Am. Rep. 145); and the application of the police power cannot be extended by the authority which is intrusted with such application to an arbitrary misuse of private rights. Any such unwarranted exercise of authority is unconstitutional and void. *State v. Addington*, 12 Mo. App. 214; *Saginaw v. Swift Electric Light Co.* 113 Mich. 660, 72 N. W. 6. Recently the subject of municipal control over the erection and maintenance of poles and electric wires in the streets of cities has received particular attention from the courts, and it has been held that an electric company, which has been granted, by the local authorities, the right to use the streets, and has constructed its line in compliance with and in reliance upon the terms and conditions of such grant, cannot be made the subject of new conditions, aside from what may necessarily be required of it by the city in proper exercise of the police power and the control and regulation of the streets. *Com. ex rel. Bell Teleph. Co. v. Warwick*, 185 Pa. 623, 40 Atl. 93; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; *Levis v. Newton*, 75 Fed. 884; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 65 Vt. 377, 20 L. R. A. 821, 26 Atl. 635; *State, Hudson Teleph. Co., Prosecutor, v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123. We need not go further in disposing of the demurrer than to apply the doctrine established by these authorities, for it is easily applied to the facts which are conceded by the demurrer. The addition of ten times the area through which underground conduits must be constructed at an enormous additional expense, without necessity, is violative of the contract entered into between the city and the plaintiff in the ordinance under which the system was established. The requirements imposed by the later ordinance upon the company to build such conduits through ungraded streets in suburban parts of the city and in the open country is clearly, upon its face, unreasonable, and the claim to exer-

cise such right on the part of the common council of the city at their "will and mere motion" cannot be sustained in the reasonable exercise of the police power, or upon any theory that is consistent with the acquired and vested rights which the plaintiff enjoys under the Constitution and the laws. The authority thus demanded by the city touches the limits of absolutism, and, if the right of plaintiff to use its franchise depends upon it, it amounts to an unnecessary destruction of property rights, which no municipality can or ought to exercise, and does not receive the sanction of this court.

We cannot agree with the court below that the provisions of § 5 of the ordinance of 1883, which provides for the removal of poles by direction of the municipality, contains a reservation of authority in the city to enforce the removal of the same at its pleasure. Conceding that the provisions of § 5 extend to the whole ordinance,—which we do not decide,—and thereby authorized the city to order the removal of the poles from streets not being graded, such power cannot be unreasonably and arbitrarily exercised. This provision manifestly implies the exercise of judgment upon such necessities as are always liable to arise in improving the streets, to be enforced only for the public good in the administration of municipal functions, under the authority of the police power. In a proper case, where the city exercises its power of control in the regulation of the use of the streets by the plaintiff, based upon necessity and the interests of the public, that power will be sustained. Beyond that limit it cannot go. The reservation, in the ordinance of October, 1899, to the city of the right to grant or refuse the occupation of the streets at its own will, is nothing better than a declaration of a right to arbitrarily grant or refuse the privileges to which it refers. The two ordinances of May and October, 1899, which upon their face and in terms seek to amend the first underground ordinance of 1886, are to be read and construed together as one enactment; for, when such an amendment is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, *vis.*, the ordinance as amended. Black, *Interpretation of Laws*, pp. 356, 357. When these ordinances are read together, as they evidently should be, under the facts admitted by the demurrer they are, as a whole, void, for they are clearly open to the objection which is best stated in a leading authority in the highest court of the land upon a similar question: "They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. . . . The power given . . . is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guid-

ance nor restraint." *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *People ex rel. Maybury v. Mutual Gaslight Co.* 38 Mich. 154; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533; *State v. Finch*, 78 Minn. 118, 46 L. R. A. 437, 80 N. W. 856.

We do not intend, in the disposition of this case, to abridge the wholesome right of the municipal government to regulate their internal and domestic affairs within the limits essential to the welfare of their citizens. A city has the right to enact reasonable ordinances, and to enforce them; but it is the conservator, not the autocrat, of the police power. It may originate its useful authority, and apply it by specific and valid regulations; but that exercise is not despotic, nor absolute, but is open to review, and an ordinance that upon its face is unreasonable and arbitrary is subject to judicial examination. When it is not bounded by a fair and wise administration of municipal authority, but is unreasonable and arbitrary, it will be declared void, and the municipality restrained from its enforcement. *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 375, 11 L. R. A. 434, 48 N. W. 6. To prevent any misunderstanding, we add that the complaint tenders the issue that the city council arbitrarily and without any reasonable necessity enacted the ordinance complained of. The demurrer admits the allegations of the complaint in this respect, and our conclusion is based upon this admission. If, however, the plaintiff on the trial fails to establish such allegation by competent evidence, it must comply with the ordinance, for it is not to be doubted that the city council has the plenary power to extend the subsurface district wherever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot do so arbitrarily in the premises as alleged in the complaint.

We have not thought it necessary to consider the claim of counsel for defendant that the charter of the city of Minneapolis authorized or warranted the adoption of the ordinance of 1899, if, in the view which we have taken, which is expressed above, such charter provisions would be in violation of the Constitution; but our examination of the subject does not lead us to the conclusion that there is any inconsistency between the charter of the city and the rights of the plaintiff as justifies such claim.

*The order of the Trial Court sustaining the demurrer is reversed, and the case is remanded for further proceedings according to law.*

A rehearing having been granted, *Lovely, J.*, on May 10, 1901, handed down the following additional opinion:

The public importance of our previous decision upon the control by the municipalities of this state of their streets in the use of the same by telephone companies, as well as the fact that full consideration was not given in the original opinion to the subject 53 L. R. A.

of legislative authority for such control, nor to the dependent rights of the telephone companies thereunder, has required a reinvestigation of the whole subject upon reargument. Counsel for the respective parties have not only fully reargued all the questions submitted on the previous hearing, but have filed extensive additional briefs. We have been further aided by the briefs of counsel in a similar case arising in the city of Duluth, which have been of much assistance, and have been fully considered in the result reached. It was urged for respondent that the court, in its opinion, had assumed that the authority to make the contract upon which the decision rested, between the telephone company and the city, existed, without pointing it out, while in fact no such authority did exist. It is true, such authority was not, in fact, discussed in the opinion. The course on the oral argument by counsel, and the pressing demand for a speedy decision, were to some extent responsible for this omission. The opinion rested principally upon the allegation in the complaint that the city council, in the adoption of two recent ordinances of 1899, had acted arbitrarily, without reason or necessity, after the plaintiff had, at the invitation of the city, upon privileges received, and in consideration of public utility and benefit, expended large sums of money in availing itself of the rights granted in a previous ordinance of the municipality. We recognize that important questions other than those actually referred to in the opinion are material to the disposition of the order of the trial court, and have regarded it as our duty to reconsider so much of the subject involved, determinative of this appeal, but not referred to in the opinion, which we think may be embraced comprehensively in the following propositions: (1) Did the telephone company have any right from the state to erect its poles and wires in defendant's streets? If so, what was the nature and extent of such right? (2) Did the city possess a delegated power to control, limit, regulate, or restrict the placing of poles and wires by plaintiff in its streets? And, if so, what were the limitations of such right?

1. What were plaintiff's rights under the general laws of this state? It was claimed that we had overlooked the fact in the previous opinion that under the decisions of this court the city of Minneapolis had no power to make the contract with the telephone company, for the reason that such power must necessarily be derived from the state, where it originally belonged, as an element of its sovereignty, and that the state had never delegated such power to the city, from which conclusion it would necessarily follow that the contract between the city and the company was in excess of authority. The decisions invoked to support this position undoubtedly sustain the view that the plaintiff must necessarily rest its authority upon a prior grant of power from the state. *Nash v. Lourey*, 37 Minn. 261, 33 N. W. 787; *St. Paul v.*

*Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. It is not to be questioned that this original element of state control over its public thoroughfares might be legally delegated to municipalities, even to the power of excluding poles and wires entirely from urban streets. In such case the streets cannot be used except by permission of the city, who can restrain such use without reference to public benefit or advantage; and this conclusion presents the necessity of referring to the general legislation of the state, where authority to use such thoroughfares for poles and wires must be found, if it exists.

In 1860 the following statutory provision applicable to telegraph companies was enacted: "Any telegraph company incorporated or organized under the laws of this state shall have full power and right to use the public roads and highways of this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures; provided, however, that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways." This section was incorporated into the revision of 1866, where it continued without change until 1881, when this statute was amended by inserting after the word "telegraph" the words "or telephone." Gen. Laws 1881, chap. 73 (Gen. Stat. 1894, § 2641). In passing it may be well to say that this court has never recognized any difference in character between telephone and telegraph companies. "The transmission of intelligence by telegraph or telephone is a business of a public character, to be conducted under public control, in the same manner as the transportation of persons or property by common carriers." *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111. And again, as vigorously expressed in a later opinion of this court (Collins, J.): "In these days there ought to be no one to question the statement that a telephone is simply an improved telegraph." *Northwestern Teleph. Exch. Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 79 N. W. 315. In practical application, it is not easy to recognize any difference in the subject-matter (the erection of poles and wires on public highways), in the manner of erecting and maintaining the same, the public benefits to be derived, or the burdens to be created, although the more extensive use of telephone exchanges has given to the latter improvement a greater utility; but, for the purpose of construing the effect of the legislative enactment referred to, no distinction can be made in favor of telegraph over telephone companies, in their imposition of burdens upon the public thoroughfares of this state. It is well known to everyone that the telegraph companies have always had their offices in business centers, at which places only intelligence has been transmitted and delivered for the benefit of their patrons; and it is likewise as

well known that at no time since the first enactment of the statute, in 1860, have telegraph companies directly delivered from their wires messages at private residences on rural highways, while their poles and wires have been erected and continued over the same at all times. The difference between the use of the streets by telegraph and telephone companies in this respect is worthy of note. For nearly ten years after the amendment of 1881 was adopted, the benefits conferred upon telephone companies were not used upon rural highways, but to a great extent on city streets. It was not until after 1890 that the long-distance telephone, for which such use would have been available, was known in this state. Within a very short time thereafter the cities and villages throughout the country were connected largely through the imposition of the servitude previously enjoyed only by telegraph companies, and such highways made subservient thereto. These historical facts, of which the court must take notice, are to be borne in mind, to appropriately apply the statute; for if the legislature, by the use of the words "roads" and "highways" therein, intended to adopt the popular sense in which these words were understood, such intention must prevail, and be held to have given authority to the plaintiff to erect its poles and wires within the highways of defendant and other cities throughout the state, for the legislature must be understood to mean what it has plainly expressed. Where the legislative intent is plainly expressed, so that the act, read by itself, or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. This is elementary. *Sutherland, Stat. Constr.* § 237.

It is contended by defendant that such was not the legislative intent in the enactment of the amended statute of 1881, which gives the same right to telephone as to the telegraph companies, but that a distinction was intended, and must be now applied, in construing this statute, as between urban and rural highways, limiting such use solely to country roads. The definition of a word in a statute need not be absolutely decisive of its meaning in all cases. The history of the act, its general purpose, the mischief to be cured or benefits to be obtained, according to general understanding, as well as the sense to be derived from its connection in the same or other statutes, may be essential to aid courts in the duty of construction. But, in a legislative enactment that has continued for many years without cavil or question, the first source of inquiry is the popular meaning of the words employed to express its sense, and furnishes the natural and reasonable, as well as the primary, legal source of interpretation; and for authoritative definitions we necessarily turn to the standard dictionaries of our language. The popular meaning of the word "road" is defined in the *Century Dictionary* as "a public way for passage or travel; a

strip of ground appropriated for travel, forming a line of communication between different places; a highway; hence any similar passage for travel public or private." The same authority defines the word "highway" as "a public road or passage; a way open to all passengers by either land or water." The approved legal definition of "highway" is "a passage or road through the country, or some parts of it, for the use of the people. It is the generic name for all kinds of public ways." Bouvier Law Dict., *Highways*. The word "highway" has been used in its generic sense extensively in decisions of the courts to which our attention has been directed in the briefs and arguments of counsel, and it does not appear from such use that any distinction has been made in the application of the word "highway" to a country road which would distinguish it from an urban street or way. A very distinctive recognition has been made by our own court of the use of the term "highway" as applicable to city streets, whereby, in Gen. Stat. 1878, chap. 13, § 47 Gen. Stat. 1894, § 1832, it is provided that "when any road or portion thereof shall have been used and kept in repair, and worked, for six years continuously as a public highway, the same shall be deemed as having been dedicated to the public, and be and remain, until lawfully vacated, a public highway." Under this section, notwithstanding its reference to the town in which the road is located, the same has been considered as applicable to incorporated municipalities. *Benson v. St. Paul, M. & M. R. Co.* 62 Minn. 198, 64 N. W. 393; *Hall v. St. Paul*, 56 Minn. 428, 57 N. W. 928; *Elfelt v. Stillwater Street R. Co.* 53 Minn. 68, 55 N. W. 116. We might collect authorities without number to show that this term has been applied in judicial decisions, in its generic sense, to city streets. The result of such investigation leads to the conclusion, seemingly too plain for serious discussion, that the word "highway," in actual use embraces city streets as well as country roads, furnishing the strongest inference that it was intended to apply to both, and that, while the word "street" is more often used than "highway" to designate an urban way, yet it was in this statute used for both purposes. We cannot, therefore, by looking through the charters of different cities where the words "street" and "highway" are used, respectively, in reference to urban thoroughfares, and by comparing the result, necessarily determine any distinction in this respect; for where a word of general import covers two classes, and another only one, the obvious and sensible inference would be that the general term was intended to embrace both, and we do not discover from the reading of the statute under consideration any intention to restrict or limit the general meaning of the word in this respect. The suggestion that the proviso limiting the erection of posts or poles so that the same shall "in no way interfere with the safety or convenience of ordinary travel on or over said roads or highways" is more

applicable to rural than urban streets is of little significance, or that such restriction is ordinarily a subject of municipal control under charter provisions has no persuasive force in construing into this law the distinction urged. Ordinary travel takes place on city streets as well as rural roads, and the proviso would go no further than to secure protection when needed. Besides, at the time this statute and its proviso were first adopted the population of Minneapolis, now the largest city in the state, was less than 3,000 people, and the state, in its infancy, encouraged all public improvements with great liberality; and if the words "ordinary travel and convenience," in any popular sense, are more applicable to country than city places, which is not clear, the restriction in the proviso at that time would apply to a greater part of the area included in the cities of the state with as much force as to any country road. Since it cannot be disputed that a city street, in the popular sense, is a highway, and that the plaintiff, under the statute, may use highways under the limitation so as not "to interfere with the safety or convenience of ordinary travel," it follows that the statute must be treated as having meant what it said. A more critical examination of its language than is furnished by its ordinary reading is not useful or even possible. A statute must be treated as a living thing, but oftentimes it is dissected as if it were a dead letter. Our duty is not to make an autopsy upon its remains, but to sensibly discover what it means; we apprehend that the reasons which led to its enactment, as well as the manner in which it has been treated by our people and the legislature, if consonant with its sensible meaning, would prevail. Any other course would require us to usurp functions we do not possess. It is our duty to construe the statute, not to amend or repeal its provisions.

If we recur again to the historical facts which assist in defining the meaning of this law, we find that, so far as the placing of poles and wires on highways is concerned, that right was created by legislative action more than forty years ago, and it has continued in force and materially aided in the growth of this great commonwealth; and the only change of such right, until 1893, has been an extension of its benefits. For twenty years the telegraph companies of this state applied its terms comprehensively to cover their necessities upon all public ways, both rural and urban, when the telephone companies were given the same benefit. For ten years thereafter, at least, the telegraph companies exercised the same privileges as before, while the telephone companies during the intermediate period between the amendment and the origin of the long-distance service derived no other benefits than within the urban districts to which they confined their business, and to which it is now claimed the statute did not refer. In other words, the telephone companies were using, under the benefits of this stat-

ute, without apparent objection, the places where it did not, on defendant's theory, apply, and did not use the only places where it did apply, while the telegraph companies were using both for the same purpose; and the inference that follows is obvious, and lies upon the surface: The people understood the law to mean what it said, and had found it sufficient to meet the necessities of the people of this state, and consonant with the demands of growth and progress, and for thirty years and more its benefits as to both kinds of companies were accepted, and it was not amended or changed.

The strongest argument in support of defendants' contention that there was a reserved legislative purpose to exclude urban thoroughfares from the benefits of the statute is that such a restriction has been practically placed upon the statute by the plaintiff itself. It is urged that plaintiff and others similarly situated have repeatedly sought concessions from municipalities, particularly from defendants, at variance with the right to use their streets, which it now insists upon; that the privilege of placing poles and wires in the streets has never until the present time been demanded as a right, but has been accepted (as under the ordinance of 1883, set forth at length in the former opinion), and the fact that the plaintiff has recognized the power of the city to control this subject is to be given weight; and this, to a certain extent, is true, although to what extent, and how far such privileges have been asked for and received, in the absence of any reliable data, it is not easy to determine. There is some logical force in this claim, although it cannot be deemed controlling, nor sufficient to overcome the spirit of the statute expressed in its literal terms; for it is in opposition to the source of the real authority to construe the law, which is judicial, and vested in the courts. If the meaning of the words of the statute were doubtful, the interpretation which the telephone company and the city have placed upon its meaning might be more weighty; but where there is no doubt, or private policy and self-interest dictate the action of either party, such argument is of very little force. Were it clear that no such authority to use urban ways had been vested in the telephone company by the general statute, its assertion or assumption of such right would not create it, or, if a reasonable construction would not permit such a view, the plaintiff could not determine the question by its own acts. It would still be for the courts, rather than the plaintiff, to construe the meaning of the law.

If the views we have expressed above are correct, the actual right to use the highways of the state, either in cities or upon country roads, subject to necessities of ordinary travel, was conferred upon plaintiff. The defendant has for years assumed control itself of this right, and contracted with the plaintiff on that basis, notwithstanding the statute; but the city now disclaims that it had such right, and it would be hardly a conclusive argument for the plaintiff to say, 53 L. R. A.

in answer to this claim, that the city did not have such right, because it had construed the statute against itself in this respect, by adopting the ordinance of 1883, and could not repudiate its *ultra vires* acts. The peculiar nature of the telephone business is such that the plaintiff and defendant do not stand upon equal grounds in dealing with each other, and, notwithstanding the provisions of the statute authorizing the use of city streets, the exactions of the municipality might well be such that any hostile treatment of the plaintiff might greatly injure its business and deprive it of the benefits to be derived therefrom; and it is quite easy to see how the plaintiff might well desire to avoid friction with or antagonism from the city in the enjoyment of its franchises. Again, if the city, as we conclude further on, had the reserved power of regulation, in the interest of public convenience and necessity, in the placing of telephone poles and wires in particular streets or in subsurface conduits, such right would justify action on the part of the city that would necessitate concessions that the city would be authorized to make in formal respects, and the argument based upon the practical construction of the statute falls to the ground.

We have not overlooked two recent enactments affecting the subject. In 1893, for the first time, a restrictive proviso was incorporated into an amended section of Gen. Stat. 1878, chap. 34, title 1, § 1 (Gen. Stat. 1894, chap. 34, title 1, § 2592), providing for the organization of corporations, to the effect that no franchise should be granted to telegraph or telephone companies that would authorize them to place their poles and wires in city streets without permission of the municipality. Gen. Laws 1893, chap. 74. And to the same effect is Gen. Laws 1899, chap. 51. The plaintiff was organized as a corporation in 1878. It obtained the benefits of the act of 1860, above referred to, in 1881, which became a contract between the state and the plaintiff by the acceptance of the same. Hence the proviso in the law of 1893 and 1899, being prospective, could not impair rights that had become vested, because forbidden under the clearest prohibitions in the state and Federal Constitutions; and it is not claimed that these statutes did so, nor is it possible to treat the latter proviso as a legislative interpretation of the original act of 1860, which had been continued in force up to that time, without change, unless the inference follows, for what it is worth, that these restrictive provisions were enacted to impose upon companies organized in the future an obligation which was by the legislature not supposed to be expressed in any previous statute. This inference favors plaintiff's contention.

As a result of this review of the subject, we are led to the conclusion that the plaintiff had a right to use the streets of the city, under proper regulations and restrictions (referred to in the original appeal) by the municipality. What such power of regulation in the city imposed in its relation to



the plaintiff is still to be considered. Since the first argument in this case the general statute (Gen. Stat. 1894, § 2641), has been judicially construed by the United States circuit court of this district, and the conclusions expressed above find authority therein, as well as the necessary deduction that any ordinance of the city interfering with or impairing the vested right thus conferred upon the plaintiff by the state violated constitutional rights and was invalid. *Abbott v. Duluth*, 104 Fed. 833.

2. It still remains to consider such provisions of the city charter as affect the subject under the inquiry, Did the city possess a delegated power to limit and regulate the placing of poles and wires by plaintiff in its streets; and, if so, what were the limits upon such right? The provisions of the defendant's charter germane to this subject at the time when the ordinance of 1883 was enacted by the common council in the exercise of the delegation of power to defendant over its streets gave it the right, under subdivision 6, § 5, chap. 4, "to prevent the encumbering of streets, alleys, lanes, sidewalks, public grounds, or wharves with carriages, carts, wagons, sleighs, boxes, lumber, firewood, posts, awnings or any other materials or substance whatever;" and by subdivision 31, § 5, chap. 4, the power "to remove and abate any nuisance, obstruction, or encroachment upon the streets, alleys, public grounds, and highways of the city;" and by § 1, chap. 8, "the care, supervision, and control of all highways, streets, alleys, public squares, and grounds within the limits of the city." Such was the power delegated to the city council to adopt the ordinance of 1883, set forth at length in the opinion, which conferred upon the plaintiff the right to use and occupy the streets and alleys of the city with its poles and wires. Nothing in the provisions above quoted conflicts with the power to pass such ordinance. On the other hand, under such general provisions, even in the absence of the general statute (Gen. Stat. 1894, § 2641), it might be held that sufficient power was so delegated for that purpose. In a recent case decided by the United States circuit court of appeals for this circuit, it was held (*Sanborn, J.*), under a statute where the city of Colorado Springs was empowered to regulate the use of its streets, to provide for the lighting of the same, and to pass all ordinances and to make all rules and regulations demanded or necessary to exercise those powers, that "it had the implied authority to grant the right and privilege to construct a power house to generate electricity on its public grounds," etc. *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1. Thirty-four days after the passage of the ordinance under which the city attempted to grant the right to the telephone company to erect its poles in its streets, the charter of the city was amended by adding to § 5, chap. 4, the following authority to be exercised by the council: "To regulate and control or prohibit the placing of poles and the suspending of electric and other wires

along or across the streets of said city, and to require any or all already placed or suspended either in limited districts, or throughout the entire city, to be removed or to be placed in such manner as it may designate beneath the surface of the street or sidewalk." This provision does not declare that the power therein conferred is exclusive in the city, nor that the right to remove poles and wires in the streets is to be exercised by the city arbitrarily. If the general statute (Gen. Stat. 1894, § 2641) is controlling, as we have held above, this provision should be construed so as to harmonize with that statute, and not given such a construction as would give absolute power to the city to remove wires and poles without reason or necessity, for such a view would clearly interfere with plaintiff's vested rights; or if, as we are led to believe, there was authority under the previous provisions of the charter in force at the time the ordinance of 1883 was enacted and accepted by the plaintiff, it follows, as held in *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1, that an ordinance of a city passed under legislative authority, within the provision of the Federal Constitution, "cannot be repealed by later ordinances which would be so clearly a violation of § 10, art. 1, which prevents the passing of a law impairing the obligations of a contract, and the 14th Amendment to the Constitution, which forbids the taking of property without due process of law," that, as held in that case, "no argument to the contrary would be worthy of a moment's consideration."

So far we have considered this question with reference to the rights of the plaintiff, upon the allegations of the complaint well pleaded that allege that defendant was arbitrarily attempting to interfere with plaintiff's rights; but the provisions of the city charter which we have quoted do possess a force and vitality in authorizing such control and regulation of plaintiff's business by the city that they must not be overlooked. We think much misunderstanding has arisen from the previous opinion, through a failure to realize what was actually determined. We have not held, and do not hold, that the city had the power to confer upon the plaintiff vested rights to irrevocably occupy its streets, in violation of any reasonable right therein by the city. We hold that the only power delegated by the state to the city under any of the charter provisions referred to is the power of regulation, and the necessary control incident to such power. We held in the former opinion, and now hold, that the only contract entered into by the city with the defendant was with reference to the manner and method of placing its poles and wires. Such contract was within the police power of the city, and the defendant having acted upon the contract by the ordinance of 1883 as to how it should place its poles and wires, the city cannot, without reasonable cause, in the exercise of its power of regulation, revoke its contract as to such matters, and order a different ar-

rangement. The power of regulation, or the police power, as there designated, belonged to the state, and was delegated to the city in its charter; and we think that the charter provisions referred to fully recognize its beneficent authority, which should be exercised in reason and judgment for the best interest and welfare of the municipality, and secures all that is essential to a proper and reasonable control of the plaintiff's business. It is not to be assumed that the legislature, in delegating such powers, intended to violate the organic law, or (what would be, perhaps, as bad in its practical effect) to invest the defendant with the power to confer a monopoly in the use of its streets to a favored corporation, which is the logical and necessary result of defendant's claim. If the claims of the city are well founded upon the issue raised by the demurrer, it can grant a right to-day, and deprive the party to whom it is granted of such right to-morrow. If it can confer the privilege upon the plaintiff of placing overhead wires on the streets, and immediately thereafter compel the plaintiff to replace the same in subsurface conduits in rural neighborhoods, where there is no reason or necessity for such change, which purpose is admitted by the demurrer in this case, it might immediately thereafter compel the removal of the wires so placed in subsurface conduits. Nor is such a result impossible of conjecture. Oscillations of power in local government do not always vibrate from the same center, for history is full of illustrations to show that the guardians of the people may become their oppressors, through injurious monopolies that deprive the people of their privileges. The safeguards of the Constitution are the ultimate refuge from such usurpations, and it cannot be believed, when we consider the extreme and justifiable jealousy which has existed on the part of the lawmakers to guard against the abuses of power, that they could have intended to confer by doubtful terms an arbitrary right upon any municipality in this state unreasonably to deprive its citizens of the benefits of progress or to grant monopolies.

The solution of the question involved in this case is not difficult, and is consistent with every reasonable interest that belongs to the people of the city of Minneapolis. The plaintiff has the right to use its streets in the way prescribed, but such right is subject to regulation; and if the use of any street for overhead wires, or any other placement of its lines, is injurious to public safety, convenience, comfort, or utility in the management of city affairs, or inconsistent with reason, order, and good government, the city has the power, under the law and its charter provisions, to compel a removal of such poles and wires from its streets, and compel them to be placed in subsurface conduits, or to otherwise regulate the business of the company so that the use of its streets shall not interfere with the rights of its citizens, but subserve their welfare, in the inestimable service which the telephone ren-

ders to commerce, civilization, and the happiness of its people. This case comes here upon statements in the complaint as to what the city is attempting to do that may or may not be true. We are required, upon the admissions made by the defendant itself in its demurrer, to accept such statements; and, accepting them, we have simply determined that what has been well pleaded and alleged shows an exercise of arbitrary and absolute power on the part of the city, and cannot be sustained. We have determined no facts, but only assumed that to be true which defendant has admitted. In the tribunals of the law, within the jurisdiction where this plaintiff and defendant are conducting this contest, there is no doubt, it seems to us, but what a determination should be reached upon the actual facts, with which no fault should be found by anyone who cares more for the benefits of good government and the best interests of the people than for the assertion of arbitrary rights.

We have noted the point that the defendant claims that injunction is not the proper remedy; that it was the prerequisite duty of the plaintiff to have applied for permission to place its poles to the city engineer, and, on his refusal, to seek its rights through mandamus. This is not a case where ministerial officers have refused to perform a duty imposed upon them by law, but where the city itself, by the enactment of ordinances, prohibits its officers from performing such duties. In such a case injunction is clearly the proper remedy. What we have stated above, in addition to what is held in the original opinion, must be deemed a disposition of the claim that § 5 of the ordinance of 1883 gave the city the arbitrary power to remove poles at its pleasure, and we adhere to our former conclusions in this respect.

While we have not noticed particularly all the points suggested by counsel on the reargument and briefs, they have all been fully considered, and we have covered the propositions which seem to us to be decisive; and have reached the conclusion—which seems to us as clear as can be realized in any disputed legal controversy—that the power to place poles and wires in the streets of municipalities in this state has been conferred upon the plaintiff by the legislature; that the question as to the manner in which this power should be exercised to meet the demands of convenience and necessity was within the authority of the city; that the ordinance of 1883 was, to a certain extent, so far as manner and form, at least are concerned, the subject of contract obligation; and that the subsequent ordinances of May and October, 1899, as alleged in the plaintiff's complaint and admitted by the demurrer, impose such burdens upon the plaintiff as to impair their legal contract rights, and to that extent must be restrained, leaving the question of fact yet to be determined, whenever raised in the proper manner, whether the provisions of those ordinances, or of any other that may be adopted, are within the limits of wholesome and proper

municipal regulation. For the reasons stated above, *we abide by the former opinion of this court, and the order sustaining the demurrer is overruled, and the case remanded.*

**Start, Ch. J., dissenting:**

I cannot assent to the conclusion reached by the court upon several vital questions in this case. It is not my purpose, however, to discuss them in detail, but to simply state my conclusions.

I dissent from so much of the decision that is to the effect that telephone companies are given, subject only to a proper exercise of the police power, the right, by Gen. Stat. 1886, chap. 34, § 28, as amended by Laws 1881, chap. 73 (Gen. Stat. 1894, § 2641), to use the public streets of the municipalities of the state, without the permission of the corporate authorities, for the purpose of erecting and maintaining their posts and wires therein, provided such posts be so located as in no way to interfere with the safety or convenience of ordinary travel in such streets. While the word "highways," in its most comprehensive meaning, includes the streets of a municipality, yet in its popular meaning it does not. Wherever the word is used in a statute, its meaning depends upon the legislative intent, but no inflexible rule can be laid down for determining such intent. It must be gathered from the language used, the subject-matter and the purpose of the statute, and existing legislation to be affected by it. It seems unreasonable to conclude that the legislature intended by this statute to repeal, *pro tanto*, existing special laws giving to the municipalities of the state the control of their streets, and to confer the perpetual right upon telegraph and telephone companies to enter upon any and all of the streets of such municipalities, without consent of the governing body thereof, and erect and maintain therein their poles and wires, subject to no control or limitation except such as is incidental to the exercise of the police power. If such was the intention of the legislature, it seems reasonable to believe that it would have been clearly expressed by the use of the word "streets" in connection with the words "roads and highways," as was and is the legislative custom in cognate cases, as evidenced by numerous statutes. It seems clear to me that the word "highways" was used in this statute in its restricted sense, as referring only to rural highways, and not to the streets of the municipalities of the state. In any event, there is more than a fair doubt as to whether it was intended by the statute in question to grant any rights in such streets; hence the doubt must be resolved against all parties claim-

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ing such rights, for public grants, unlike private ones, must be construed strictly against the grantee. I am of the opinion that the plaintiff has no right to maintain its poles and wires in the streets of the defendant city by virtue of Gen. Stat. 1894, § 2641, but that its rights therein depend upon the charter provisions and ordinances of the city. The plaintiff, by virtue of the existing charter provisions of the city, on January 24, 1883; the city ordinance of that date, referred to in the record as "Ordinance A;" the amendment of the charter thirty-four days thereafter (Special Laws 1883, chap. 3, § 13); and by its acceptance of the ordinance,—acquired a qualified contract right to maintain its telephone exchange system in the streets of the city. The right, however, to have the poles and wires removed from the surface of the streets, and placed underground, whenever, in the opinion of the city council, public interest so required, was expressly reserved, as a part of the contract. This stipulation is something more than the mere right to regulate and control the streets of the city and the business of the plaintiff in the exercise of the police power. That right is inalienable, and need not be reserved. While the city council, by virtue of this provision of the contract, cannot confiscate the plaintiff's property, nor wholly exclude it from the streets of the city, yet it does commit the question as to when, and to what extent, public safety, convenience, and comfort require that the defendant's poles should be removed from the surface of the streets, and its wires placed underground, to the discretion, judgment and decision of the city council. It is the arbitrator agreed upon to determine the question, between the city and the plaintiff, whether public interests at any particular time require that the wires be placed below the surface of the street; and its decision, when made, whether it be correct, wise, or just, is conclusive, unless it has acted in the premises arbitrarily or dishonestly. When, as in this case, the city council passes an ordinance requiring the wires within a designated district to be placed in subsurface conduits, the ordinance, whether a proper exercise of the police power or not, is valid, and must be obeyed, unless the plaintiff can establish by satisfactory evidence that the city council did not enact the ordinance in the exercise of a fair discretion, but arbitrarily or dishonestly. The allegations of the complaint, liberally construed, are sufficient to bring the case within the rule stated, and upon this ground alone I concur in the conclusion of the court that the complaint states a cause of action.

## RHODE ISLAND SUPREME COURT.

Joseph L. PEACOCK

v.

Hugh LINTON.

(.....R. L.....)

A father is not liable for services rendered in tutoring during vacation time his minor son who lives with and is supported by him, where the father is not committed about and does not consent to the employment.

(January 4, 1901.)

**M**OTION for new trial after the granting of a nonsuit in an action brought to recover the value of services rendered in tutoring defendant's minor son. *Denied.*

The facts are stated in the opinion.

*Mr. James A. Williams*, for plaintiff:

Food, clothing, lodging, and needful medicine are necessities; so is proper instruction.

1 Parsons, Contr. p. 321; 1 Story, Contr. § 126; Co. Litt. 172; Chitty, Contr. 198; 10 Am. & Eng. Enc. Law, pp. 660, 661, and footnotes.

If the supplier seeks to make the parent responsible on the ground that his authority was given to the child, then if the goods supplied were necessities it would seem from the cases that slight evidence is sufficient to prove such authority,—as that the father saw the son wear the clothes, or knew that he had received them, and made no objection.

1 Parsons, Contr. pp. 330, 331; 1 Story, Contr. § 133; *Suain v. Tyler*, 26 Vt. 9.

*Mr. John A. Tillinghast*, for defendant:

A college education, or tutoring at fifty cents an hour in vacation in preparing for one, has never yet been ranked among those necessities for which an infant can render himself or his parent liable.

*Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574.

There was no express contract by the defendant.

Plaintiff has proved no implied contract. He admits that he did not inform defendant that he intended to tutor his son, made no bargain with either the defendant or his son, and did not find out whether defendant wished him to tutor his son or not. In fact, he has not even proved that defendant knew the son was being tutored by him; and it is settled that the burden of proof is on the person seeking to charge the parent.

17 Am. & Eng. Enc. Law, p. 358.

Even if plaintiff had not performed the work at the request of Cole, he could not recover, since, where an infant child resides at home, it is to be presumed that the father

furnishes whatever is necessary and proper for his maintenance; and, a proper support being rendered under such circumstances, a third person cannot supply even necessities, and charge the father.

Schouler, Dom. Rel. 5th ed. §§ 241, 412, 413; 17 Am. & Eng. Enc. Law, p. 356; *Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399; *Raymond v. Loyl*, 10 Barb. 483; *Chilcott v. Trimble*, 13 Barb. 502; *Tyler v. Arnold*, 47 Mich. 564, 11 N. W. 387; *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499.

Plaintiff did the work at Cole's request, and must therefore look to Cole for payment.

**Dubois, J.**, delivered the opinion of the court:

The plaintiff sues to recover \$25 for services as tutor of defendant's minor son in 1898, during the summer vacation of the school of Charles A. Cole, in which the minor was a pupil. The services were performed by the plaintiff at the written request of said Cole, and after making arrangements with the minor. No contract was entered into by the plaintiff and defendant. The plaintiff did not see the defendant, or inform him, by letter or otherwise, respecting the services rendered, at any time prior to the completion thereof. The parties were both living in and doing business in Pawtucket, and the minor lived with, and was supported and educated at the expense of, his father, the defendant. The plaintiff contends that education is one of the necessities, that his services were also necessary, and that a minor is presumed to be the agent of his father in procuring necessities suitable to his condition. There can be no question at this time and place of the necessity of education. Our statutes make it compulsory, within well-defined limits. A common-school education is undoubtedly necessary, and under favorable circumstances a collegiate education may also be. Whether tutoring in vacation can be said to be one of the necessities is more doubtful. Continuous application, without rest or recreation, is not generally recommended. It is not necessary to determine that question in this case. In 1 Parsons, Contr. 8th ed. p. 308, the law is stated to be as follows: "When an infant lives with the father or under his control, his judgment as to what are necessities will be so far respected that he will be liable only for those things furnished to the infant to relieve him from absolute want."

However this may be, in the present case it is clear that before tutoring the minor the plaintiff should have ascertained whether the defendant was willing to employ him for that purpose. The intimate relation of tutor and pupil should not have been established without allowing the father to exercise his choice and judgment in the matter.

Under the circumstances, the motion for a nonsuit was properly granted, and the petition for new trial is denied.

**NOTE.**—On the question whether a father can be held liable for his son's room rent at college on the ground that it is a necessary, see the earlier case, in this series, of *Gregory v. Lee* (Conn.) 25 L. R. A. 618.

On the question of his liability for his son's board bill while attending school, see *Kilgore v. Rich* (Me.) 12 L. R. A. 859, with note as to what constitutes necessities generally.

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## UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

FIDELITY MUTUAL LIFE ASSOCIATION, *Plff. in Err.*,  
v.

Thomas C. JEFFORDS.

(107 Fed. 402.)

1. The existence of a disease in applicant at the time of taking out a life insurance policy, which is so undeveloped that he is entirely unconscious of its existence, will not avoid the policy, although in his application he denies having disease, and agrees that any untrue statement shall render the policy void,—especially where the statute provides that representations in the application are covenanted to be true, and

that "wilful concealment" will avoid the policy.

2. A policy taken by one on his own life for the benefit of his brother is not avoided by the fact that the premiums are paid by the latter.

3. A caution to the jury to closely scan evidence prepared by inspectors of an insurance company, in an action to enforce payment of a policy, is justified where one of the persons from whom statements were obtained expressly reserved the right to make corrections, and another, who was a beneficiary, testified that the statement was written partly at the inspector's dictation, after assurance that her claim would be paid, and that she was much agitated when she prepared it.

(March 19, 1901.)

NOTES.—*Innocent misrepresentations as to health of insured when he has an undisclosed disease.*

I. In general.

II. Representations to the best of knowledge and belief, etc.

III. Effect of statutory provisions.

IV. Representations by beneficiary.

V. Conclusion.

This note does not include the necessity of disclosing slight temporary ailments or affections not of a serious or dangerous character, where the lack of knowledge in regard thereto is not discussed, nor the failure to disclose diseases because the applicant did not remember them at the time. Nor does it include the question whether the insured at the time of the application or issuance of the policy really had the disease which it is claimed that he had, nor the question as to the materiality of the falsity of his answers, where the question of his lack of knowledge is not considered. Nor is the question as to the necessity of communicating notice of any change in health before the policy issues and the effect of such change considered.

#### I. In general.

The question whether an innocent misrepresentation as to health will avoid a life-insurance policy depends largely upon the nature of the misrepresentations, and of the agreements as to their effect. Ordinarily where the statements as to health are made absolutely instead of being made to the best of the applicant's knowledge or belief, the general rule that warranties will be strictly construed, and if false in any particular the policy will be avoided, is applied. Usually, also, an agreement that the policy shall be void if the answers are in any respect untrue is held to give the same effect to an untrue answer as if it were a warranty, even though it is regarded as a representation only.

Thus, in *Whoehrle v. Metropolitan L. Ins. Co.* 21 Misc. 88, 48 N. Y. Supp. 862, the answers in the application were made warranties, and it was agreed that any untrue answer would render the policy void. One of the answers was that the applicant was in sound health. The court held that a charge that if a disease existed in the insured, and he knew nothing about it and honestly answered "No," there might be a recovery, was erroneous, as his want of knowledge that the answer was untrue was immaterial as the answer was made a warranty; although such charge would have

been proper if the answer had been a representation only.

In *McClain v. Provident Sav. & Life Assur. Soc.* 105 Fed. 834, the applicant stated that he had not had dyspepsia, although he had previously had it. The policy referred to the statements and agreement in the application, and warranted that all the statements were full, true, and complete, and contained an agreement that if any concealment or fraudulent or untrue statement had been made the policy should be void. The court held the answers to be a warranty, and that the untrue answer, even if made in good faith, avoided the policy.

In *Provident Sav. & Life Assur. Soc. v. Llewellyn*, 7 C. C. A. 579, 16 U. S. App. 405, 58 Fed. 940, the applicant warranted that the statements and representations should be true and be the basis of the contract, and that if any untrue or fraudulent statement should have been made, the policy should be void. The court held that it was not necessary to show that the applicant knew or believed that his statements as to his health were untrue to avoid the policy, if they were untrue in fact.

In *Mayer v. Equitable Reserve Fund Life Assn.* 49 Hun, 336, 2 N. Y. Supp. 79, the applicant declared and warranted that the statements and answers in the application were full, complete, and true, and it was agreed therein that the declaration and warranty should form the basis of the contract. The certificate recited that it was accepted subject to the condition that, if any of the statements or answers in the application which was made a part of the certificate were in any respect untrue, the certificate should be void. One question was as to the age, health, etc., of certain relatives "so far as you know." The next question was as to whether the applicant was in good health, and whether his health was usually good, followed by other questions as to his health. The court held that the clause "so far as you know" did not refer to any of the questions as to the applicant's own health, but that he was presumed to know about that, and that an instruction that if he answered "fairly and honestly" as to his own health he had performed his warranty was erroneous.

In *Breeze v. Metropolitan L. Ins. Co.* 24 App. Div. 377, 48 N. Y. Supp. 753, the policy provided that all statements and answers in the application were made warranties and made part of the contract. One of the statements was that the applicant was then in good health. The court held that an instruction that if he represented himself to be sound and healthy, when he was of unsound health to such an extent that he must have realized it, that would be

**E**RROR to the Circuit Court of the United States for the Southern District of Georgia to review a judgment in favor of plaintiff in an action upon a life insurance policy. *Affirmed.*

**Statement by Shelby, Circuit Judge:**

This is an action on a life insurance policy. It was brought by Thomas C. Jeffords, a citizen of Georgia, against the Fidelity Mutual Life Association a corporation under the laws of Pennsylvania. The action was brought in the city court of Savannah, Georgia, and was removed into the court below on the application of the association. It is alleged in the petition that on December 29, 1894, the association issued to Martin A. Jeffords its policy of insurance, promising to pay \$10,000 to Thomas C. Jeffords, and \$3,000 to Edna Jeffords, within ninety

days after satisfactory proof of the death of Martin A. Jeffords. It is averred that the insured and beneficiaries had complied with all the terms of the policy; that on July 29, 1896, Martin A. Jeffords died; that due notice of his death was given on September 3, 1896; and that a demand for payment had been made and refused notwithstanding ninety days had elapsed since furnishing proofs. A copy of the insurance policy was made part of the petition. The association filed the following pleas: First, A general denial that it was indebted. "Second. For further plea in this behalf, this defendant avers that the said plaintiff ought not to have and maintain his action aforesaid, for that the said alleged contract of insurance is void and of no effect, and not binding upon this defendant, because the same was obtained by fraud practised upon this de-

a warranty, was erroneous, although it might have been proper if the statement had been a representation only. But that, as it was made a warranty, the fact that he may not have realized that his health was not sound, would not prevent the forfeiture of the policy.

But on a second appeal, in *Bresse v. Metropolitan L. Ins. Co.* 37 App. Div. 152, 55 N. Y. Supp. 775, the court held that the evidence showed that he was in good health at the time of the application.

In *Swick v. Home L. Ins. Co.* 2 Dill. 160, Fed. Cas. 13,692, the answers in the application were warranted to be true, and it was agreed that if they were untrue or deceptive in any respect the policy should be void. One of the questions, affirmatively answered, was, "Is your health good and as far as you know free from any symptoms of disease?" The court, Dillon, Ch. J., in charging the jury, stated that the parties had the right to so agree, and that if the answers were untrue the policy would be void, although there were no intentional or fraudulent misstatements. The court also stated that if the jury should find that the health of the insured at the time of the application was not good, or if he knew of any symptoms of disease which he did not disclose, there could be no recovery.

In *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351, the applicant stated that she was then in "sound health" and by the terms of the application covenanted and warranted all the answers to be full, complete, and true, and that the application should be the basis of her rights, and on the certificate was an indorsement that it was issued on the faith that the application was complete and true and contained all her answers and statements, and that otherwise the certificate should be void. The applicant had a serious disease at the time of the application which had been of a chronic character for a year, and, although she was not conscious of such disease, the court held that the policy was avoided thereby, as the answer was made a warranty by the contract.

In *Conver v. Phoenix Mut. L. Ins. Co.* 3 Dill. 226, Fed. Cas. No. 3,143, the insured agreed that the representations should form part of the contract, and if untrue in any respect, the policy should be void. He had shortly before the application had several fainting spells, during which he lost consciousness for a few minutes, but answered in the negative the questions whether he had had any severe sickness or disease during the last seven years, and whether he was then afflicted with any disease or disorder of any kind. The court charged the jury that he could not recover if the answers were

untrue, even though he did not know that they were so, although there was a further charge that a failure to mention a mere slight temporary disturbance would not avoid the policy, and the jury returned a verdict for plaintiff.

In *Wright v. Equitable Life Assur. Soc.* 50 How. Pr. 387, the statements in the application were made warranties, and it was expressly agreed that any untrue or fraudulent answers should render the policy void. The applicant stated that he had no serious illness or local disease. At the time and for years before he had been afflicted with a disease of the bowels, and the court held that there could be no recovery on account of the warranty, even though the untrue statements were made innocently under a belief in their truth.

In *Lewis v. New York L. Ins. Co.* 4 Hawaiian, 305, as cited in 4 Berryman's Ins. Digest, ¶ 9026, the applicant warranted that he had not been affected since childhood with any serious disease, and that he was then in good health. In fact he was then afflicted with aneurism, the rupture of which within twelve days thereafter caused his death. The evidence showed that aneurism was a serious disease, and the court held that there was a breach of the warranty, and that his good faith in making the answer did not satisfy the warranty as to truthfulness, and that lack of knowledge did not relieve him under a warranty that he had not withheld any material information as to his health.

In *Cheever v. Union Cent. L. Ins. Co.* 4 Am. L. Rec. 155, the insured had had for more than a year before making the application what his physician called a malignant tumor or cancer. A consultation was held, and it was decided to have an operation. The sore was healed, however, without any operation, by external and internal remedies, and some of the physicians who were at the consultation afterwards told him that it was not a cancer that he had had, and he in good faith believed so at the time of the application. After the insurance, however, the tumor or cancer reappeared and caused the death of the insured. One of the questions in the application was "Have you had during the last seven years any sickness or disease? If so, state the particulars and the name of the physician" who prescribed or was consulted, to which the applicant answered "No." The court held that he was required by such question to disclose the matter as to the tumor or cancer, although a question requiring him to state whether he was in good health and as far as he knew free from any symptoms of disease, and one as to whether he had ever had cancer, or as far as he knew any symptoms thereof, did not require any such disclosure.

fendant by Martin A. Jeffords, in this: That the said Martin A. Jeffords, in making application for insurance on his life with this defendant, made the statements in such application a part of his contract or policy of insurance which is sued on in this case, and thereby covenanted to and with this defendant that he was at the time in good health and free from any and all diseases, sicknesses, ailments, or complaints, trivial or otherwise, except as therein stated, and that there was nothing therein stated which excepted pulmonary consumption; when in truth and in fact the said Martin A. was at the time afflicted with pulmonary consumption; whereby the said Martin A. warranted to this defendant in said contract that he was free from said diseases, sicknesses, ailments, and complaints, which warranty the said Martin A.

On a subsequent trial, in Union Cent. L. Ins. Co. v. Cheever, 11 Ins. L. J. 264, the court, in charging the jury, stated that, even though the insured in good faith believed that such cancer or tumor was not a sickness or disease, his negative answer to the question first considered in the preceding case would defeat a recovery, if it was a sickness in fact.

In Story v. United Life & Acci. Ins. Asso. 22 N. Y. S. R. 832, 4 N. Y. Supp. 373, the applicant stated that he was in good health at the time of the application, and that his health was usually good, and the policy provided that the answer was a warranty. For two or three years before the application his tongue had been affected, sometimes exhibiting a whitish covering, and at other times a red appearance. He had also received medical advice. In the application he stated that he had had a pimple on his tongue and had been told by a physician that it was not serious. He also showed his tongue to the medical examiner, and told where the pimple had been, but the examiner discovered no indication of disease. A few months after the tongue was removed and he died of cancer about nine months after the application. The court held that there could be no question under the evidence that the disease existed at the time of the application, and that there could be no recovery, although he was ignorant of any falsity in his answer, as he had a disease upon him marked and considerably advanced toward the end.

The action in the preceding case was by the executor of the insured, and in a subsequent case apparently on the same policy (McCormick v. United Life & Acci. Ins. Asso. 79 Hun, 840, 29 N. Y. Supp. 364, Affirmed in 151 N. Y. 661, 46 N. E. 1149, brought by members of a certain club to whom part of the policy was payable, the court held that the disease was clearly shown to have existed at the time of the application, and therefore there could be no recovery. Nothing is said directly as to the effect of the ignorance of the insured that he had any disease, but the statement is clearly made that, as he had a disease, there could be no recovery.

In Tobin v. Modern Woodmen (Mich.) 7 Det. L. N. 739, 85 N. W. 472, the applicant stated on April 4, that he was then in good health and free from disease or injury, and that he had never had any serious illness, local disease, or personal injury. The certificate stated that the application which was annexed to and made part of the certificate was true in all respects, and that its literal truth should be held a strict warranty, and form the only basis of liability, and that if it was not literally true in every part the certificate should be absolutely void, 53 L. R. A.

then and there did violate and break, and did deceive and defraud this defendant; and this defendant avers that for this reason said contract is void and of no effect. Third. And for further plea this defendant saith that the said contract the same purporting to be a policy of insurance, is void, for that the same was obtained from this defendant by the fraud practised upon it by the said Martin A. Jeffords, in this: The said Martin A. Jeffords, in order to induce this defendant to enter into said contract of insurance, did represent to this defendant that he was at the time in good health, and free from any and all diseases, sicknesses, ailments, or complaints, trivial or otherwise, except as therein stated, and there was nothing therein stated which excepted pulmonary consumption, when in truth and in fact the said Martin A. was at the time afflicted

and that the certificate was issued in consideration of the warranties and agreements, and that there should be no liability unless the insured was in sound health at the time of receiving the certificate. The applicant was initiated May 23, and died of cancer June 2. There was evidence that he was not feeling well on the evening of the initiation, but there was also evidence that the cancer might have grown after such initiation, and the question was submitted to the jury, whose verdict in favor of the plaintiff was sustained, the court saying, however, that if the testimony conclusively showed that he had the cancer at the time of the initiation there could be no recovery, as it was agreed that sick men should not be eligible to the society, and the prohibition was not confined to those who believed themselves sick, but those who were sick as a matter of fact when initiated, whether known or not, and that the contract was one which the society had a right to make and to have enforced.

In Cushman v. United States L. Ins. Co. 63 N. Y. 404, reversing 4 Hun, 733, the statements in the application were referred to in, and made a part of, the policy, which also provided that if any statements as to the health of the applicant should be found in any respect untrue the policy should be void. The applicant stated that he had never had any disease of the liver, but the evidence showed that he had in fact had congestion of such organ twice before, once sixteen months and the other time four months before the application, employing a physician each time, and he died of congestion of the liver. The court held that the statement denying the disease was a warranty, and that, even though the statement was made innocently and under the belief that it was true, the trial court should have charged, as requested, that the statements in the application were warranties, and that if any of them were fraudulent or untrue plaintiff could not recover.

But in Cushman v. United States L. Ins. Co. 70 N. Y. 72, on a second appeal there was evidence that the insured died of a disease of the bowels instead of the liver, and that at the time of the application his liver was examined by the medical examiner and found free from disease, and the court held that the evidence did not conclusively show that the previous attacks were congestion of the liver, and that, even if they were, it did not follow that within the meaning of the policy the insured had had a "disease" of the liver; and a judgment for plaintiff was affirmed.

Where the policy provides that it shall be void if the declaration of the insured shall be found in any respect untrue, the policy will be void

with pulmonary consumption. And in this: That this defendant was further induced to enter into said contract by the representation made to it at the time by the said Martin A. that he had not consulted or been prescribed for by any other physicians or medical men during the last ten years next preceding the making of said application, except Dr. T. C. Jeffords, about three months prior to the application, for cold, and Dr. McRae, two years prior thereto, for pleurisy, when, in truth and in fact, on the 20th of February, 1894, which was about ten (10) months before said application, the said Martin A. had consulted and been prescribed for professionally by Dr. R. E. Hinman, who was a practising physician at Atlanta, Georgia, and said Dr. R. E. Hinman had informed him, the said Martin A., then and there, that he had incipient

tuberculosis, and prescribed for him a change of residence to New Mexico or Arizona; and when, in truth and in fact, during the fall of 1894, the said Martin A. had consulted and been prescribed for professionally by Dr. Floyd McRae, a practising physician of Atlanta, Georgia, who told him he had consumption, and advised a change of residence from the city, and that he live in the open air. This was in the late fall or early winter of 1894, only a few weeks before the said representation above referred to was made to this defendant. And this defendant avers that all of these representations were material, all of them were false, and were known to said Martin A. to be false at the time he made them, and were wilfully and corruptly made to deceive and defraud this defendant, and did deceive and mislead this defendant, who relied upon the same,

If he in fact had consumption at the time of the application, and stated that he did not have it, although he did not know or suppose that he had such disease, as the design in making the contract in such form was to protect the company from the ignorance, as well as the wilful misrepresentation, of the applicant. *Day v. Mutual Ben. L. Ins. Co.* 1 MacArth. 41, 29 Am. Rep. 565.

In *Miles v. Connecticut Mut. L. Ins. Co.* 8 Gray, 580, the policy provided that if the proposal, answers, and declaration of the insured, on the faith of which the agreement was made, should be found in any respect untrue, the policy should be void; and in the proposal the insured agreed that the answers given should be the basis of the agreement and form part of the contract, and that, if they were not in all respects true and correctly stated, the policy should be void. The applicant denied that he had been afflicted with consumption, spitting of blood, or disease of the heart, or of any vital organ. The court held that the statements of the applicant were warranties, and that if any of them, whether material or immaterial, were untrue, either from design, mistake, or ignorance, there could be no recovery.

In *Metropolitan L. Ins. Co. v. Dempsey*, 72 Md. 288, 19 Atl. 642, it was agreed that the policy should be void if any of the answers were untrue. The insured died of consumption less than a year after the application. An instruction that if any answer was not wholly true the verdict must be for defendant, even if the applicant may not have known its falsity, and may have made it ignorantly and innocently, was held to have been sufficiently covered by an instruction given that if any answer was untrue in any respect the verdict should be for defendant; and it was also held that an instruction that if the insured was not in sound health at the time of the application and stated that she was, or if the duration of her sickness was three years before her death, or if she had a chronic sickness called phthisis two or more years before her death, and did not inform the defendant, the verdict must be for the latter, should have been given.

In *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, the claim was made by defendant that the insured had had spitting of blood and consumption at the time of the application. In the application he denied that he had been subject to, or at all affected by, either disease. The policy provided that if the statements of the applicant were found to be in any respect untrue the policy should be void. The trial court gave an instruction that an untrue statement, innocently made, in regard to a latent disease

of which the applicant was unconscious, would not avoid the policy. And on appeal such instruction was held to be erroneous although the statements were only representations, as an untrue statement, though made ignorantly and in good faith, would avoid the policy.

In *Vose v. Eagle Life & Health Ins. Co.* 6 Cush. 42, the application stated that any untrue or fraudulent allegations, or any misrepresentations or concealment, would render the policy void. The applicant at the time was rapidly declining in a confirmed consumption, and had been so declining for five months before, and lived only about two months thereafter, and he had known for such five months that he had the symptoms of consumption, but denied that he had consumption, or any pulmonary complaint, and, in answer to the question whether he then had any disease, said that he could not say that he had, but that he was troubled with a general debility of the system. The court held that whether the application was considered as a warranty or a representation there could be no recovery, and that it was immaterial that he did not suppose himself in a consumption, as in any case it was his duty to disclose the symptoms of consumption which he knew that he had.

In *Foot v. Aetna L. Ins. Co.* 61 N. Y. 571, reversing on another point 4 Daly, 285, the application declared that the answers were correct and true, and agreed that any "untrue" or fraudulent answers, or any suppression of facts, should avoid the policy, and the policy provided that the answers in the application were part of it, and that if they were in any respect "false" or fraudulent the policy should be void. The applicant stated that he had never had spitting of blood, consumption, or disease of the lungs, and that he had not had any severe disease within seven years. He had in fact had two quite severe attacks of spitting of blood without any cough about a year before, having been wounded in the army some time before. He had another severe attack of spitting of blood about one year and a half after the application, and died of consumption a year thereafter. The court held the answers to be warranties, and that if he had, at the time of the application, the disease of spitting of blood, consumption, or any disease of the lungs, there could be no recovery, even though the applicant had no knowledge of such fact, as "false" in the policy meant the same as "untrue" in the application.

In *Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475, the policy provided that if the declaration of the insured, on the faith of which the agreement was made, should be found in any respect



all of which this defendant is ready to verify. Fourth. And, for further plea in his behalf, this defendant saith that the said Thomas C. Jeffords ought not to have and maintain his action aforesaid, for that this contract of insurance now sued upon by the said Thomas C., the plaintiff, was gotten up by him, the said Thomas C., for his own benefit; that he conducted the negotiations, paying up all premiums and other charges, and that he persuaded and induced the said Martin A. to procure the said insurance for the benefit of him, the said Thomas C.; that the introduction of the said Edna C. Jeffords into the contract as a beneficiary was an afterthought, and was done merely to try and save appearances, it being the original purpose of said Thomas C. to take out a policy payable only to himself; and this defendant avers that the said

Thomas C. well knew at the time that his brother Martin A. had consumption and could not live long, and the said Thomas C., being himself at the time one of the medical examiners for this defendant, represented to the other physician who took his place in the examination of the said Martin A. that the said Martin A. was sound and free from all diseases, and thereby induced said physician to forego and omit to make a complete examination himself of the said Martin A.; all of which this defendant is ready to verify."

These pleas were subsequently amended by alleging that the association was a mutual insurance company; that each insurer became a member of the association; and that its rules and regulations became parts of the policy. According to these rules, it was alleged that every person desiring to be

untrue. the policy would be void, and it was stipulated in the application that the answers therein should be the basis of the contract. The applicant stated that he did not have consumption. The claim was made that he did have such disease at the time of the application. The court held that the answers were warranties, and that an instruction that if the applicant did have consumption at the time of the application the verdict must be for defendant, even though the applicant was entirely ignorant of such fact, or may have believed that the symptoms he had did not indicate consumption, should have been given.

In *Powers v. North Eastern Mut. Life Asso.* 50 Vt. 630, it was agreed that the application should form the basis of the contract, and that if any misrepresentation or fraudulent or untrue answers had been made the policy should be void. The policy stated that it was issued in consideration of the representations and agreement in the application, and that in case the answers were found untrue in any respect the policy should be void. The insured stated that he had no disease of the heart, and the court held that he assumed the whole risk of the consequences if his answer turned out to be untrue, and that it was immaterial that he did not know of its existence, or that the question was a scientific one, as to which a layman might easily be deceived into a false answer.

In *Baumgart v. Modern Woodmen*, 85 Wis. 546, 55 N. W. 713, the applicant stated that he had never had piles, and agreed that the answers and statements in the application should form the basis of his contract, and that the truth of such answers and statements should be construed to be strict warranties, and the certificate provided that if any of the statements or declarations in the application were found in any respect untrue the policy should be void. The applicant had had an attack of the piles four months before the application, for which he was treated by a physician, and died of pneumonia less than a month after the policy was issued. The court held that the policy was void, and that it was immaterial, if true (which seemed incredible), that the applicant never knew that he had the piles.

In *Richards v. Maine Ben. Asso.* 85 Me. 99, 26 Atl. 1050, after the policy had been forfeited by nonpayment of assessments, the insured signed an application for reinstatement in which he stated that he was in good health, and that there was nothing in his habits and condition likely to impair his health or shorten his life, and that, if the statements were found to be untrue in any respect, the policy should be treated as if the premiums had not been accepted. 53 L. R. A.

Some two or three months before such application he had tried to commit suicide, and did commit suicide less than a month after reinstatement, and the court held that a suicidal tendency possessed him, and that the untrue statement in the application for reinstatement avoided the policy, although it was made honestly under the belief that it was true.

In *Trudden v. Metropolitan L. Ins. Co.* 50 App. Div. 473, 64 N. Y. Supp. 183, the answers in the application were strict warranties in form, and it was claimed that there was a breach of the warranty by the insured by representing that he had never had disease of the kidneys, and that at the date of the application he was in sound health. The court held that if any of such answers were false in fact the contract of insurance was vitiated, although nothing was said as to whether the insured knew that he had any disease.

But in *Goucher v. Northwestern Traveling Men's Asso.* 20 Fed. 596, the court stated that where the applicant answered in the negative the question "Is there any fact relating to your physical condition with which the association ought to be made acquainted?" knowledge of such a condition, and intent to conceal it, were necessary to render the policy void, although there was an agreement that any misstatement should annul all claims to any benefit.

And in *Sprott v. Ross*, 16 Shaw. & D. Sess. Cas. 1145, a claim was made that the application contained untrue averments as to the applicant's health, of a nature tending to mislead, and fraudulently intended to mislead, the insurers. The matter before the court was the form of an issue for determining the liability on the policy, and the issue decided on after discussion was "whether, by misrepresentation or undue concealment or non-statement of material facts, as to the health" of the applicant, the insurers were induced to grant the policy. The claim was made by the beneficiary that the term "wilful," or its equivalent, should be inserted, and that the fact that the insured might be discovered after her death to have labored under a latent disease, of the existence of which she was ignorant at the time, ought not to avoid the policy. Clark, Lord Justice, said that no policy would be secure if the nonstatement of facts as to health which may appear on *post mortem* to have affected the duration of life were to be held to endanger a policy, and that such a doctrine was untenable.

And in *Northwestern Benev. & Mut. Aid Asso. v. Cain*, 21 Ill. App. 471, the certificate stated that it was issued on the condition that the statements in the application were true. The court held that the policy would not be

come a member must make an application; that the truthfulness of the statements contained in the application should be the basis of the policy; that no person was eligible to membership who was not in all respects in good health; and that Martin A. Jeffords on December 21, 1894, made such application for insurance and membership, and therein warranted the truthfulness of the statements made and their materiality.

On the trial, the policy, together with the application, was offered in evidence. The policy was correctly described in the declaration as above stated. The material parts of it that are necessary to an understanding of the case are the following: "The Fidelity Mutual Life Association, in consideration of the application for this policy, which is made a part hereof, a copy of which is hereto attached, and the payment to said as-

sociation of forty and <sup>45</sup>/<sub>100</sub> dollars on the 29th days of the months of December, March, June, and September for the period of twenty years from the date thereof, etc., does hereby receive Martin A. Jeffords, of Sylvester, county of Worth, state of Georgia, as a member of said association, and issues this policy of insurance," etc., "subject, however, to all the requirements hereinafter stated and the conditions hereon indorsed, which are hereby referred to and made a material part of this contract." The following is one of the conditions forming part of the policy: "If any statement contained in the application on which this policy is issued be untrue in any respect, then this policy, except as herein provided, shall be *ipso facto* null and void."

The applications signed by the insured

avoided because some statements in the application as to the applicant's health were untrue, if they were made in good faith, and the misstatement was unintentional and made under a belief that it was true.

And in *Swete v. Fairlie*, 6 Car. & P. 1, the person insured stated that he was not afflicted with specified diseases, or any other disease tending to shorten life. There was a claim that there had been incipient insanity some years before from which he had at least apparently recovered. The jury found that he was not aware of what had taken place during such time, and therefore could not communicate it, and a verdict was returned for the plaintiff. In this case the death of the insured was caused by apoplexy.

Where the answers are representations only, and not warranties, an innocent misrepresentation as to an undiscovered disease will not ordinarily avoid the policy.

Thus, in *Woehrie v. Metropolitan L. Ins. Co.* 21 Misc. 88, 46 N. Y. Supp. 862, the court, while holding that the answers were warranties and that an untrue statement avoided the policy, stated that if the answers had been representations only, a charge that if a disease existed in the insured of which he knew nothing, and to which he honestly answered "No," there might be a recovery, would have been proper.

And in *Breeze v. Metropolitan L. Ins. Co.* 24 App. Div. 377, 48 N. Y. Supp. 753, the court stated that a charge that if the insured represented himself to be sound and healthy when he was of unsound health, to such an extent that he must have realized it, that would be a warranty, might have been proper if the answer had been a representation only, although the holding was that the answers were warranties, and therefore the fact that the applicant did not realize that his health was unsound would not prevent the forfeiture of the policy.

And in *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466, the insured was required to answer categorically whether he had ever been afflicted with specified diseases, including scrofula, asthma, and consumption, to each of which he gave a negative answer. At that time he was in sound health, and did not know or believe that he had ever been afflicted with any of such diseases in any appreciable form, although as a fact he had been. The court held that if the contract had so provided the untruth of the answer would have avoided the policy, although made in perfect good faith and without any reason to believe that he had ever had such diseases, but that such an interpretation would be avoided if possible, and that the contract, which

elsewhere required him to state any "known cause" or circumstance with which the company should be made acquainted, and which in some places characterized the statements in the application as warranties, and in others as representations, simply required the insured to use the utmost good faith and deal fairly and honestly as to material facts, and that the policy was therefore valid.

And in *Northwestern Mut. L. Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189, the policy provided that it should be void if any "statement" in the application was found to be incorrect. The court held that the answers were representations only, and not warranties, and approved the language in *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466, *supra*, that plaintiff was not precluded from recovering unless it appeared from all the circumstances, including the nature of the alleged diseases, that the assured knew or had reason to believe that he was afflicted with them, although in this case the court held that the insured did not have any disease at the time of the application.

And in *Bloomington Mut. Life Ben. Asso. v. Cummins*, 53 Ill. App. 530, the court said *obiter*, referring to the above case of *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466, that in the case of representations as to health, as distinguished from warranties, many well-considered cases insist that the honesty and good faith of the answers is an issuable fact, and that, if the tendency to disease is manifest, the company should protect itself by the physical examination of its medical examiner.

And in *Patten v. United Life & Acci. Ins. Asso.* 70 Hun. 200, 24 N. Y. Supp. 269, affirmed on opinion below in 141 N. Y. 589, 36 N. E. 739, the insured was reinstated after default in payment of a premium upon representations that he was in good health, the truth of which was not guaranteed or made part of the contract. The court held, in an action on the policy, that unless the insured knew at the time, or had cause to know, or was necessarily presumed to know, that his statement was false, plaintiff could recover under a defense of fraud in the representation which was set up by defendant. The court also held that a charge that if the insured was not in good health at the time of the reinstatement the verdict must be for defendant was more favorable to the latter than he was entitled to.

And some cases hold that the mere fact that one has had symptoms of a disease which he either warrants or represents that he does not

contained the following among other declarations and statements:

"(1) I hereby apply to the Fidelity Mutual Life Association of Philadelphia, Pa., for a policy of insurance, to be issued in pursuance of this application." "(3) That I am now in good health, and am free from any and all diseases, sickness, ailments, or complaints, trivial or otherwise, except as here stated: Yes." "(5) That I have never had or been afflicted with any sickness, disease, ailment, injury, or complaint, except as here stated: Pleurisy, about two years ago; cold, about one week, about six months ago. (6) That the last physician I consulted or who prescribed for me was Dr. T. C. Jeffords, of Sylvester, Ga., about three months ago, for the sickness here stated: Cold, about one week, about six months ago. (7) That I have not consulted or been prescribed

have will not prevent a recovery, but that the disease must have progressed so far as to indicate a vice in the system, or to have some bearing on the general health or continuance of life.

Thus, in *Goucher v. Northwestern Traveling Men's Asso.* 20 Fed. 596, the court in its charge to the jury stated that where the applicant agreed that any misstatement should annul all claims to any benefit, and answered in the negative a question whether he had had, or then had, any disease of the liver, there could be no recovery if he had then or previously had had a real disease of the liver, even though his answer was not intentionally untrue, but that the fact that he had had premonitory symptoms of the approach of such disease would not prevent recovery. In this case it was claimed that external evidence of the disease of abscess of the liver appeared within a month or two after the application, an operation was performed the third month after such application, and death occurred as the remote cause of the disease eight and a half months afterwards.

In *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 Am. Rep. 112, 2 So. 125, expressions occurred in the application expressing an intention to make all statements of the applicant absolute warranties, but the policy also purported to be issued in consideration of the "representations" made in the application, and there was no express declaration that they were warranties. There was also a provision that any "untrue or fraudulent" answers, or any "suppression of facts," would vitiate the policy, and that the applicant had not withheld any "material" circumstance or information as to his health. The court held that any untrue statement, if material, would vitiate the policy, even though not within the knowledge of the insured, but that an immaterial one would not, and that symptoms of disease were not intended to be made absolutely material, unless they existed to such an extent as to affect soundness of health, or tend to shorten life, and that the words "untrue" and "suppression of facts" did not refer to a disease of which the insured did not know, and could not have informed himself by proper diligence.

An untrue statement by the applicant that he is in good health will not avoid the policy, although it is claimed that he had tuberculosis at the time of the application, and he had just been rejected by another company to the knowledge of the agent procuring the insurance, where he believed himself to be in a fair state of health, and if there was any tubercular condition it was latent and unknown to him, and a report of his condition, given to him by the

for by any other physician or medical man during the last ten years, except as here stated: Dr. McRae, Atlanta, Ga.; pleurisy, about two years ago. I hereby agree and bind myself as follows: That the truthfulness of the statements above made or contained, by whomsoever written, are material to the risk, and are the sole basis of the contract with the said association; that I have signed this application in my own proper handwriting; . . . and that, if any concealment or untrue statement or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso facto* null and void."

The evidence showed that Thomas C. Jeffords was the brother, and that Edna Jeffords was the wife, of the insured. The application for insurance was made December 21, 1894, the policy was issued December 29,

examining physician, was likely to lull him into a feeling of security as to his health. *Tarpey v. Security Trust Co.* 80 Ill. App. 378. The applicant in this case warranted the answers in the application to be true and agreed that if during his lifetime any statements were shown to be untrue the policy should be void, and that he would surrender it on return of the premiums paid.

On appeal in the preceding case (*Security Trust Co. v. Tarpey*, 162 Ill. 52, 54 N. E. 1041) the court states that the company was organized to insure those who had been rejected by other companies and charged an increased rate for doing so, and that the applicant represented himself to be in good health, honestly and in good faith, and, although the germs of disease were present, the disease had not become manifest to him or his associates, and the company, from the statements in the examination to the effect that his lungs were not free from indications of disease and other statements, knew as much about his disease as he did, and held that the policy was not avoided by the incorrect statement as to his health.

In *Tucker v. United Life & Acci. Ins. Asso.* 133 N. Y. 548, 30 N. E. 723, the claim was made that the answers were made warranties, and that they were untrue, and that an answer by the applicant that he had never had any serious illness or local disease was untrue because he did in fact have consumption, of which disease he died less than seven months afterwards. There was evidence that he had been treated by a physician shortly before the application, who testified that he then had Koch bacilli, and that in his judgment he then had consumption. He did not, however, tell the insured of such fact, and the latter thought he had nothing but a cold. There was also evidence that the cough disappeared for some months, and that he died of acute tuberculosis, which usually runs its course in three or four months. The court held that the question whether he had consumption at the time of the application was properly left to the jury, and said that the presence of bacilli was not an indication that the disease had really commenced, but that in order to work mischief they must find favorable conditions, and that the precise time when their operation had gone so far as to cause disease could not be easily determined.

In *Fowkes v. Manchester & L. I. Ins. Co.* 3 Fost. & F. 440, the insured stated that he had never been afflicted with gout. There was evidence by his physician that he had previously had a very slight attack of suppressed gout, but there was no clear evidence that the insured knew such fact. He died, however, of

1894, and the insured died of consumption July 29, 1896. The evidence was conflicting as to whether he had consulted and been prescribed for within the last ten years by other physicians besides those which he named. The evidence was conflicting as to his condition of health at the date of the application. Some of the evidence tended to show that he was then afflicted with "incipient tuberculosis"; other evidence tended to show he was in good health, and that he did not at that time have consumption.

The plaintiff in error requested the court to give the following charges, and reserved an exception to the refusal to give each:

"(1) Under the law of this state, as set forth in § 2097 of the Code, the representations contained in an application for a policy of insurance are covenanted to be true. If you believe that on the 21st of December,

1894, when Martin A. Jeffords made application for insurance, he was then afflicted with pulmonary consumption, he stated in his application that he was free from disease, trivial or otherwise, then I charge you that this would void the policy, and the plaintiff would not be entitled to recover, for the reason that consumption is a disease which, from its nature, does affect the extent of the risk. This would be true also without regard to the good faith of the applicant, as, he having covenanted that the representations were true, the question of good faith does not enter into it.

"(2) I charge you, further, that if you believe he did consult Dr. Hinman in February, 1894, or Dr. McRae in October, 1894, and that he stated in his application that he had not consulted any physician in ten years, except Dr. Floyd McRae two years

suppressed gout less than a year after the policy was issued. The court Cockburn, Ch. J., instructed the jury that the answer would not be false merely because he had some symptoms which an experienced medical man might see indicated the presence of gout, and that the jury should consider whether there was gout in a sensible form, and the jury found that he had not been "afflicted with gout."

In *Sleverts v. National Benev. Asso.* 95 Iowa, 710, 64 N. W. 671, the insured signed a health certificate some time before June 20, in which he stated that he was in good health and free from all ailments. The evidence showed that for a short time before he had had a cold and complained some of his chest, but continued at work till the latter part of June. A physician was called June 26, and on July 10, it was discovered that he had something serious the matter with his stomach, although the disease of cancer of the stomach, of which he died November 28, had not then progressed far enough to give undoubted evidence of its existence. The court held that there was not such a misstatement as avoided the policy, saying that it was a general rule that before any ailment could be said to be a disease it must be such as to indicate a vice in the constitution, or to be so serious as to have some bearing on the general health and continuance of life.

An answer that the applicant is in "good health" means that he is not conscious of any derangement of the functions by which health may be tested. *Goucher v. Northwestern Traveling Men's Asso.* 20 Fed. 596; *Conver v. Phoenix Mut. L. Ins. Co.* 3 Dill. 224, Fed. Cas. No. 8,148.

In *Continental L. Ins. Co. v. Yung*, 113 Ind. 159, 15 N. E. 220, the claim was made that there was a breach of the warranties in the application, in that the insured had represented that he had no disease of the kidneys, while he in fact had Bright's disease. The court charged that if the assured had at the time of the application some affection or ailment of some of the organs inquired about, which ailment was of a character so well defined and marked as materially to derange for the time the functions of such organ, such ailment would avoid the policy whether known to the assured or not, and added that this would be so with reference to Bright's disease of the kidneys if it was such a disease. The court held that an objection by the defendant to the latter part of the instruction was not well taken, no objection having been made to the first part of such instruction.

In *Grattan v. Metropolitan L. Ins. Co.* 28 Hun, 480, the court said that a latent and un-

developed germ of disease probably exists in every mortal body, and if a person thinks that his present health is good, the answer is not untrue because in his system there is a seed of disease already sown, and subsequently to germinate. Although this was said with reference to statements made as to the health of the brother of the insured, it is inserted here under the belief that it may be helpful on the subject under discussion.

And on appeal, *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372, the court held that the answer that the health of the brother of the insured was "good" must be understood in a general and ordinary sense, and not in a strict and rigid sense, and that the brother had indicated no symptoms or traces of disease, and to the ordinary observation of a friend or relative he was in truth well, and that such answer, even considered as a warranty, warranted nothing more.

And some cases hold that, even though the applicant states absolutely that he does not have some specified disease, or that he is in good health, and warrants the truth of his answers, the warranty is only to the effect that such is the fact to the best of his knowledge and belief.

Thus, in *Ames v. Manhattan L. Ins. Co.* 40 App. Div. 465, 58 N. Y. Supp. 244, the applicant warranted that the statements and answers in the application were full, complete, and true in every particular. The court held that he only warranted those answers which reasonably bore the construction of strict warranties, and not those which on their face merely import honest representations, made truthfully to the best of the applicant's knowledge, information, and belief, and that a negative answer to the question whether he had any "disease" of the heart would not avoid the policy, although without his knowledge he had cardiac insufficiency of which he died five days after the policy was issued, especially where the evidence did not show that cardiac insufficiency was a disease of the heart; nor was the policy avoided because he stated that he had not had specified diseases of the urinary or genital organs "or any other disease" of such organs although without his knowledge he had chronic nephritis, which is a disease of such organs, as the general question could not be considered as calling for a strict warranty as to every possible disease of such organs.

And in *Hutchison v. National Loan Fund Life Assur. Soc.* 7 Dunlop, B. & M. Sess. 467, the applicant stated that she did not have any disease or symptoms of disease, and declared that she was in good health and ordinarily enjoyed good health, and that she had not withheld any material circumstance or information

before for pleurisy, then this was a material misrepresentation (which also conflicted with his contract and with the by-laws of the association), because it shut out from the company a very high source of information, which it was entitled to, as to his physical condition, and would defeat the right to a recovery, provided you also believe that these doctors had actually found that he had consumption at the time they examined him.

"(3) If you believe from the evidence that the deceased, Martin A. Jeffords, consulted Dr. R. E. Hinman, as a physician, during the month of February, 1894, and that the said Dr. R. E. Hinman, in the capacity of a physician, and at the request of said Martin A. Jeffords, made a physical examination of him, you will find for the defendant."

The refusal to give each of these three charges is assigned as error.

as to her health, and agreed that the declaration and proposal should be the basis of the contract, and that, if any fraudulent or untrue allegation was contained therein, the policy should be void. The policy provided that in case of any fraudulent or untrue allegations it should be void. The court held that the only warranty was to the effect that the applicant was and had been, according to his own knowledge and reasonable belief, free from any disease or symptoms of disease material to the risk, and no warranty was imputed against any latent and imperceptible disease, that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at a subsequent period.

And in *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227, the applicant stated in the application that the answers therein were true and correct, and this was followed by a statement that if the answers and statements were in any "material" respects untrue or false, the policy should be void. The court held that a statement by him that he was then in good health was not made on his personal knowledge, and that, if he acted in good faith and had no suspicion that he was not sound of body, the policy would not be forfeited, although he had had a cancer of the stomach three months before the application.

And in *Horn v. Amicable Mut. L. Ins. Co.* 64 Barb. 81, the claim was made that the statements as to health in the application which were incorporated in and made part of the policy were warranties, but the court stated that the insured might not know enough of the human system to be aware of the existence of some affection of a vital organ, and that the victim of Bright's disease of the kidneys, or of an affection of the lungs, might be in the enjoyment of such health and strength as to lead him to believe that his vital organs were all sound, and that it would be monstrous to hold that he warranted himself to be sound as to those organs, by answering that he was never sick, or had no disease of such organs; and said that the medical advisers of the company were far better able to detect incipient disease than the subject in most cases, and held that such statements were not warranties.

And in *Knights of Honor v. Dickson*, 102 Tenn. 255, 52 S. W. 862, the applicant agreed in the application that his answers were true, and that they should form the basis of his contract, and the policy contained an agreement to pay on condition that the statements in the application were true and that they were a part of the contract, and stated that they were warranted to be true. The court held that any 53 L. R. A.

The plaintiff in error reserved exceptions to each of the following charges given by the court:

"(1) Now, with regard to that plea [referring to the plea that the insured had consumption], I charge you, as matter of law, that if the proof fails to satisfy you, to the extent which the law heretofore read to you has defined, that Martin A. Jeffords intentionally misled the defendant company; that he knew, or had reason to believe, that he had consumption at the time of his application; if it fails to show you that he knew, or had reason to believe he had consumption, and, thus knowing and believing, he intentionally and fraudulently withheld the facts from the defendant company,—you would not be justified in defeating a proper recovery on account of that plea.

"(2) With the provisos I have already

statement of a material fact must be considered as a warranty, and if false would vitiate the policy, though made ignorantly and in good faith. But that, while falsehood might be predicated of a misstatement of fact, it could not be of a mistaken opinion as to whether a man has a disease when it is latent, and can only be a matter of opinion.

And if the insured knows, or has ground to believe, that he has any disease, even though it is latent and undeveloped, it is his duty to make it known, whether specially questioned or not, and failure to do so will be a misstatement or concealment which will void the policy. But if he has some latent disease of which he knows and suspects nothing, and has no means of ascertaining, he cannot be said to have misrepresented or concealed the facts in such a sense as to void the policy. *Knights of Pythias v. Rosenfeld*, 92 Tenn. 508, 22 S. W. 204. Nothing was said as to the nature of the warranties, representations, or conditions in the policy.

And in *Endowment Rank, K. of P. v. Cogbill*, 99 Tenn. 28, 41 S. W. 840, the court stated that the applicant is not bound, at the peril of the beneficiary, to know and state in the application with absolute certainty his real physical condition and predisposition to one disease or another, but is required in the utmost good faith to disclose fully and truthfully all that he knows about his health, past and present.

## II. Representations to the best of knowledge and belief, etc.

Where the answers are stated to be true to the best knowledge and belief of the applicant, or some equivalent expression is used, the cases hold, almost without exception, that an incorrect statement as to health, innocently made in the belief in its truth, will not void the policy, although there is also an agreement that any untrue or fraudulent statement shall void the policy.

Thus, in *Clapp v. Massachusetts Ben. Asso.* 146 Mass. 519, 18 N. E. 433, the policy provided that it was issued on condition that the statements and declarations in the application were in all respects true, and in the acknowledgment to the application the applicant warranted that all the statements were true to the "best" of "his knowledge and belief," and agreed that any "untrue" or fraudulent statement would forfeit all rights under the policy. The court held that, whether the statements as to health be regarded as warranties or representations, the policy would not be forfeited for an answer honestly made in the belief that it was true, al-

expressed, your inquiry, then, on this particular plea is this: Has the defendant produced such a preponderance of proof as will satisfy your minds that Martin A. Jeffords knew, or had reason to believe, that he was afflicted with consumption at the time the insurance was applied for, and that he fraudulently withheld the facts from the company?

"(3) A man cannot be held to warrant that he is free from disease as a prerequisite to a valid contract of insurance. If he acts in good faith, and gives all the information asked, and in doing so states the facts truly as he understands them, it is all the law requires of him, or of the beneficiary of the policy for the recovery of the amount which he has thus attempted to secure.

"(4) The court charges you that if you believe from the evidence that the insured,

Martin A. Jeffords, had consulted Dr. Hinman, or had been prescribed for by him in February, 1894, and wilfully and fraudulently withheld this fact from the defendant company, it would void the policy of insurance, and neither his brother nor his widow could recover thereon, and you would be obliged to find for the defendant.

"(5) I instruct you that the proof must preponderate to show, not only the fact of such consultation or prescription, the withholding of the fact, and that it was knowingly done and with a fraudulent purpose. If this fact existed, and it was merely omitted by the insured, and if the proof fails to satisfy you, under the rules I have given you, that he made the other fraudulent and material concealments charged as to physical condition, under these circumstances the

though the applicant may have been mistaken in such belief.

In *Hann v. National Union*, 97 Mich. 513, 58 N. W. 834, the insured declared that his statements in the application were true to the best of his knowledge and belief, and agreed that any untrue or fraudulent statement or concealment of any facts would forfeit all rights under the certificate. He also stated that he was in good health. The court said that if the qualification as to knowledge and belief had not been in his statement, the company would undoubtedly have been entitled to a charge that it was immaterial that the assured did not know at the time of the application and issuance of the certificate of the existence of the disease of which he died a month after the certificate was given, but with such qualification it would be necessary, in order to defeat recovery, to show that he knew, or had reason to believe, that he was not in good health at such time.

In *Cheever v. Union Cent. L. Ins. Co.* 2 Ohio L. J. 19, the insured had had, one or two years before the making of the application, what his physicians called a malignant tumor or cancer. A consultation was held, and it was decided to have an operation, but the sore was healed without such operation by means of external and internal remedies, and some of the physicians who were at the consultation afterwards told him that it was not cancer that he had had, and he in good faith believed so at the time of the application, but after the issuance of the policy the tumor or cancer reappeared and caused his death. The court held that the policy would not be avoided because of his affirmative answer to the question "Are you in good health, and (as far as you know) free from any symptoms of disease?" or because of the negative answer to the question "Have you ever had any of the following diseases or (as far as you know) any symptoms thereof?—cancer," although it held that he was required to disclose the matter as to such tumor or cancer by the question "Have you had during the last seven years any sickness or disease? If so, state the particulars and name of the physician" who prescribed or was consulted.

In *Keatley v. Travelers' Ins. Co.* 187 Pa. 197, 40 Atl. 508, the applicant warranted that the statements in the application were true to the best of his knowledge or belief, and agreed that any untruth or concealment would make the policy void. He stated in the application that he never had had apoplexy or paralysis. About three months before he had had an illness which some physicians called apoplexy, others paralysis, and still others neither. The 53 L. R. A.

court held that the warranty was simply that he had not consciously or wilfully falsified, and that there might be a recovery, even though he had one of the diseases named, if he believed the answer to be true.

In *Jones v. Provincial Ins. Co.* 3 C. B. N. S. 65, 26 L. J. C. P. N. S. 272, 3 Jur. N. S. 1004, the applicant stated that he was then in good health, and was not aware of any disorder or circumstance tending to shorten his life, or to render an assurance thereon more than usually hazardous. He had previously had two bilious attacks, one a little more and the other a little less than a year before the application. The medical men who attended him considered that there was nothing in them tending to shorten his life, but other medical men held a different view, but their opinion had not been communicated to the insured. The court held that, even though such attacks had a tendency to shorten his life, and he knew that he had had them, it would not prevent a recovery if he made the statement honestly without the knowledge that they had such tendency.

In *Life Assn. of Scotland v. Foster*, 11 Ct. of Seas. Cas. 3d Series, 351, 4 *Migelow Life & Am. Ins. Cas.* 520, the applicant stated that she was in good health and not afflicted with any diseases, external or internal, and that her statements were true, and that she had not withheld or concealed any important circumstance, and agreed that such declaration should be the basis of the contract, and that if any untrue averment was made therein the policy should be void. She also stated in the medical examination that she never had had rupture among other diseases, and that in her own opinion she was in perfect health, and declared that her statements "were faithful and true." In fact at that time she did have a swelling on her groin which to a medical man might have indicated a rupture, but it gave her no pain or uneasiness, and she attached no importance to it. After the application, however, because of unusual exertion it suddenly increased in size and ultimately proved fatal, but the applicant at the time of the application believed herself to be in perfect health. The court held that while an insurance contract might undoubtedly be so drawn as to make freedom from specified diseases, however latent, matter of warranty it was not so in this case, and if she did not know that the rupture existed, and made her answer in good faith, its existence would not prevent recovery.

In *Powers v. North Eastern Mut. Life Assn.* 50 Vt. 630, the court, while holding that there could be no recovery because the insured had stated absolutely that he had no disease of

omission would not be of such a character as would void the policy of insurance.

"(6) In other words, the presence or absence of good faith on the part of Martin A. Jeffords throughout would be exceedingly important in determining whether or not the omission to mention the alleged consultation and prescription of Dr. Hinman would be of that character which would void the policy. If you are justified in concluding from the evidence that it was a mere case of honest forgetfulness, I charge you that it would not, in itself, render the policy void.

"(7) To sum up my instructions upon this point, I repeat that if, with regard to the consultation and prescription with Dr. Hinman, you believe that the insured was guilty of fraudulent misrepresentations to the company, you ought to find against the plaintiffs, but, if you believe that it was a

case of honest omission, you ought not to find against the plaintiffs on that plea.

"(8) To sum up the instructions in this case, notwithstanding its great prolixity, the multitude of witnesses, and the multitude of pleas, the true issue is this: Did Martin A. Jeffords apply for this policy of insurance honestly and in good faith? Did he truthfully and sincerely communicate to the company the answers to the questions propounded which were material for its protection? If he did this, withholding nothing fraudulently, concealing nothing fraudulently, and not intending to deceive, his widow is entitled to recover the amount stipulated in the policy, with interest thereon from the date of proofs of loss and costs of the suit which she has brought. If, on the other hand, the defendant has produced evidence which preponderates to show that

the heart, while he in fact did have such a disease without his knowledge, stated that if he had answered that he had no knowledge that the disease existed, the finding of the jury might affect the result.

In *Swick v. Home L. Ins. Co.* 2 Dill. 160, Fed. Cas. No. 13,692, the answers in the application were warranted to be true, and it was agreed that the policy should be void if they were untrue or deceptive in any respect. The applicant stated that, so far as he knew, he was free from any symptoms of disease, and the court in charging the jury stated that there could be no recovery if he knew of any symptoms of disease which he did not disclose.

In *Ohio Mut. Life Assn. v. Draddy*, 8 Ohio N. P. 140, the insured in a health certificate for reinstatement certified that he was to the best of his knowledge in the same sound condition of health as when last examined by the company's physician, and that he did not have, and had not had since such examination, any illness or injury, nor any medical treatment, nor any ailment affecting his health, "so far as I know." The court held that the phrase "so far as I know" qualified "illness" "injury" and "medical treatment" as well as "ailment," and held that there could be a recovery, even though the applicant had an illness, injury, or ailment affecting his sound health, if he did not know of such fact, but supposed that such illness or ailment was a mere indisposition.

In *Swift v. Massachusetts Mut. L. Ins. Co.* 2 Thomp. & C. 302, the wife of the insured made the application, in which she stated that the mother of the insured died of scrofula. The examining physician thereupon asked the insured orally if he had ever had such disease or any symptoms that he was aware of, to which he answered in the negative. The court held that such answer was not a warranty, but a representation as to a material fact, and that it was for the jury to say whether he was aware that he was afflicted with scrofula, and whether he was acting in good faith when he said that he had no symptoms of the disease. In this case the insured had, at the time of the application, an abscess of which he was aware, and which was in reality caused by scrofula, and he died within a year after the policy was issued, scrofula being the indirect cause of death.

In *Confederation Life Assn. v. Miller*, 14 Can. S. C. 330, the applicant warranted that his answers were true to the best of his knowledge and belief, and agreed that the proposal should be the basis of the contract, and that any misstatement should render the policy void. The claim was made that if the answers as 53 L. R. A.

to health were not absolutely according to the fact, however innocently or unintentionally made, the policy would be void. The court held, however, that if the answer was true to the best of the applicant's knowledge the policy would not be avoided, but also held that all the defenses except one as to a former injury set up that the answers were wilfully false and made with intent to deceive, and therefore did not raise the question as to ignorance in the answers.

In *United Brethren Mut. Aid Soc. v. Kinter*, 12 W. N. C. 76, the insured stated that he had never had specified diseases, among which dyspepsia was not included, and stated that to the best of his knowledge and belief he was free from all other diseases and complaints. It was agreed that the statements and declarations issued formed the basis of the contract, and that if any of them were untrue and false the contract should be void. The physician's certificate stated that the insured had never been subject to dyspepsia, and the claim was made that the insured had had dyspepsia and therefore the policy was void. The trial court gave an instruction that if the insured answered falsely by mistake, the policy would only be avoided if it related to a matter material to the risk, and on appeal it was held that, as the application contained no question as to dyspepsia, there was no warranty as to that disease.

But in *Maine Ben. Assn. v. Parks*, 81 Me. 79, 16 Atl. 339, the insured had typhoid fever in January, applied for insurance March 1, was examined by the medical agent of the company April 18, and the policy was issued April 30. On May 12th her physician found her sick with consumption, of which disease she died July 21. In her application, in which she warranted all her statements to be true to her best knowledge and belief, and agreed that any untrue or fraudulent statement would avoid the policy, she stated that her health was good. The claim was made that she was sick of incipient consumption at the time of the application, and that she never recovered from the effects of the fever, and that there was an unbroken connection between the two diseases, the court stated that there was a close line between incipient disease, disease in its first stages, and a bodily condition susceptible to the contraction of disease, and that a person might have a disease upon him without knowing it, and held that the finding of the jury that the insured was in good health at the time of the application was erroneous, and that the policy should be canceled. The court also stated that whether the answers were to be regarded as war-

Martin A. Jeffords sought to secure insurance dishonestly, knowing or having reason to believe that he was afflicted with consumption, which knowledge he did not communicate to the company, but fraudulently withheld it, and knowing that he had been examined by a physician other than Dr. McRae and his brother, and fraudulently withholding that fact with the purpose of misleading the company, his widow would not be entitled to recover, and you should find for the defendant, with costs of suit on the action brought by her. The same statement is applicable with regard to the action brought by Thomas C. Jeffords for the

amount stipulated to be due him on the policy of insurance.

"(9) I charge you that, whether Thomas C. Jeffords had such an interest or not, his brother Martin A. Jeffords had the right to insure his own life in favor of Thomas C. It appears from the policy that this was done, and, if the insurance company accepted the payment of the premiums from Martin A. Jeffords, they cannot now be heard to say that they did not insure Martin A. for the benefit of his brother, and that he had no insurable interest. The company understood the terms of its own policy. It knew it was payable to Thomas C. Jeffords. It

ties or as representations would make no difference if they were in fact untrue, and cited, in support of its decision, *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, in which case, however, the qualification as to the applicant's best knowledge and belief was lacking.

### III. Effect of statutory provisions.

In some states provision has been made by statute as to the effect of untrue representations or warranties, some providing that the policy will not be avoided unless the misrepresentation or concealment was wilful, and others that if made in good faith the policy will not be avoided unless it relates to some matter material to the risk.

Thus, in *FIDELITY MUT. LIFE ASSO. v. JEFFORDS* the applicant stated that he was in good health and free from any and all diseases, except as stated therein, and agreed that the truthfulness of the statements in the application should be the sole basis of the contract, and that if any concealment or untrue statement or answer was contained in the application the policy should be void. The Georgia Code of 1895, § 2087, provides that every application for insurance must be made in the utmost good faith, and the representations contained therein are considered as covenanted to be true by the applicant, and that any variation by which the nature, extent, or character of the risk is changed will avoid the policy, § 2099 provides that a failure to state a material fact, if not done fraudulently, does not avoid, but the "wilful concealment" of such a fact which would enhance the risk will avoid the policy; and § 2101 provides that "wilful misrepresentation" by assured or his agent as to any material inquiry will avoid the policy. The claim was made that the insured at the time of the application had incipient consumption, and the court said that, placing the construction on the application contended for by the defendant, the policy would be void if the insured had a disease material to the risk, although he was entirely ignorant of the fact, and it might be a disease so undeveloped that it could not be discovered by an expert physician, and yet if it afterwards developed, and it could be shown that the germs of the disease were active in the insured at the date of the application, the policy would be void, but held that the contract was not susceptible of such a construction, and that such a construction ought to be avoided unless clearly demanded by legal rules, and that in the absence of explicit and unequivocal words requiring such interpretation, the court would not conclude that the insured took a life policy with the distinct understanding that it should be void and all premiums paid forfeited, if at the time of his application he had a disease of which he was entirely unconscious.

In *March v. Metropolitan L. Ins. Co.* 186 53 L. R. A.

Pa. 629, 40 Atl. 1100, the court held that, under Pennsylvania act June 23, 1885, P. L. 134, § 1, providing that whenever the application contains a clause of warranty of the truth of the answers therein contained no misrepresentation or untrue statement made in good faith shall effect a forfeiture unless it relates to some matter material to the risk, the element of knowledge and intentional concealment should not have been submitted to the jury, where there was an untrue answer by the applicant that she did not have consumption, as it was the most fatal of all diseases, of the presence of which the applicant could not be ignorant, the question being most material, and the answer thereto a warranty.

But an untrue representation by the applicant that he has not had a certain specified disease will not prevent a recovery under such act, if it was made in good faith and was not material to the risk, even though the policy contained a waiver of any statute which might affect the policy, as such statute was passed to strike down literal warranties so far as the enforcement of immaterial matters was concerned. *Hermany v. Fidelity Mut. Life Assn.* 151 Pa. 17, 24 Atl. 1064.

And *Keatley v. Travelers' Ins. Co.* 187 Pa. 197, 40 Atl. 808, holds that under such act an untrue statement by the insured that he has not had any illness or local disease will not, if made in good faith, prevent recovery unless it is material to the risk. The same case holds that a stipulation in a policy that it will be construed solely by the laws of another state is not binding so far as it affects the provisions of such act, as it is against public policy.

In *Jordan v. Provincial Provident Inst.* 28 Can. S. C. 554, the applicant declared that she had given true answers to all questions put, and agreed that her statements and answers should be the basis of the contract, and they were warranted to be true and complete, and it was agreed that any certificate issued was to be accepted on the express condition that if any of such statements or answers were untrue the certificate should be void. The applicant stated that she had no serious illness, but that at that time she had a cancer of the uterus, although she was ignorant of such fact, and underwent an operation two weeks after the application, and died of such disease less than ten months after the application. The jury found that several of the answers were untrue, and that all such answers were material, but were not wilfully or fraudulently given. The complaint was held to have been properly dismissed under Ontario Insurance act of 1892, § 33, which prevents the forfeiture of a policy for untrue answers made in good faith if they are immaterial, but not if they are material.

These provisions as to the effect of untrue representations or warranties do not, however, apply in case of express covenants in the policy



knew it was taken out by Martin A. Jeffords, and, not having raised the objection when these facts were ascertained, its plea on that subject cannot now be maintained.

"(10) You heard the testimony of the other witnesses with regard to one or both of them [referring to the 'inspectors,' Gary and Milliken, who represented the life association in procuring evidence], and, while their business is legitimate, the court thinks it proper to instruct you that you should closely scan evidence prepared by them, or with their assistance, or under their direction, personal presence, or influence, and not

conclude the rights of the parties thereby unless it is right and proper in view of all the evidence in the case. It is perhaps fair to presume that these inspectors are experts in their business, and it is the duty of the jury to carefully consider the statements of Mrs. Jeffords and Dr. Hall, and to determine, in view of all the evidence, whether they were obtained by the inspectors, or either of them, by personal influence, or by promises of settlement of a particular claim, or by threats, or by the skillful use of language in writing, and whether or not they gave a coloring to the statements of the witness or

not directly dependent on such representations or warranties.

Thus, the provision of Ohio Rev. Stat. § 3625, that it must be clearly proved that the answers to interrogatories were wilfully false in order to avoid the policy, does not apply to a condition in the policy that no obligation is assumed thereby unless at the date of the policy the assured is in sound health, and consequently there can be no recovery if at such date the insured was not in sound health, although he did not know such fact. *Metropolitan L. Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908.

Where the policy contains a covenant that it shall be void if the insured has had before its date specified diseases, the validity of the policy depends on actual conditions, and not on the knowledge of the parties, and if the applicant, prior to and at the time of the issuance of the policy, had one of such diseases, of which she subsequently died, there could be no recovery, although she had no knowledge that she had such disease. *Connell v. Metropolitan L. Ins. Co.* 8 Del. Co. Rep. 184.

As to the effect generally of a statutory provision as to the incontestability of a life insurance policy, see *note* to *Clement v. New York L. Ins. Co.* (Tenn.) 42 L. R. A. 247.

#### IV. Representations by beneficiary.

In a few cases the misrepresentations as to health have been made by the beneficiary instead of the person insured.

In *Duckett v. Williams*, 4 Tyrw. 240, 2 Crompt. & M. 348, the trustees of an insurance company having an interest in the life of the insured, declared that he was in good health and had no disease which tended to shorten life, and agreed that such declaration should be the basis of the contract, and that if any untrue statement was contained therein, or if the facts were not truly stated, the policy should be void and all premiums paid should be forfeited. The insured did have a disease tending to shorten life, although such trustees did not know that fact, and the court held that the policy was not only forfeited, but that the premiums paid could not be recovered back.

In *Whelton v. Hardisty*, 8 Bl. & Bl. 232, 27 L. J. Q. B. N. S. 241, neither the insured nor the beneficiary knew that the statements in the application as to the health of the insured were untrue, but the beneficiary declared that the particulars were truly and fully stated, and agreed that if any material circumstances as to the health of the insured were untruly stated the policy should be void. The reply of the beneficiary set up that a prospectus had been issued by the company stating that the insurance would be unquestionable except for fraud, and that the insurance had been taken out in reliance on such agreement, and the court held that under such prospectus the only fraud which could vitiate the policy was

that of the beneficiary, and that the insurer could not, after receiving premiums for many years, claim that the policy was a nullity because of the fraud of the insured and his referees.

In *Crockett v. Royal Liver Soc.* 7 Sheriff Ct. 301, cited in 4 Berryman's Ins. Digest, ¶ 13,102, the application, signed by a sister of the insured, expressed that the answers were correct, and that no material information had been withheld, and that any misstatement of facts should avoid the policy. One of the statements made in good faith was that the insured was in good health. The court held that by dispensing with a medical examination the insurer undertook the risk of latent diseases.

#### V. Conclusion.

As a general thing the policy will not, where the answers are mere representations, be avoided because of an innocent misrepresentation as to health. But if the answers are made warranties, or if it is agreed that the policy shall be void if they are untrue in any respect, the policy has generally been held to be avoided by an untrue answer, though innocently made. Some cases, however, hold that the warranty does not cover mere symptoms of a disease, but that the disease must have progressed so far as to indicate a vice in the system, or to have some effect on the general health, or have a tendency to shorten life.

Where the insured states or represents his answers to be true to the best of his knowledge and belief, or some equivalent expression is used, an untrue answer as to health will not avoid the policy, and a few cases hold that, even though the answers as to health are absolute and warranted to be true, the warranty is only to the effect that the answers are true to the best of the applicant's knowledge and belief.

In some states statutes have been passed limiting the effect of untrue answers or representations made in good faith, some providing that the policy will not be avoided thereby in any event, and others that they will not have that effect unless they relate to some matter material to the risk. But such provisions are held not to apply to express covenants or conditions not depending on the warranties or representations as to the truth of the answers.

Many policies also now contain an incontestable clause, and although no cases directly involving the validity of such a policy because of an innocent misrepresentation as to the health of an applicant having an undiscovered disease seem to have been reported, there can be no doubt that such a defense would not be available.

As to the incontestability of a life insurance policy generally under provisions of the policy, or of a statute, see *note* to *Clement v. New York L. Ins. Co.* (Tenn.) 42 L. R. A. 247.

witnesses which they or either of them did not intend, and by which an improper advantage was taken of that party or witness. This would be especially the duty of the jury if it appears from these statements that, by hers, Mrs. Jeffords wholly surrenders her right to any claim against the company, and practically admits that her policy was void, and from the statement of Dr. Hall that he admits, or is made to admit, facts which would indicate his carelessness as a physician and his unfitness as a medical examiner for the company." The giving of each of these ten charges is assigned as error.

The trial resulted in a verdict for Thomas C. Jeffords for \$9,969.20, on which, judgment was entered. This writ of error is sued out by the Fidelity Mutual Life Association to reverse that judgment.

Argued before *Pardee, McCormick, and Shelby*, Circuit Judges.

*Messrs. King & Spalding and Barrow & Barrow*, for plaintiff in error:

Where an application for insurance is made the foundation of the policy, and its statements are covenanted to be true, if they are not true the policy is void, whether the untruth be intentional or not, or fraudulent or not.

1 May, Ins. 4th ed. § 156; Ga. Civil Code 1895, §§ 2097, 2117; *O'Connell v. Supreme Conclave K. of D.* 102 Ga. 143, 28 S. E. 282; 11 Am. & Eng. Enc. Law, p. 291; Bliss, Ins. 38; *Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210; *Commonwealth Mut. F. Ins. Co. v. Huntsinger*, 98 Pa. 41.

Representations as to previous medical attendance are material, and, if untrue, void the policy.

*Fidelity Mut. Life Asso. v. Harris* (Tex.) 57 S. W. 635.

In Georgia the applicant for insurance warrants that every material statement in his application is true. The question of good faith does not enter into it.

*Morris v. Imperial Ins. Co.* 106 Ga. 461, 32 S. E. 595; *Fidelity Mut. Life Asso. v. Miller*, 34 C. C. A. 211, 63 U. S. App. 717, 92 Fed. 63; Joyce, Ins. §§ 1945-1949; *Newman v. Clafin Co.* 107 Ga. 89, 32 S. E. 943; *Bailey v. Jones*, 14 Ga. 384; *Smith v. Mitchell*, 6 Ga. 458; *Jeffries v. Economical Mut. L. Ins. Co.* 22 Wall. 47, 22 L. ed. 833; *Ætna L. Ins. Co. v. Frances*, 91 U. S. 510, 23 L. ed. 401; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 937; *March v. Metropolitan L. Ins. Co.* 186 Pa. 629, 40 Atl. 1100; *Mengel v. North-Western Mut. L. Ins. Co.* 176 Pa. 280, 35 Atl. 197; *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. 256, 13 Atl. 932.

The question of materiality is for the court.

*Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L. R. A. 261, 30 S. E. 918; *Fidelity Mut. Life Asso. v. Miller*, 34 C. C. A. 211, 63 U. S. App. 714, 92 Fed. 63.

Representations in an application for insurance, containing statements that the

plaintiff had not consulted any physician in ten years except one named, are statements of a fact, and not opinions.

*Brown v. Greenfield Life Asso.* 172 Mass. 498, 53 N. E. 129; *Sladden v. New York L. Ins. Co.* 29 C. C. A. 596, 58 U. S. App. 492, 86 Fed. 102; *Cobb v. Covenant Mut. Ben. Asso.* 153 Mass. 176, 10 L. R. A. 666, 26 N. E. 230; *Brady v. United L. Ins. Asso.* 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727; 13 Am. & Eng. Enc. Law, p. 636; *Fidelity Mut. Life Asso. v. McDaniel*, 25 Ind. App. 608, 57 N. E. 645; *Fidelity Mut. Life Asso. v. Harris* (Tex.) 57 S. W. 635.

The defendant is a mutual company, and the by-laws become a part of the contract.

Ga. Civil Code 1895, § 2135; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681, 28 S. E. 498.

Where one warrants a fact to be true as the basis of a contract, and provides in the contract that if the statement is untrue in any respect the contract shall be void, the untruth of the statement avoids such contract, no matter how thoroughly the party making the same believes it.

1 May, Ins. 156.

A policy of insurance issued to one who has no legal interest in the life of another, or only a qualified interest, beyond such interest is a wagering contract, against public policy, and void.

One has no insurable interest in the life of his brother, both being *sui juris*.

*Lewis v. Phoenix Mut. L. Ins. Co.* 39 Conn. 100; *Greenhood*, Pub. Pol. p. 286, rule CCLVI.

The form in which the contract is put is immaterial. It is what is actually done that matters.

*Greenhood*, Pub. Pol. p. 279, rule CCLI.

Wagering contracts are void.

*Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. Rep. 749.

In Georgia one cannot insure the life of another for his own benefit unless he has an insurable interest in the life which is insured.

Ga. Civil Code 1895, § 2114; *Exchange Bank v. Loh*, 104 Ga. 459, 44 L. R. A. 372, 31 S. E. 459; *West v. Sanders*, 104 Ga. 727, 31 Pac. 619; *Union Fraternal League v. Walton*, 109 Ga. 1, 46 L. R. A. 424, 34 S. E. 317.

Mere relationship is not sufficient.

*Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772; *Carpenter v. United States L. Ins. Co.* 161 Pa. 9, 23 L. R. A. 571, 28 Atl. 943; *United Brethren Mut. Aid Soc. v. McDonnell*, 122 Pa. 324, 1 L. R. A. 238, 15 Atl. 439.

The interest must be in favor of the continuance of the life, and not its destruction.

*Holmes v. Gilman*, 138 N. Y. 369, 20 L. R. A. 566, 34 N. E. 205; *Cheeves v. Anders*, 87 Tex. 237, 28 S. W. 274; *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 926; *Keystone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 6 Atl. 638.

Even if this could be held to be a creditor's policy, the smallness of the debt and the

length of time made it incumbent on the plaintiff to prove the continuance of the relation and the amount of the debt, which was not done.

*Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. Rep. 749; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244.

*Messrs. Du Bignon & Stephens*, for defendant in error:

The contract in question does not put upon the assured the obligation of strict and legal warranties respecting the information given the insurance company at the time of the application.

The courts do not favor a construction which imposes upon the assured the obligation of a warranty.

*Phœnix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; *Moulou v. American L. Ins. Co.* 111 U. S. 341, 28 L. ed. 449, 4 Sup. Ct. Rep. 466; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

The word "warrant" nowhere appears in the application or the policy.

9 Am. & Eng. Enc. Law, 2d ed. p. 12; 16 Am. & Eng. Enc. Law, 2d ed. p. 925; *Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466.

Where there is any doubt as to the meaning of the contract of insurance it will be presumed that the statements of the applicant were to be regarded as representations, and not as strict warranties, and the agreement will be presumed to be a warranty only that the answers were made in good faith, and were true to the knowledge of the insured.

*Moulou v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 372; *Daniels v. Hudson River F. Ins. Co.* 12 Cuah. 416, 59 Am. Dec. 192.

The statement by the assured that he was in good health meant that "the applicant was free from any apparent sensible disease or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested."

*Conver v. Phœnix Mut. L. Ins. Co.* 3 Dill. 226, Fed. Cas. No. 3,143; May, Ins. § 295; *Goucher v. Northwestern Traveling Men's Assn.* 20 Fed. 598; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119.

Good faith on the part of an applicant for insurance as to all material matters is what is required of him.

*Moulou v. American L. Ins. Co.* 111 U. S. 345, 28 L. ed. 450, 4 Sup. Ct. Rep. 466; *Mobile Fire Department Ins. Co. v. Miller*, 58 Ga. 425; *Watertown F. Ins. Co. v. Grehan*, 74 Ga. 656; *German American Mut. Life Assn. v. Farley*, 102 Ga. 725, 29 S. E. 615.

The question of materiality is for the jury.

*Massachusetts Ben. Life Assn. v. Robinson*, 53 L. R. A.

*son*, 104 Ga. 287, 42 L. R. A. 261, 30 S. E. 918; *Mobile Fire Department Ins. Co. v. Miller*, 58 Ga. 426; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 414.

Martin A. Jeffords had a right to take out a policy on his own life for his brother's benefit, and the brother had a right to advance him the necessary means to do so.

The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals. And as the company gets a perfect *quid pro quo* in the stipulated premiums it cannot justly refuse to pay the insurance when incurred by the terms of the contract.

*Etna L. Ins. Co. v. France*, 94 U. S. 564, 24 L. ed. 289; *Union Fraternal League v. Walton*, 109 Ga. 4, 46 L. R. A. 424, 34 S. E. 317; *Provident L. Ins. & Invest. Co. v. Baum*, 29 Ind. 240; 2 Joyce, Ins. § 918; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518; *Robinson v. United States Mut. Acci. Assn.* 68 Fed. 825.

The policy provides that payment may be made to "assigns." In such case even a stranger can be made a beneficiary, and the policy will not be void as a wager policy.

*Massey v. Mutual Relief Soc.* 102 N. Y. 523, 7 N. E. 619; *Sabin v. Phinney*, 134 N. Y. 423, 31 N. E. 1087; *Sule v. Mutual Reserve Fund Life Assn.* 145 N. Y. 563, 28 L. R. A. 379, 40 N. E. 242; *Northwestern Masonic Aid Assn. v. Jones*, 164 Pa. 99, 26 Atl. 253; *Mulderick v. Grand Lodge, A. O. U. W.* 155 Pa. 505, 26 Atl. 663; *Olmsted v. Keyes*, 85 N. Y. 593; *Ingersoll v. Knights of Golden Rule*, 47 Fed. 272.

Shelby, Circuit Judge, delivered the opinion of the court:

1. The failure of the court to give the three charges requested by the plaintiff in error, and the giving of the first eight against its objection, all of which we have set out in full, raised practically the same question. The distinguished counsel for the plaintiff in error contend that the application for insurance was made the foundation of the policy, and that its statements are covenanted to be true, and that if they are not true the policy is void; that is, it is void whether the untruth be intentional or not. They assert that under the Georgia law the application for insurance in this case warrants every material statement to be true, and that the question of good faith is not involved. The charge of the court was upon the theory that the applicant for insurance in this case did not warrant the truth of every material statement in his application, and that an honest mistake, even as to a material fact, would not void the policy. On the one hand, it is contended that if the insured was afflicted with "incipient tuberculosis" at the date of his application, although he believed he was free from disease, that the policy would be void. On the contrary, it was held by the court below that, even if he had such disease, if he was entirely ignorant of the fact, and

answered the inquiry in reference to his condition in good faith, the policy would be valid. Again, it is contended that if the insured answered that he had been examined only by certain physicians within the last ten years preceding his application, failing to name other physicians who had examined him, this omission would be fatal to the policy, although he answered in good faith, having failed to remember his examination by other physicians. On the contrary, it was held that an honest omission to name all the physicians who had examined him, if he answered in good faith, giving his best recollection and making no wilful misrepresentation or fraudulent concealment, would not void the policy. These are the conflicting contentions raised by the refusal to give the charges asked and by the giving of the charges to which exceptions were taken.

The contract of insurance was made and delivered, and the premiums paid, in the state of Georgia, where the insured resided. It is therefore a Georgia contract, and is governed by the laws of that state. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822.

The following are sections of the Code of Georgia of 1895:

"Sec. 2097. Application, Good Faith. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed, will void the policy."

"Sec. 2099. Concealment. A failure to state a material fact, if not done fraudulently, does not void; but the wilful concealment of such a fact, which would enhance the risk, will void the policy."

"Sec. 2101. Wilful misrepresentation voids policy. Wilful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy."

These sections are made applicable to both life and fire insurance. Ga. Code, § 2117.

It may be stated as a general rule that answers to questions propounded to insured in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties to be strictly and literally complied with, are to be construed as representations and not as warranties. *Phoenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500. One of the statements that the insured was required to make to obtain the insurance was that he was "free from any and all diseases," except as stated. Placing the construction upon the application which the plaintiff in error contends for, the policy would be made void if the insured had a disease material to the risk, although he was entirely ignorant of the fact. It might be

a disease so undeveloped that it could not be discovered by an expert physician, and yet if it afterwards developed, and it could be shown that the germs of the disease were active in the insured at the date of his application, the policy would be made void. We cannot believe that this contract is fairly susceptible to such construction. Such a construction ought to be avoided unless clearly demanded by legal rules. In the absence of explicit and unequivocal words requiring such interpretation, the court should not conclude that the insured took a life policy with the distinct understanding that it should be void, and all premiums paid forfeited, if at the time of his application he had a disease of which he was entirely unconscious. *Moulton v. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466. We do not think that it was the purpose of the insurers to exact from the insured, as a condition precedent to a valid contract of insurance, a guaranty against the existence of diseases of which he had no knowledge, and which even a skilful specialist, on careful examination, would be unable to detect.

We are not unmindful of the fact that the insured distinctly certifies that the statements in his application are true, and that he agrees that, if any concealment or untrue statement or answer be made, the policy of insurance shall be void. Referring to the Georgia statute, and probably without the statute, concealment means "wilful concealment." By that statute it is only the wilful misrepresentations and wilful concealments that affect the policy. And when the insured agrees that the policy shall be void if it contains any untrue statements, what does he mean? He surely means "untrue," in the sense of the law which governs the contract. He means, to quote the Georgia statute, that there is no wilful concealment and no wilful misrepresentation, and that his statements are made in the utmost good faith. Construing a life policy, Mr. Justice Harlan asked what was meant by true and untrue answers, and he answered the question, saying: "In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But, in another and broader sense, the word 'true' is often used as a synonym of 'honest,' 'sincere,' 'not fraudulent.' Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'" *Moulton v. American L. Ins. Co.*

111 U. S. 335, 345, 28 L. ed. 447, 450, 4 Sup. Ct. Rep. 466, 471.

The application in the case at bar does not contain the word "warranted." It purports to be a declaration or statement, and not a warranty. In *Moulton v. American L. Ins. Co.* 111 U. S. 335, 345, 28 L. ed. 447, 450, 4 Sup. Ct. Rep. 466, 471, the word "warranted" was used in the application which was part of the contract sued on. The language in the application for insurance in that case was: "It is hereby declared and warranted that the above are fair and true answers to the foregoing questions." Notwithstanding this language, the court held that there was not a warranty in the strict sense that would make the contract void if there was a statement not literally true made in answer to the questions. The court held that, in the absence of intentional misstatement or fraudulent misrepresentation, the contract of insurance was valid.

Recently, the supreme court of Georgia has had occasion to construe § 2099 of the Georgia Code. In the court below the request had been made for a charge that the policy would be made void if the applicant failed to give the names of other insurance companies to which he had applied for insurance. He had given the name of one, when he had applied to several. A charge was also asked that the policy would be made void because he had given the name of only one physician who had attended him during the last ten years, when, in fact, during that time he had been attended by several others. The trial court refused to give these charges, and the refusal was assigned as error in the supreme court. It was held, Atkinson, J., delivering the opinion of the court and all the justices concurring, that the court did not err in refusing to give the charges. "It will be seen," said the learned justice, "that, if the instruction requested correctly stated the law, a policy would be avoided because of a mere omission upon the part of the assured to state a material fact, without reference to the motive by which he was influenced in omitting to make such statement. An omission to state is the equivalent of a failure to state, and by our Civil Code (§ 2099), it is expressly provided as follows: 'A failure to state a material fact, if not done fraudulently, does not void; but the wilful concealment of such a fact, which would enhance the risk, will void the policy.' The request under consideration was not adjusted to the section of the Code we have just quoted, because if the failure to state the fact was the result of an oversight or other cause, and was not done fraudulently, it would not avoid the policy. The omission from the request of the word 'fraudulently' put it in direct opposition to the Code provision above referred to, and it was therefore properly refused by the court." *German American Mut. Life Assn. v. Farley*, 102 Ga. 720, 744, 29 S. E. 615.

2. Martin A. Jeffords applied for and obtained the policy on his own life. He is 53 L. R. A.

conclusively presumed to have an insurable interest in his own life. *Bliss, Ins.* § 17. He directed who should be the beneficiaries. His wife was to receive \$3,000, and his brother, Thomas C. Jeffords, \$10,000. This latter sum, by agreement between the parties, was "to protect his child or children." He had one child to survive him. The first premium was paid out of the money of Martin A. Jeffords. The other premiums were paid by Thomas C. Jeffords for his brother. The insurance company receipted for the money as paid by Martin A. Jeffords. The fact that Thomas C. Jeffords paid the premiums did not invalidate the policy. On the facts stated, it was not a wager policy. A man may take out a policy of insurance upon his life for the benefit of his brother, and it is immaterial what arrangement is made between them for the payment of the premiums. *Atina L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *Union Fraternal League v. Walton*, 109 Ga. 4, 46 L. R. A. 424, 34 S. E. 317. It follows that the court did not err in giving charge numbered 9.

3. The court charged the jury that they should closely scan evidence prepared by William E. Gary and R. C. Milliken, inspectors of the defendant in error. Gary obtained a written statement of Mrs. Jeffords, the widow of the insured, and Milliken obtained a written statement from Dr. Hall. These statements were offered in evidence, and tended to contradict the evidence of Mrs. Jeffords and Dr. Hall given on the trial. The charge referred to is numbered 10, and is set out in full in the statement of the case. The giving of this charge is assigned as error. William E. Gary, one of the inspectors, sought and had two interviews with Mrs. Jeffords,—one in Georgia and one at her home in Florida. Gary, on cross-examination, stated that he informed her of the "result" of some suit recently brought against an insurance company where the defense of fraud and conspiracy was made, and he told her "that if the company refused to pay her she could not recover . . . unless the courts reversed themselves. I cited cases, no doubt." He denied making any threats, saying: "I have been in this business twenty years, and I never make any threat in any case, sir." An important question in the case was whether Dr. Hinman had examined the insured after the policy was issued, or in 1894, before it was issued. Gary testified that Mrs. Jeffords said "it was in 1894." Mrs. Jeffords testified as to the interviews. She said that "Mr. Gary seemed very sympathetic;" that the paper she signed was written in his presence, and partly from his dictation; that Gary assured her that her claim would be paid in full; and that she was very much agitated when she wrote the paper. The statement signed by Dr. Hall, which was offered in evidence, was obtained by the other inspector, R. C. Milliken. Dr. Hall's evidence tended to show that the statement was not entirely correct. Milli-

ken approached Hall, and asked him to sign the paper. Dr. Hall testified:

Q. Under what circumstances did they get that statement from you?

A. He [Milliken] was going over there. Seemed to be gathering up proofs for his side of the case. He was wanting to write them up and outline the manner in which they might not be mistaken, and that my interrogatories might corroborate such statement as I made to him. And at that time I told him, when he drew up those papers, that some things are not fresh in my mind at the moment, and I told him at the time, if I recollected things more clearly, I should correct them.

Q. You reserved the right to make corrections?

A. Yes, sir.

Dr. Hall's evidence tended to show that the statement prepared by Milliken and signed by him was materially inaccurate.

In this state of the evidence, we think the court was amply justified in giving the instructions. These inspectors were the agents of the plaintiff in error. They were engaged in preparing a defense in this case. An insurance company can only act through its agents. It is, as the learned trial judge said, a legitimate business to investigate the facts of a case that will probably be litigated. Still, the fact that agents so employed are likely to be partial to their principals is well known. And, if the mode of obtaining admissions indicates that a skilled and experienced person has unduly influenced or unfairly induced admissions, such facts should be closely scanned by the jury, and should greatly affect the weight to be given to the admissions. The position of these inspectors or agents preparing a case is anal-

ogous to that of an attorney performing the same service. If an attorney becomes a witness in a case he is trying, it is perfectly proper for the jury, in weighing his evidence, to consider his relation to the case, and his conduct in procuring evidence. In common-law courts it was formerly doubted whether a lawyer retained in a cause, and who was taking part in the trial, was a competent witness (1 Wharton, Ev. § 420); and in the civil law the advocate or procureur of a party was not received as a witness. "Their testimony," says Pothier, "would be liable to the suspicion of partiality, if they were witnesses in favor of their parties, and there would be an indecency in admitting them as witnesses against them." 1 Pothier, Obligations (Evans) 405. Referring to the proof of admissions proved by an attorney in the cause as made to him by the opposing party, Sandford, J., speaking for the court, said: "Moreover, testimony by an attorney of such admissions, made to him by the opposite party, affecting a really doubtful or litigated point, are always regarded with extreme suspicion and distrust by both courts and juries." *Little v. McKeon*, 1 Sandf. 607, 609. The parties themselves, and, of course, their agents and attorneys also, are now competent witnesses. Their evidence goes to the jury as that of any other witnesses. The rules that once excluded them as witnesses have long ceased to be rules, but their evidence goes to the jury to be considered by them in view of the witness's relation to the case. The question of credibility of every witness is for the jury. As the jury should consider such relation, there can be no error in the court's properly calling it to their attention. The court, we think, did not err in giving this charge.

*The judgment is affirmed.*

## GEORGIA SUPREME COURT.

### CENTRAL OF GEORGIA RAILWAY COMPANY, *Pff. in Err.*,

v.

Pearl PERKERSON.

(112 Ga. 923.)

- \*1. There was no error in refusing to grant a nonsuit.
2. In an action for the homicide of a railroad employee proof of his usual earnings as such employee, within a reasonable period of time prior to his death, is admissible. There is no arbitrary rule which confines the proof upon this point to what he

\*Headnotes by FISH, J.

NOTE.—As to right of judge to order a re-mittitur in actions for damages, see earlier cases in this series as follows: *Albany v. Sikes* (Ga.) 26 L. R. A. 653; *Killegal v. Aitken* (Wis.) 35 L. R. A. 249; *Tucker v. Hyatt* (Ind.) 44 L. R. A. 129; and *Detsur v. B. Stroh Brewing Co.* (Mich.) 44 L. R. A. 500.  
53 L. R. A.

was actually earning at the very time of his death.

3. The rule that the widow of a railroad employee cannot recover of the company employing him for his homicide, if his negligence contributed thereto, was stated with sufficient fullness in the general charge; and, if counsel for the defendant desired more particular instructions on this point, the same should have been specially requested.
4. The trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where, from the application of the law to the evidence, the excess can be accurately ascertained.
5. There was no material error in any of the charges complained of, when read in connection with the whole charge; nor was there any error in the rulings of the court upon the admission of evidence to which exception is taken.

(February 26, 1901.)

**E**RROR to the Macon City Court to review a judgment in favor of plaintiff in an action brought to recover damages for the negligent killing of plaintiff's husband. *Reversed.*

The facts are stated in the opinion.

*Messrs. Hall & Wimberly* and *R. C. Jordan* for plaintiff in error.

*Messrs. Guerry & Hall* for defendant in error.

*Fish, J.*, delivered the opinion of the court:

Pearl Perkeron brought an action for damages against the Central of Georgia Railway Company for the homicide of her husband, Marion A. Perkeron. Upon the trial the plaintiff proved that her husband was killed by the running of the defendant's train; that at the time of his death he was thirty-two years old, and was in the employ of the defendant as a yard conductor or foreman, receiving \$65 per month for his services, which position he had held for about three months; that prior to this he had been for seven or eight years a passenger conductor, in which position he earned from \$100 to \$110 per month, and then a freight conductor, receiving from \$75 to \$85 per month. She testified that he gave up his position as passenger conductor "because of his health, his meals being so irregular," but she thought he was in perfect health at the time of his death. The mortality and annuity tables contained in 70 Ga. 843, were put in evidence. The jury returned a verdict in favor of the plaintiff for \$10,833.33. The defendant moved for a new trial. This motion was overruled, except as to the ground complaining that the verdict was excessive, upon which ground the court ordered that a new trial be granted unless the plaintiff should write off from the verdict a designated amount. The plaintiff complied with this requirement, and a new trial was thereupon refused. The defendant then excepted to the judgment of the court overruling the motion.

1. The evidence submitted for the plaintiff authorized a recovery in her behalf, and the refusal of a nonsuit was proper.

2. Error is assigned upon the ruling of the court in permitting, over the objection of the defendant, the plaintiff to prove by one of the defendant's witnesses the usual earnings of a freight conductor in the employment of the defendant. The objection urged to the admissibility of this testimony is "that plaintiff's husband was what was called a 'yard foreman,' and not a freight conductor, and that plaintiff could only prove what he was earning in the capacity in which he was working, and that it was not competent to prove what might be earned by persons in other employments, but that the same was contingent and speculative, and that said testimony was irrelevant and inadmissible." It appears from the evidence that the plaintiff's husband at the time of his death was employed by the defendant as a yard conductor or foreman, and received for his services as such \$65 per month. He had been

for seven or eight years a passenger conductor, in which position he received \$100 per month, part of the time receiving \$110 per month. He gave up this position, "because of his health, his meals being so irregular," and then was a freight conductor for not quite a year, earning from \$75 to \$85 per month, and then took the position in which he was employed at the time of his death, which he had held for about three months. At the time that he was killed by the running of the defendant's train, he was, in the opinion of his widow,—the only witness who testified as to his physical condition,—in perfect health. Epperson, a witness for the defendant, testified that he was superintendent of the second division of the defendant's railway, extending from Macon to Atlanta and from Barnesville to Thomas-ton, and as such had charge of the yard in Macon, where Perkeron, the plaintiff's husband, was employed, and where he was killed. He testified further: "I knew Mr. Perkeron. I had known him, I reckon, thirteen or fourteen years; maybe not quite so long. He was quite young when I first knew him. The first railroading he done was for me. He came to me on the L. & N. He came to me here in Macon, and I recommended him to the yardmaster. I regarded him as a reliable man, and a man that understood his business; bright, intelligent man. When I first knew him, my recollection is, he was flagging on the work train. It pays about \$50 per month. A good many things on the train are lower than that. He has been rising in his calling. I don't know, but I suppose his prospects for further promotion were fair. I suppose he could have gotten very easily back to where he had been as passenger train conductor. I don't think he was intelligent enough to fill positions higher than that. In fact, I always thought he would make a first-class conductor, or yard master in a small yard. A yard master gets different prices,—from \$90 to \$130; and some as high as \$150 or \$300. I don't think he could have filled the yard here in the course of time. I never had made up my mind at all as to making him yard master of Macon, here. He was on the line of promotion, as all men are who do their duty." Counsel for plaintiff in error, referring to the evidence as to the earnings of a freight conductor, in their brief, say: "It will be seen from the brief of evidence that a great deal of testimony similar to this in character was admitted. We deemed it unnecessary to assign error in each separate instance, as the principle is the same in all these instances. If it was error to admit testimony as to the earnings of freight conductors, it would, of course, be error to admit the similar testimony as to what passenger conductors can earn, and as to what yard masters can earn; and hence we thought one assignment was sufficient to present the question squarely to the consideration of the court."

Ought the plaintiff in this case, in endeavoring to furnish the jury with data from which to estimate the financial value of the

life of the decedent had he lived, have been, so far as his earning capacity was concerned, confined to proof of what he was actually earning at the time of his death? It is pretty well established that in proving the value of the life of a deceased employee it is not competent to prove that he was in the line of promotion in his calling, and the increased rate of wages which he would have received if promoted. 8 Am. & Eng. Enc. Law, 2d ed. p. 943, and cases cited. See also *Richmond & D. R. Co. v. Allison*, 86 Ga. 145, 11 L. R. A. 43, 12 S. E. 352. The reason for the rule is that the chances for promotion are too remote and dependent upon too many contingencies to be considered. 8 Am. & Eng. Enc. Law, 2d ed. p. 943. It is, however, competent to prove what were the accustomed earnings of the deceased. *Abbott*, Trial Ev. 2d ed. 758; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; *McIntyre v. New York C. R. Co.* 37 N. Y. 287, 35 How. Pr. 36. The apparent reason for this rule is that what a man usually earned, within a reasonable period of time prior to his death, is about as reliable datum upon which to estimate what his probable future earnings would have been, had he lived, as can be found. It is not permissible to prove what the deceased could have earned in a calling in which he had never engaged, but for which, in the opinion of witnesses, he was well qualified. Nor, as we have seen, in the case of an employee, to prove that there were chances of promotion in the service in which he was engaged, and what his earnings would have been if he had lived and been promoted to a more remunerative position than he had ever held. The proof is not allowed to enter the domain of pure conjecture or speculation. But it does not follow from this that proof of what a railroad employee earned up to a short while before his death, in his chosen calling, is to be excluded because at the very time of his death he was not filling the particular position or positions in which these earnings were made. Demonstrated skill and capacity are one thing; conjectural skill and capacity are another thing. Proof of wages actually earned and received by an employee in a nonpolitical position, for which he had demonstrated his fitness, which go to make up his average earnings, within a reasonable period of time prior to his death, is different from proof of his probable chances, had he survived, to be promoted to a better position than he had ever occupied, and for which he had not demonstrated his fitness, in which he could have earned higher wages than he had ever done in the past. In the one case the proof deals with established facts and demonstrated capacity; in the other it has to do with imaginary facts and speculative capacity. In the one case the proof shows what a man has actually earned; in the other it shows what, under speculative contingencies, he could earn. What were this young man's accustomed earnings? What was his demonstrated capacity to earn money? It seems to us that

these are questions which a jury could properly consider, along with others involving his age, his health, his habits, his expectancy of life, etc., in determining the financial value of his life. For a period of seven or eight years prior to his death, Perkerson, who was only thirty-two years old when he died, had been a passenger conductor, receiving from \$100 to \$110 per month, which position he voluntarily gave up because his health had been temporarily impaired by reason of the irregularity of his meals. Then he was a freight conductor for not quite a year, receiving from \$75 to \$85 per month; and then a yard conductor or foreman, for about three months, in which position he was employed at the time of his death. At the time of his death he was, in the opinion of the only witness who testified on this point, in perfect health. Under these circumstances, would it be fair or just, in estimating the future value of his life had he lived out his expectancy, to restrict the proof to what he earned for the brief period of about three months immediately preceding his death, when for about eight years immediately prior to this he had been continuously earning higher wages, unless there was something in the proof to show that his capacity to earn such higher wages had been lost or diminished? We think not. In our opinion, it was competent to introduce evidence to show the demonstrated capacity of the decedent to earn money, and what his usual earnings were, as a railroad employee, within a reasonable period prior to his death. The only element of conjecture involved was whether an experienced and well-qualified railroad conductor, in good health, and only thirty-two years of age, who had voluntarily given up his position as a passenger conductor, who had been for some time before he attained his majority and afterwards in railroad service, and who had been for about three months immediately prior to his death employed by the defendant as yard conductor or foreman, would have again obtained employment as a passenger or freight conductor. In the opinion of the superintendent of the division of the defendant's railway upon which the deceased was employed when he was killed, and who had known him, as a railroad employee, for thirteen or fourteen years, he could have easily gotten back to his old position as a passenger conductor. We are of opinion that the evidence was properly admitted for the purpose of showing the usual earnings of the decedent, as a railroad employee, within a reasonable time prior to his death. It would have been proper to exclude the proof as to what yard masters usually earn, as evidence upon this point did not tend to show the accustomed earnings of the deceased, he never having been a yard master.

3. One of the grounds of the motion for a new trial complained that the court "wholly failed to charge or instruct the jury upon the defense developed at the greatest length in the testimony of the witnesses for the defendant, and most stressed, viz. that, as the defendant contends, it was negligence on the



part of plaintiff's husband to put himself in a place of danger, where he was killed, without taking such steps as were proper and required by the rules of the company, and the rules of prudence, to make his presence known to the persons in charge of the engine, and to notify the engineer, or other person in charge of the engine, not to move the train while he should thus be at work in a position of danger, and wholly failed to instruct the jury that it was for them to say whether or not such omission on his part constituted negligence; and whether or not such omission and failure on his part might be looked to by them in determining the question of his fault or freedom from fault in and about the matter which caused his death." The court did charge: "If the jury should believe from the evidence that the deceased, Marion A. Perkeron, negligently, either immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, the plaintiff would not be entitled to recover in this case. In order for the plaintiff to recover, the plaintiff's husband must be blameless about the business which caused the injury." And further charged: "If you find from the evidence that a drawhead had been pulled out from the caboose by an engine of the defendant company that had been connected with a train; and if you find that the yard conductor, Marion A. Perkeron, was seeking to remove that drawhead; and if you find he exercised prudence and care in doing so; and if you find that he was, while doing this work, if you find he was in the discharge of his duty, exercising all prudence and care, he was killed by the negligence of the defendant company,—you would then be authorized to find a verdict for the plaintiff. If you find, on the contrary, that in the discharge of that duty he was not exercising all care and prudence, and if he was killed in the exercise or discharge of that duty, whether by the negligence of the company or not, you would be authorized to find for the defendant, provided you find that the fault, if you find a fault upon the part of Perkeron in the discharge of that duty, contributed in an appreciable degree to the injury or blows that he received that brought his death. Now, gentlemen of the jury, in ascertaining the truth as to that transaction you look to all the evidence and surroundings, and determine whether or not the yard conductor, Perkeron, was in the discharge of his duty upon that occasion,—whether he was exercising the prudence and care that was proper and commensurate with the surroundings. You consider the surroundings, and consider all the facts and circumstances relating to the transaction as it existed. . . . Now, look to all the facts and circumstances as to how that drawhead was removed, and how it was carried away. . . . The question, gentlemen of the jury, upon that proposition, is whether or not the yard foreman, Perkeron, in the discharge of that duty exercised the prudence and caution that was properly commensurate with the danger, if there was

any danger in the work." The parts of the charge we have quoted, as well as other parts of it, stated with sufficient fullness that the plaintiff could not recover if her husband's negligence contributed to his homicide; and, if counsel for defendant desired more particular instructions on this point, the same should have been specially requested.

4. As we have seen, the plaintiff recovered a verdict for \$10,833.33. In reference to the ground in the motion for a new trial that the verdict was excessive, the order of the court rendered upon the hearing of the motion recites: "As to said ground it is ordered and adjudged by the court that a new trial be and is hereby granted solely on said ground, unless the plaintiff in said suit shall write off from the verdict the sum of \$2,333.33, so as to leave the recovery in said case amounting to \$8,500, and said latter sum to bear interest at 7 per cent per annum from the date heretofore rendered in said cause. . . . But in the matter of amount the court finds that a verdict of \$8,500 would have been and will be a proper one in said cause, doing substantial justice to all parties." The defendant excepted to the overruling of its motion for a new trial, and made the point that the judge had no power in this case to order a part of the verdict to be written off, as a condition to the refusal of a new trial, and upon compliance by the plaintiff with such condition to overrule the same. Under what circumstances the trial judge may order part of a verdict to be remitted is a question upon which the decisions of this court are not in entire harmony. It has been ruled several times, in effect, that where some definite and readily ascertainable portion of a verdict should not, under the law and the facts of the case, have been recovered by the plaintiff, the trial judge may order that such illegal portion be remitted by the plaintiff, or a new trial will be granted. In *Vigal v. Castleberry*, 67 Ga. 600, which was an action upon a trustee's bond, the court charged the jury that if the trustee charged himself, in his returns, with 10 per cent interest, that would be evidence that he made 10 per cent, and the jury should find the principal, with 10 per cent interest to the time of the trial. There was a verdict against the defendant, charging him with interest at 10 per cent. In his motion for a new trial he complained of the above-stated charge. The court ordered all interest over 7 per cent to be written off, and, upon compliance by the plaintiff with such direction, that a new trial be refused. The plaintiff complied with such order. Upon exception by the defendant, this court decided there was no error in the ruling made by the trial judge. In that case the illegal part of the verdict was apparent, and there was no uncertainty about it. *Whaley v. Broadwater*, 78 Ga. 336, was a suit on account. One of the defendant's pleas was set-off. The plaintiff admitted his indebtedness to the defendant in a given sum. The jury found for the plaintiff the full amount of the account sued on. The de-

defendant moved for a new trial, which the court granted unless the plaintiff would write off the amount admitted to be due the defendant. The plaintiff complied with such condition, whereupon the new trial was refused. This court, in affirming the judgment below, ruled that as there was enough evidence to sustain the verdict, except as to the sum written off, there was no error in the disposition of the motion for a new trial made by the court below. In *Brown v. Ison*, 105 Ga. 722, 31 S. E. 742, it was held: "Where the charge of the court complained of in the motion for a new trial could not possibly have affected the finding of the jury, except as to one item in their verdict, and where the amount of this item was written off by plaintiff's counsel, the charge, even if erroneous, was thus made harmless to defendant; and hence there was no error in refusing a new trial on this ground." In that case, upon the hearing of a motion for a new trial made by the defendant, the court directed that the plaintiff write off from the verdict the amount of the item referred to, and upon this being done the motion for a new trial was overruled, and the defendants excepted. *Brinson v. Reid*, 107 Ga. 250, 33 S. E. 31, was a suit, in a city court, brought by a guest of a hotel against its proprietor for the value of lost baggage. The plaintiff recovered \$125 as principal and \$5 as interest. The defendant filed a petition for certiorari, alleging error in the charge of the court, and complaining that the verdict was excessive. A judgment was rendered in the superior court overruling the certiorari on condition that the plaintiff in the court below would write off from his verdict the sum named therein as interest. The interest was written off, and defendant's bill of exceptions alleged error in not sustaining the certiorari generally. This court held: "Even if the charge excepted to was not an accurate statement of the law applicable, it is manifest that it caused no injury to the losing party, and the verdict rendered in the city court being one of which he had no just cause to complain, save as to a single error therein, which the superior court corrected, its judgment overruling the certiorari . . . will not be disturbed." On the other hand, we have the ruling made by this court in *Jones v. Water-Lot Co.* 18 Ga. 539. There the court charged the jury that they should find nominal damages for the plaintiff, but they found for the defendant; and upon the plaintiff moving for a new trial the court ordered that a new trial be refused, upon the defendant paying to the plaintiff nominal damages and costs. Subsequently, upon defendant tendering in open court to the plaintiff \$1, as nominal damages, and the costs, which the plaintiff declined to accept, the court overruled the motion. Upon exception by the plaintiff, this court held, in effect, that the judge had no right to determine what the nominal damages should be, and reversed the judgment below and ordered a new trial. Again, in *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257, which was an action for dam-

ages for causing plaintiff's land to be overflowed, there was a verdict for plaintiff for \$1,500. The court ordered that a new trial be granted unless, by writing off, the recovery should be reduced to \$300. Plaintiff wrote off the amount required by the court. A new trial was refused, and the defendant excepted. This court held: "In view of the conflict and uncertainty in the evidence as to whether the depreciation in the value of the plaintiff's property was occasioned by the flooding incident to the erection of the waterworks, and, if so, to what sum the depreciation from this cause amounted, it was error to make the grant of a new trial conditional upon reducing the recovery from \$1,500 to \$300. The new trial should have been granted unconditionally."

Where general damages are recovered for a tort to the person, this court has held that the trial judge has no power to say that the verdict in such a case should not exceed a specified sum, and to require the plaintiff to write off a portion of the damages awarded by the jury, and thereupon refuse a new trial. In *Savannah, F. & W. R. Co. v. Harper*, 70 Ga. 119, Harper and wife sued the railway company to recover damages for a personal injury to the latter alleged to have been caused by the negligent running of the defendant's train. On the trial the jury found for the plaintiffs \$8,000. Defendant moved for a new trial upon the ground, among others, that the verdict was excessive. The court ordered that a new trial be granted unless the plaintiffs would within a given time write off from the verdict the sum of \$2,000, and, in the event the verdict should be so reduced, then the new trial was refused. Plaintiffs accepted the terms of the order, and wrote off the amount required thereby. Defendant excepted, and one of the errors assigned by the bill of exceptions was in not granting a new trial without terms or conditions. In discussing the power of the trial judge to order a part of the verdict to be remitted, as a condition to the refusal of a new trial, Mr. Justice Hall, who delivered the opinion in the case, said: "In *Lang v. Hopkins*, 10 Ga. 45, Lumpkin, J., delivering the opinion, declares excessive damages to be 'good cause for granting a new trial, and that the discretion of courts may be properly exercised in this respect in two cases: One where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is error in the verdict, as in actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other includes suits for personal injuries, where, although there is no fixed criterion for assessing damages, yet the court must conclude, from the exorbitancy of them, that the jury acted from passion, partiality, or corruption.' This case furnishes the text of the last section of the Code above cited [Civil Code, § 3803], and that includes both classes of cases in which damages may be given, and prescribes the grounds upon which the court may rightfully interfere with the verdict in the first

class of cases, where there has been gross mistake, and in the second, where the finding has been so excessive as to justify the inference of undue bias. In the first instance named it is an easy matter to correct any excess in the verdict by directing a portion of the same to be written off; for there the law recognizes fixed rules and principles for measuring the damages, and the evidence accurately ascertains what amount should be found. But in the last, from the very nature of the case, it is impossible to lay down any such fixed rules and principles; and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases, that this finding should not have exceeded a certain sum, is to invade their peculiar province and to assume their functions; and to require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, seems to us unauthorized, either by the words of the law, or by the precedents and practice in such cases." To the suggestion that the course pursued by the trial judge would be desirable, as it would often relieve the parties of the expense and delay of a new trial, the learned justice said: "The answer to such a suggestion is that neither the venerable sages of the common law nor the wisdom of the legislature deemed it prudent or safe to confide this power to the judge. Without such authority, he has no jurisdiction or power to pass upon or determine questions which the law refers to the enlightened conscience of impartial jurors, and with which he is forbidden to interfere except where the finding leads him to suspect or authorizes him to infer that the verdict is the result of undue bias or prejudice. We are not to consider what would be more convenient or economical than the course marked out by the express provisions of the law, in determining such question; nor do we design to suggest that the course of the court below was influenced by such considerations, however laudable they may be." *Brunswick Light & Water Co. v. Gale*, 91 Ga. 813, 18 S. E. 11, was an action for personal injuries. It was there held: "The court having determined that the ground in the motion for a new trial complaining that the damages found by the jury were excessive was well taken, it was error not to grant a new trial unconditionally; there being in the evidence no guide or criterion by which the court could determine the amount which should be written off." What is said in the opinion in that case in reference to an action for a tortious homicide is *obiter*, as is what is said upon the same subject in *Albany v. Sikes*, 94 Ga. 30, 26 L. R. A. 653, 20 S. E. 257; and in *Savannah, F. & W. R. Co. v. Godkin*, 104 Ga. 655, 30 S. E. 378. In *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463, which was a suit by a widow for the homicide of her husband, a majority of the court held that a measure for estimating damages was furnished the jury by proof of the earning ca-

capacity of the deceased and the introduction in evidence of the mortality tables, and that where, pending a motion for a new trial by the defendant, counsel for plaintiff voluntarily wrote off from the verdict a given sum, so as to bring the verdict within the measure of damages proved, the refusal of a new trial was not erroneous. In that case the plaintiff's counsel voluntarily remitted a portion of the verdict, and it does not affirmatively appear that the action of the trial judge in overruling the motion for a new trial was in any way influenced by such voluntary act of counsel. It is well settled that one may voluntarily release a portion of a verdict in his favor, when it does not prejudice the rights of the other party. *Griffin v. Witherspoon*, 8 Ga. 113; *Hendry v. Hurst*, 22 Ga. 312; *Steadman v. Simmons*, 39 Ga. 501; *Stanford v. Murphy*, 60 Ga. 154; *Johnson v. Duncan*, 90 Ga. 1, 16 S. E. 88; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Brunswick v. Tucker*, 103 Ga. 233, 29 S. E. 701; *Savannah, F. & W. R. Co. v. Godkin*, 104 Ga. 655, 30 S. E. 378. The majority of the court in *Crosby's Case* expressly recognized the necessity of the jury having some criterion for measuring the damages before the judge could order a part of the verdict written off and allow the balance to stand, but held that the Carlisle table of the expectancy of life furnished such a criterion, when used in connection with the proved earning capacity of the deceased; and for this reason, in the judgment of the majority, that case was not controlled by the ruling in *Harper's Case*, 70 Ga. 119. Chief Justice Jackson dissented from this view, upon the ground that it was the province of the jury to assess the damages, and that there were no settled and fixed rules for estimating them in an action for a tortious homicide. In support of his opinion that it was impossible in such a case for the trial judge to know what portion of the verdict should be written off, the learned justice said: "The uncertainty of life, the mere expectancy of its duration, the approach of age, the decline of strength, the hazard of so hard a life, so much exposed and worn, the uncertainty of employment,—all these and many more considerations move a jury in estimating damages according to law, and no human being can tell what aliquot part is not supported by evidence and ought to be written off." How can the mortality tables, considered in connection with the earning capacity of the deceased, constitute a criterion for measuring the value of his life, when, as has been held by this court, it is not essential in an action for a tortious homicide to introduce such tables in evidence (*Boswell v. Barnhart*, 96 Ga. 521, 23 S. E. 414), and where they are put in evidence, as repeatedly ruled, they are not conclusive, but simply data on which the jury may act or not, as they see fit? In *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 446, Chief Justice Jackson, in his concurring opinion, says: "I do not think there is any procrustean rule in the mode of estimating the value of a life. The age of a man, the

health he enjoys, the money he is making by his labor, his habits, are *data* from which the jury may argue how long he will probably live and work, and what his life is worth to his wife, in its pecuniary value. I know of no law which requires tables of the probable length of life and its probable worth to be introduced. They may be a useful circumstance, but are not conclusive or absolutely essential." This extract was approvingly quoted by Chief Justice Simmons in *Boswell v. Barnhart*, 96 Ga. 521, 23 S. E. 414. There being, therefore, no fixed rule prescribed by which the jury can measure the value of a human life, and the matter, accordingly, being largely left to their discretion, in view of all the *data* and circumstances submitted in evidence, it is utterly impossible for the judge to determine what portion of the verdict is excessive, since he, like the jury, has no criterion for estimating with any degree of accuracy the value of the life. It would be inconsistent to allow the judge, who under our practice, is prohibited during the trial from even intimating to the jury his opinion on any fact in issue, after the trial to arbitrarily say what the verdict should be. Such action would clearly be an invasion by the judge of the peculiar province of the jury. Again, under our Code the judge can direct a verdict only where there is no conflict in the evidence, and where that introduced, with all reasonable deductions and inferences therefrom, demands a particular verdict. How, then, can he have the authority to set aside a verdict which it was, under the evidence, in the discretion of the jury to find, and to substitute therefor some other amount, which is not only not demanded by the evidence, but which cannot be arrived at under any proof submitted to the jury? In the case under consideration there was a verdict for the plaintiff for \$10,833.33. The judge granted a new trial unless the plaintiff should write off the sum of \$2,333.33, so as to leave the recovery \$8,500; and in the event the plaintiff complied with this condition a new trial was refused, the judge's order reciting that "in the matter of amount the court finds that a verdict for \$8,500 would have been and will be a proper one in said case, doing substantial justice to all parties." It is manifest that the verdict for \$8,500 was rendered by the judge, and not by the jury, and it is impossible to ascertain from the evidence in the case how he arrived at that exact amount. It is evident from his order that he was dissatisfied with the verdict, as to the amount of damages found, and that, if he had not thought he had the power of remitting a portion of the damages, he would have set the verdict aside and granted a new trial upon the ground that the verdict was excessive. The judge may have the power to determine that a verdict is grossly excessive, and for that cause to order it set aside, and yet have no power to fix the exact amount for which it should stand. "The power to control does not include the power to find. Like the ex-

ecutive veto, it arrests, but does not by its exercise bestow the power to enact."

After mature consideration, we are of opinion that, upon principle, the rule denying the power of a trial judge to order a remittitur as a condition to the overruling of a motion for a new trial in actions for personal injuries should apply with equal force to an action for a tortious homicide, and, indeed, to all cases where by the application of fixed principles of law to the evidence the excess in a verdict cannot be accurately ascertained. There are several decisions of this court, however, which are not in harmony with this rule. In *Eaves v. Cherokee Iron Co.* 73 Ga. 459, which was a suit for damages for breach of contract, the jury found for the defendant, on its plea of set-off against the plaintiffs, a given sum. The court granted the plaintiffs a new trial unless defendant would write off from the verdict a specified sum, which the judge, in his order, stated was "allowed for the unroasted ore left by the plaintiffs at the mine." The defendant remitted the amount designated by the court. The court refused a new trial, and the plaintiffs excepted. The record in the case shows that the verdict was for a lump sum, with no indication upon which of the various items in the plea of set-off it was based; nor was there any proof of the exact value of the "unroasted ore left by the plaintiffs at the mine," which the judge arbitrarily valued at a specified sum. In his opinion, Chief Justice Jackson, on this point, said: "The judge below having given this case a thorough examination, and having granted a new trial unless the defendant would write off a large part of the verdict which the jury gave it as set-off, and thus having shown the thoroughness of his investigation of the facts, and having approved the verdict with that part written off, and having given, we think, a fair charge, and the plaintiffs in error having shown this court no substantial error of law, our duty is to affirm the judgment." The question whether the judge had the power to order a part of the verdict to be written off does not appear to have been distinctly made or decided in this case. In *Mayer v. Tufts*, 76 Ga. 96, plaintiff brought trover against the defendants, and obtained a verdict for \$340. Various estimates were made by the witnesses as to the value of the property sued for, one being as high as \$408. The defendants moved for a new trial, which the judge refused on condition that the plaintiff would write off from the verdict \$112, which was done. The defendants excepted, and this court held: "There being some evidence to support the verdict, and the presiding judge having required a portion of the verdict to be written off, and refused a new trial, this court will not interfere with his discretion in so doing." In *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751, the plaintiff sued the defendant for damages for forcibly entering and holding certain property used by the plaintiff while engaged in railroad work. An examination of the evidence in the record in that case discloses that the amount

which the plaintiff was damaged by the acts of the defendant and his servants was exceedingly uncertain, as the witnesses for the plaintiff did not agree in their estimates of the damages the plaintiff had suffered. There was a verdict for the plaintiff for \$550. The court granted the defendant a new trial unless the plaintiff within a given time should reduce the verdict by writing the damages down to \$250. The plaintiff wrote off the amount required, and a new trial was refused. The defendant excepted on the ground, among others that the court had no power to order the damages lessened; it following from his doing so that the verdict was made by the court, and not by the jury. Upon the point in question this court ruled: "The court has no power to write off, or order written off, any part of a verdict for damages in an action sounding in tort, where the tort is to the person; *aliter*, where it is to property,"—citing *Savannah, F. & W. R. Co. v. Harper*, 70 Ga. 119, and *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463. Here the court seems to make a distinction, as to the judge's power to have the verdict reduced, between an action for a tort to the person and one for a tort to property, without regard to the question whether the damages in the latter case can be accurately ascertained by the application of the law to the evidence. As we have seen, no such arbitrary distinction was recognized in *Harper's Case*, 70 Ga. 119. *Thornton v. George*, 108 Ga. 9, 33 S. E. 633, was a proceeding to foreclose a lien for material furnished the owner of a sawmill. The defendant's pleas involved an accounting between the parties. The amount that the plaintiff was entitled to recover, under the evidence, was very uncertain. The jury found for him \$739.00, whereupon the defendant moved for a new trial upon the general grounds, and because the court erred in overruling his motion for a nonsuit. The court ordered that a new trial be granted unless the plaintiff would write off from the verdict the sum of \$400. This the plaintiff did, and a new trial was refused. The defendant excepted, and this court held: "Where the verdict for the plaintiff in such a case is, in the opinion of the judge before whom [it] the case was tried, excessive, and under order of court the same is reduced by the plaintiff's counsel to an amount for which a verdict of the jury would have been authorized under the evidence, such order of the court is not illegal; and, after the verdict is thus reduced, there is no error in the court refusing to grant a new trial on the ground in the motion of the defendant that the verdict was contrary to evidence." In each of the four cases last cited the amount of damages which the prevailing party was entitled, under the law and evidence, to recover, was uncertain and rested largely in the discretion of the jury, under all the circumstances and facts submitted, and in none of them can it be said that the evidence demanded the finding of \$53 L. R. A.

any definite amount. We are therefore of opinion that the decisions in these cases to the effect that the trial judge has the power in such cases to order a part of the verdict written off, as a condition to the refusal of a new trial, are not sound; and, as they are now under review, we are constrained to overrule them in so far as they, in principle, conflict with the rule we have announced above. The decision in *Sparks v. Aetna Ins. Co.* 62 Ga. 198, is really not out of line with the rule we have laid down. In that case the court awarded a new trial unless the plaintiff would write off a part of the recovery. The plaintiff complied, reserving the right to except. This court held that the plaintiff could not except to a judgment with which she had voluntarily complied. The question whether the court had the power to order a part of the verdict written off was not involved in that case, and what was said on that subject in the headnote was *obiter*. Besides, there is no question but that the trial judge may, in a proper case, refuse a new trial upon terms, and such terms may require the writing off of part of the verdict. There is quite a contrariety of judicial opinion as to the power of a trial judge to order a remittitur in actions for damages, where there is no legal measure or standard for fixing the amount of the recovery. See on the subject, 18 Enc. Pl. & Pr. 124 *et seq.*; 16 Am. & Eng. Enc. Law, pp. 593 *et seq.*; 1 Sutherland, Damages, 2d ed. §§ 459, 460; 3 Sedgw. Damages, 8th ed. 1322; Field, Damages, §§ 882 *et seq.*; 3 Graham & W. New Trials, 1163 *et seq.*; Tiffany, Death by Wrongful Act, § 178; and the cases cited in these works.

5. The fifth headnote needs no elaboration.

*Judgment reversed.*

All the Justices concur; **Simmons, Ch. J., and Lewis, J., specially.**

**Simmons, Ch. J., and Lewis, J., concurring:**

Where, in a suit against a railroad company by the widow of a deceased employee for damages for the homicide of her husband, the main defense of the company was that the employee was negligent in omitting to give the signal prescribed by the company before going between the cars by which he was crushed, it was error for the trial judge, in his charge, to confine the jury to a consideration of whether the employee was negligent after he had gone between the cars, and to fail to call attention to the question whether he was negligent in going between them. For this reason, we think a new trial should have been granted, not only for the causes mentioned in the foregoing opinion, but because the judge erred as herein indicated. We do not assent to the correctness of the holding that the charge was not open to the criticism here made thereon.

## UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

William J. BRYAN *et al.*, *Plffs. in Err.*,  
v.

UNITED STATES OF AMERICA.

(83 C. C. A. 617, 61 U. S. App. 259, 90 Fed. 473.)

**Recovery on a bond conditioned that a postmaster shall turn over the money received in the money-order department of his office is not prevented by the fact that the money was embezzled without his fault or neglect, by a clerk holding office under the civil service rules of the government.**

(October 10, 1898.)

**E**RROR to the Circuit Court of the United States for the Northern District of California to review a judgment in favor of plaintiff in an action to enforce an alleged liability on the bond of a postmaster. *Affirmed.*

The facts are stated in the opinion.

Argued before *Gilbert and Ross*, Circuit Judges, and *De Haven*, District Judge.

*Mr. John T. Carey*, for plaintiffs in error:

Postmaster Bryan was not responsible for the malfeasance of clerk Kennedy by reason of the obligation arising from his official position, and aside from such a bond as exists in this case.

*United States v. Thomas*, 15 Wall. 343, 21 L. ed. 91.

Kennedy was an officer of the United States. He held his position, not by the sufferance or appointment of Bryan, but under the civil service law of the United States and the rules and regulations adopted pursuant to said law governing the appointment, promotion, and tenure of the office he held.

*United States v. Hartwell*, 6 Wall. 392, 18 L. ed. 831.

Postmaster Bryan and clerk Kennedy were both servants of the same master, and each under a personal responsibility to the government.

*Dunlop v. Munroe*, 7 Cranch, 242, 3 L. ed. 329.

A postmaster is not responsible for any losses occasioned by the negligence, or delinquencies, or embezzlements of his assistants, if he exercises a due and reasonable superintendence over their official conduct, and if he has no reason to suspect them of any negligence or malconduct.

*Story*, Bailm. 9th ed. § 463, pp. 428, 429; *Schroyer v. Lynch*, 8 Watts, 453; *Story*, Agency, 9th ed. § 319a, p. 392; *Lane v. Cotton*, 1 Ld. Raym. 646; *Whitfield v. Le Despencer*, 2 Cowp. 754; *Nicholson v. Mounsey*, 15 East, 384.

Postmaster Bryan did not become responsible for the malfeasance of Kennedy arising from his official position by the terms

and express stipulations of the bond sued on.

The condition of an official bond is collateral to the obligation or penalty. It is not based on a prior debt, nor is it evidence of a debt, and the duty secured thereby does not become a debt until default be made on the part of the principal.

*United States v. Thomas*, 15 Wall. 351, 21 L. ed. 94.

The contract of the surety must be strictly construed in his favor.

He has the right to stand upon the very terms of his contract.

*Anderson v. Bellenger*, 87 Ala. 334, 4 L. R. A. 680, 6 So. 82; *Miller v. Stewart*, 9 Wheat. 701, 6 L. ed. 195; *United States v. Boyd*, 15 Pet. 208, 10 L. ed. 706; *Farrar v. United States*, 5 Pet. 373, 8 L. ed. 159.

If the bond in suit was intended to cover delinquencies of clerks, assistants, and others connected with the postoffice over whose appointment, designation for duty, promotion, or tenure of office Bryan had no control, then it should have been so nominated in the bond.

*Smith v. United States*, 2 Wall. 235, 17 L. ed. 792.

The mere defining of his duties, without more, cannot be regarded as enlarging, or in any way affecting, his responsibility.

*United States v. Thomas*, 15 Wall. 345, 21 L. ed. 92.

*Messrs. Page, McCutchen, & Eells* also for plaintiffs in error.

*Mr. Samuel Knight*, for defendant in error:

Public policy, the language of the bond, and the relations assumed between the government and its officers dictate that only the acts of God or the public enemy shall excuse a public official intrusted with the care and handling of public funds from liability arising from loss incurred either by himself or his subordinates.

*United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *United States v. Giles*, 9 Cranch, 212, 3 L. ed. 708, note; *Postmaster General v. Early*, 12 Wheat. 136, 6 L. ed. 577; *United States v. Morgan*, 11 How. 154, 13 L. ed. 643; *United States v. Keebler*, 9 Wall. 83, 19 L. ed. 574.

Where a receiver of public moneys had given a bond similar to that here in question for the faithful performance of his duties as required by law, proof that he had been robbed of the public money received by him was held no defense to a suit on such bond, in the case of *Boyd v. United States*, 13 Wall. 17, 20 L. ed. 527.

The melter and refiner in the mint at Carson City, Nevada, was liable upon his official bond for the embezzlement of his assistant, though not committed through any fault of the former.

*United States v. Zabriskie*, 87 Fed. 714.

*De Haven*, District Judge, delivered the opinion of the court:

This was an action by the United States

**NOTE.**—As to liability on official bond for loss of money by theft, see *note* to *Wilson v. People, use of Pueblo & A. Valley E. Co. (Colo.)* 22 L. R. A. 449.  
53 L. R. A.

to recover from William J. Bryan and others, the plaintiffs in error, the sum of \$9,399.88 and interest from April 30, 1892, on account of their alleged liability as principal and sureties upon an official bond given by Bryan for the faithful performance of his duties as postmaster of the city of San Francisco for a term which commenced July 14, 1886, and ended June 30, 1890. By the terms of this bond the plaintiffs in error became jointly and severally bound to the United States that Bryan, the principal therein, would pay the balance of all moneys that might "come into his hands from postage collected . . . or money orders issued by him," and would also "faithfully do and perform all of the duties and obligations imposed upon or required of him by law or the rules and regulations of the department in connection with the money-order business." The complaint alleges that Bryan, in his official capacity as postmaster, received the sum of money demanded in this action in the transaction of the money-order business of his office, and neglected to account for and pay the same over to the United States. The answer in one paragraph contains a denial of the averment that Bryan did not properly account for and pay the balance of all moneys that came into his hands on money-order account in the postoffice at San Francisco, but this denial is qualified by an admission that there was due to the United States on such account, on June 30, 1890, the sum sued for, and that the same has not been paid; and it is alleged as a defense to this action that these moneys were embezzled by one James S. Kennedy, a clerk in charge of the money-order accounts and money-order funds of the postoffice at the city of San Francisco, during the period of time covered by the bond; that Kennedy was not appointed by Bryan, but held such office of clerk under the civil service laws of the United States, and the rules and regulations adopted in pursuance thereof, governing the tenure of office of clerks of that class, and that the money so embezzled by Kennedy was lost to the United States without the fault or negligence of said William J. Bryan. The circuit court sustained a demurrer to this answer, and thereupon gave judgment for the plaintiff for the amount demanded in the complaint. 82 Fed. 290. This ruling of the court upon the demurrer is assigned as error.

It is apparent from the foregoing statement that the only question which is here presented for decision is this: Do the facts alleged in the answer excuse the principal in the bond from accounting to the United States for the money-order funds admitted to have been received at the postoffice at San Francisco while such principal was the postmaster, and during the term for which

such bond was given? To this question a negative answer must be given. The postmaster at a money-order postoffice is the official custodian of all money received on account of money orders issued therefrom, and as such custodian it is his duty to account to the government for the same; and, in view of this fact, § 3834 of the Revised Statutes requires that the bond of the postmaster at a money-order postoffice "shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business." The condition above quoted from the bond sued on is that the principal therein will pay the balance of all moneys that shall "come into his hands from postage collected . . . or money orders issued by him." The words "come into his hands," as here used, have the same meaning as the phrase, "come into his official custody," and the true construction of this condition of the bond is that the principal, Bryan, would account for and pay over the balance of all such moneys as should come into his official custody as postmaster at San Francisco. The money which was received by Kennedy, the postal clerk in charge of the money-order business in that office, was thereby, in contemplation of law, received into the official custody of the postmaster; and the fact alleged in the answer that such money was embezzled by Kennedy constitutes no defense to this action. The cases sustaining this conclusion are so numerous that no extended discussion of the question is necessary. *United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *United States v. Morgan*, 11 How. 154, 13 L. ed. 643; *United States v. Keebler*, 9 Wall. 83, 19 L. ed. 574; *Boyd v. United States*, 13 Wall. 17, 20 L. ed. 527; *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89; *United States v. Zabriskie*, 87 Fed. 714; *Bosbyshell v. United States*, 23 C. C. A. 581, 39 U. S. App. 474, 77 Fed. 944. The facts that the clerk who embezzled the moneys sued for was not appointed by the principal in the bond, and that the tenure of office of such clerk was held under the civil service act of January 16, 1883 (22 Stat. at L. 403), do not affect the obligation of the bond, nor render inapplicable the rule laid down in the cases above cited. The money received by this clerk on account of money orders issued was constructively in the bond, ficial custody of the principal in the bond, and it was his duty to exercise official supervision over such clerk, and to see that the money so received by his subordinate was faithfully accounted for.

*The judgment is affirmed.*

Writ of error dismissed by Supreme Court of United States, April 17, 1899.

## ARKANSAS SUPREME COURT.

ST. LOUIS SOUTHWESTERN RAILWAY  
COMPANY, *Appt.*,

v.

James B. HARPER by Next Friend.

(.....Ark.....)

1. One who boards a train which he should know does not stop at the station for which he has a ticket, in the hope that it will do so and so afford him an opportunity of reaching his destination, and who refuses to pay the additional fare to the first stopping place upon the conductor's demand, is a passenger within the meaning of a statute requiring the ejection of passengers at usual stopping places.
2. Twenty-five dollars is not excessive as damages for ejecting a passenger a mile or two from a station in the night when a slight rain is falling and he is suffering some from fever.

(March 23, 1901.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Columbia County in favor of plaintiff in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed.*

Statement by **Riddick, J.:**

James B. Harper got on the "Cannon Ball" passenger train on defendant's railroad at McNeil for the purpose of going to Milner, another station on defendant's road. Milner was not one of the stations at which that train stopped, and when Harper offered a ticket to McNeil he was informed of this fact by the conductor, and told that he must pay 15 cents more, and go on to Stephens; that being the next stopping place for that train. Harper refused to pay, and was thereupon ejected from the train at a point about a mile and a half from the station. He brought this action for being put off at a place other than a usual stopping place for trains. There was a verdict in favor of plaintiff for \$125, but the court required a remittitur of \$100, which having been done, the court gave judgment for the remaining \$25 and costs against defendant. From this judgment defendant appealed.

**Messrs. Samuel H. West and John T. Sifford**, for appellant:

The statute is confined to the instance of a passenger who refuses to pay fare.

*Hobbs v. Texas & P. R. Co.* 49 Ark. 358, 5 S. W. 586.

Plaintiff was not a passenger.

Ray, *Negligence of Imposed Duties*, p. 4; 2 Am. & Eng. Enc. Law, p. 742; *Schepers v. Union Depot R. Co.* 126 Mo. 665, 29 S. W. 713; *Shearm. & Redf. Neg.* 4th ed. § 448; *Patterson, Railway Accident Law*, §§ 210-214; *Louisville & N. R. Co. v. Hailey*, 94 Tenn. 383, 27 L. R. A. 549, 29 S. W. 367.

NOTE.—As to place where one refusing to pay fare may be ejected, see *Burch v. Baltimore & P. R. Co.* (D. C.) 28 L. R. A. 129, and *note*. 53 L. R. A.

It was the duty of the plaintiff to ascertain the right train before taking passage on it, and if he negligently failed to do so, and got upon the wrong train, the railway company owed him only the duty of ordinary care to refrain from injuring him.

*Missouri, K. & T. R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106; *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37; *Texas P. R. Co. v. James*, 82 Tex. 306, 15 L. R. A. 347, 18 S. W. 589; *Beauchamp v. International & G. N. R. Co.* 56 Tex. 239; *Rorer, Railroads*, 984.

Where one gets on a passenger train with the deliberate purpose not to pay fare, and adheres to that purpose, the relation of carrier and passenger, and the obligations resulting from that relation, are not thereby established between him and the company, and the company owes him no other duty than not to wilfully or recklessly injure him.

*Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522.

It was the duty of appellee to have inquired about the train before entering it, and if he did not the consequences are the same as if he had known.

*St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 263; *St. Louis, I. M. & S. R. Co. v. Atchison*, 47 Ark. 79, 14 S. W. 468.

No appearance for appellee.

**Riddick, J.**, delivered the opinion of the court:

This is an action for damages alleged to have been caused the plaintiff by being ejected from one of defendant's passenger trains. Our statute provides that, "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select." *Sandels & H. Dig.* § 6192. Counsel for the defendant company contend that this statute does not apply here, for the reason that the plaintiff knew, or by the exercise of ordinary care could have known, that the train which he entered did not stop at Milner, and that, as he refused to pay his fare to any station at which the train did stop, he was not a passenger. It is doubtless true that one who enters a railway train, and afterwards wrongfully and persistently refuses to pay his fare, is not entitled to the high degree of care which the law exacts of railroads for the protection of passengers. Within the meaning of the rules requiring such care, it has been often held that such a person is not a passenger. *Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; 2 Wood, *Railroads*, Minor's ed. p. 1213; 5 Am. & Eng. Enc. Law, 2d ed. p. 496, and cases cited. We do not controvert the soundness of these decisions, but it is evident that the reasons upon which they are based do not apply here; for the object of this statute was to prevent railroad companies from



ejecting a passenger, for refusal to pay fare, at other than a usual stopping place. If those refusing to pay fare are not passengers, within the meaning of this act, then the statute can have no application, and is meaningless. It is therefore very evident, we think, that the refusal to pay by one traveling on a train does not, within the meaning of this statute, show that he is not a passenger. It may, of course, be doubted whether one who enters a train, intending not to pay his fare and to defraud the company, would be protected by this statute; but we need not determine that question, for the evidence here, we think, does not show such a state of facts. The plaintiff carelessly entered a train which he should have known did not stop at Milner, but he did so hoping that it would stop either at Milner or at a water tank near there, and thus afford him the opportunity to reach his destination. He had a ticket to Milner, which he gave to the conductor, but the ticket was returned, and the plaintiff ejected, because he refused to pay the additional fare to the first regular stopping place for that

train. The company could have excluded him from the train or ejected him at the place he entered, but, having carried him away from that point, was, under the statute, required to carry him to some other usual stopping place before ejecting him. The plaintiff may not have desired to go to Stephens, the next stopping place, but, as he had carelessly entered a train that was not required to stop before reaching that place, he could have been carried there, whether he wished to go or not; for the company in such a case was not required to stop the train sooner for his own convenience. As the place at which he was ejected was not a usual stopping place for trains, and as he was not given the option of being carried to Stephens instead of being put off there, the ejection was unlawful. The injury to plaintiff was small, but it was night, a slight rain was falling, and plaintiff was suffering some from fever. He was put off a mile or two from a station. Under these circumstances, the sum for which the court gave judgment was not excessive.

*Affirmed.*

### CALIFORNIA SUPREME COURT.

Susie T. ENOS *et al.*, *Respts.*,

*v.*

Rachel Jane SNYDER *et al.*, *Appts.*

(131 Cal. 68.)

1. One cannot by will confer any rights as to the disposition of his dead body.
2. An executor or administrator as such has no right to the possession of the body of the testator or intestate for purposes of burial.
3. The fact that a statutory provision imposing, under penalty, the duty of burying a dead body upon the next of kin of decedent, and giving him the right of possession for that purpose, is found in the Penal Code, does not prevent its having force in a civil action to establish the rights of such next of kin to possession of the body for purposes of burial.

(December 21, 1900.)

**A**PPEAL by defendants from a judgment of the Superior Court for Sonoma County in favor of plaintiffs in an action to establish rights to the possession of a dead body for the purpose of burial. *Affirmed.*

The facts are stated in the opinion.

**Messrs. Lippitt & Lippitt and Myrick & Deering** for appellants.

**NOTE.**—For earlier authorities in this series as to rights in the disposition and burial of a dead body, see *Larson v. Chase* (Minn.) 14 L. R. A. 85, and *note*; *Hackett v. Hackett* (R. I.) 19 L. R. A. 558; *Choppin v. Dauphin* (La.) 33 L. R. A. 133; *Thompson v. Deeds* (Iowa) 35 L. R. A. 66; *O'Donnell v. Slack* (Cal.) 43 L. R. A. 388; *Keyes v. Konkel* (Mich.) 44 L. R. A. 242; and *Wright v. Hollywood Cemetery Corp.* (Ga.) 52 L. R. A. 621.  
53 L. R. A.

**Messrs. Haven & Haven** for respondents.

**McFarland, J.**, delivered the opinion of the court:

John S. Enos died in Sonoma county on March 30, 1898. The plaintiff Susie T. Enos is his surviving wife, and the plaintiff Gertrude Willis is his daughter. For several years next before his death the deceased had not lived with his wife, but during that time lived at the residence of the defendant Rachel Jane Snyder, where he died. He left a will which contained a direction that the manner, time, and place of his burial should be "according to the wishes and directions of Mrs. R. J. Snyder," the said defendant. After his death the plaintiffs herein made demand of defendant Snyder for possession of his body for the purpose of burying the same, and the demand was refused. Thereupon this action was commenced against Mrs. Snyder for a judgment declaring that plaintiffs are entitled to the possession of the dead body of the deceased for the purpose of burial, enjoining defendant from proceeding with the burial of said body, and directing her to give to plaintiff's the possession thereof. Defendant Snyder answered, setting up the clause in the will above referred to, and also verbal statements to the same effect made by the deceased before his death. Afterwards E. S. Lippitt, the executor named in the will, was, on his own application, made a party defendant, and he filed an answer averring substantially the things set up in the answer of defendant Snyder. Demurrers to both answers were sustained, and judgment was entered for plaintiffs sub-

stantially as prayed for in the complaint. From this judgment defendants appeal.

It is admitted that the record presents the sole question involved in the case, namely, Under the law of this state, did the respondents, as next of kin, have the right to the possession of the body of the deceased for the purpose of burying it, as against the appellants, who claim that right under the will? The general English and American authorities on the subject are not very satisfactory,—at least, as to a contest, like the one here involved, between the next of kin and persons claiming under a will. It is quite well established, however, by those authorities, that, in the absence of statutory provisions, there is no property in a dead body; that it is not part of the estate of the deceased person; and that a man cannot by will dispose of that which after his death will be his corpse. There are some expressions in some of the authorities cited by appellants to the effect that the right of burial is in the next of kin, "in the absence of any testamentary disposition," but they were not cases in which the right of testamentary disposition was involved. The case which is most directly in point here is *Williams v. Williams*, L. R. 20 Ch. Div. 659. It is a recent case (1882), and expresses the law of England on the subject. In that case the deceased had, by his will, directed that after his death "his body should be given to his friend Eliza Williams, to be dealt with by her in such manner as he had directed to be done in a private letter to her." The body, however, was buried in a certain cemetery "by the direction of his widow and one of his sons;" but afterwards Eliza Williams succeeded in removing it from the cemetery, and, having disposed of it in accordance with the direction of the will, she brought the action against the executors to recover the amount of the expenses which she had incurred in so doing. Kay, J., in his opinion, after referring to certain cases, says: "It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body, it is impossible that by will or any other instrument the body can be disposed of. I asked for any authority in conflict with these cases, but none was produced. I have referred to the books of the greatest authority on the question, and I believe there is no authority in the least degree in conflict with these cases. It follows that the direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void." The current of American authorities, although there is some conflict, is to the same effect. *Griffith v. Charlotte, C. & A. R. Co.* 23 S. C. 25, 55 Am. Rep. 1, and cases there cited; *Re Wong Yung Quay*, 6 Sawy. 449, 2 Fed. 624; *Guthrie v. Weaver*, 1 Mo. App. 136. In *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906, the point was not involved. But as someone must, of necessity, bury the dead, and must have the temporary possession of the dead 53 L. R. A.

body for that purpose, in the few cases where there has been any question on the subject equity has been invoked, and courts of equity have assumed jurisdiction and have given the necessary remedies; and it has been generally declared that the right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin, being present and having the ability to perform the service. *Durell v. Hayward*, 9 Gray, 249, 67 Am. Dec. 284; *Fox v. Gordon*, 16 Phila. 185; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Re Beekman Street*, 4 Bradf. 503.

The appellant Lippitt in his answer bases his alleged right on the directions given by the deceased in his will and verbally, and not upon his authority as executor, independent of such directions, and the arguments of counsel for appellants rest mainly on that basis; but there is in their briefs some shadow of contention that an executor or administrator has, by mere virtue of his office, the right to bury the body, and to the possession of it for that purpose. There are expressions to that effect in the English books and particularly in the older ones, and they may also be found in some American authorities, but the current of American authorities is the other way. Those expressions are found generally in cases where there was no contest between executors and next of kin, as in *Williams v. Williams*, L. R. 20 Ch. Div. 659, where the body had been buried by the executors by the direction of the next of kin. Of course, it is generally provided by statute, as in this state by § 1643, Code Civ. Proc., that executors or administrators must pay "funeral expenses;" but it has certainly been the custom in this country for the next of kin, and not the executor or administrator, to have the custody of the dead body before the funeral, and to bury it. Indeed, under our probate system, it cannot be determined who the executor or administrator is until after the appropriate time for the funeral has elapsed, and the burial of the dead body is not to be found in the statutory enumeration of the rights and duties of executors and administrators. In 8 Am. & Eng. Enc. Law, 2d ed. p. 837, it is said in the text as follows: "In England it has been held that an executor has the right to the custody and possession of the body of his decedent until it is properly buried. But this doctrine has no support in the United States." And the cases cited support the text. In *Remihan v. Wright*, 125 Ind. 536, 9 L. R. A. 514, 25 N. E. 822, the court, after an elaborate discussion of the subject and review of the authorities, says: "Our conclusion is that the custody of the corpse and the right of burial do not belong to the executor or administrator, but to the next of kin, and that the courts of this state possess the power to protect such next of kin in the exercise of such right."

We have considered the subject as pre-

sented in the general authorities because appellants contend that there are no statutory provisions here which are determinative of the question involved, but we think that our statutory law does definitely settle the question against appellants' contention. Section 292 of the Penal Code provides that "the duty of burying the body of a deceased person devolves upon the persons herein-after specified." Then follow four subdivisions of the section. Subdivision 1 provides that in the case of the death of a married woman the duty of burial devolves on the husband, and subdivision 2 is as follows: "If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age and within this state, and possessed of sufficient means to defray the necessary expenses." And § 294 provides that "the person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it." It is also provided in another section that, if the person upon whom the duty of burial is imposed neglects to perform it in a reasonable time, he is guilty of a misdemeanor, and is also liable in a civil action to the person who does perform it in treble the expense incurred. These provisions are very clear and explicit, but appellants contend that they should not be considered in a civil action, because they are in the Penal Code. This position is not tenable. We have here a Code system which is, for convenience and partial classification, divided into four Codes, to each of which a name is given;

but they are inseparably interwoven with each other, and no one of them is complete in itself, or absolutely confined to a particular subject. Therefore clear enactments of substantive law establishing rights, like § 294, are not to be held inoperative because found in any particular Code. If the provision in one Code were in conflict with a provision on the same subject in another Code, perhaps a consideration of the general purpose of each of the Codes might afford some aid in solving the difficulty; but there is no such difficulty here, for there is no provision in any of the other Codes touching the question here involved. The fact that a penalty for not burying a dead body is also imposed upon the one whose duty it is to bury it does not affect the right of custody which the law gives. If the duty and the right had been declared in some other Code, and the Penal Code had merely provided the penalty, there would be, we suppose, no objection to the appropriateness of the legislation; but there is no reason in law why any part of this legislation is invalid because found in the Penal Code instead of one of the others. It would hardly be contended that the provision about liability in a "civil action" is inoperative because found in the Penal Code. The subject is one peculiarly appropriate for legislative direction, and it may be assumed that the legislature has looked upon the provisions of the Code above cited as sufficiently expressive of the legislative intent.

*The judgment is affirmed.*

We concur: Temple, J.; Henshaw, J.

## ILLINOIS SUPREME COURT.

PENNSYLVANIA COMPANY *et al.*, *Pliffs.*  
*in Err.,*  
*v.*

City of CHICAGO *et al.*

(181 Ill. 289.)

1. A railroad company which has leased a hack stand on its own property cannot grant the lessee special privileges beyond the limits of its own land by preventing others from occupying hack stands in the street.
2. A hack stand in front of a railroad depot, which does not prevent access to or egress therefrom, cannot of itself interfere with passenger or freight traffic so as to entitle the railroad company to an injunction.

**NOTE.**—For the conflicting decisions on the right of a carrier to discriminate between hackmen and similar solicitors of business, see *note* to *Cole v. Rowen* (Mich.) 13 L. R. A. 848.

For other cases in this series in favor of such exclusive right, see *Lucas v. Herbert* (Ind.) 37 L. R. A. 376; *New York, N. H. & H. R. Co. v. Scovill* (Conn.) 42 L. R. A. 157; *Kates v. Atlanta Baggage & Cab Co.* (Ga.) 46 L. R. A. 431; *Godbout v. St. Paul Union Depot Co.* (Minn.) 53 L. R. A.

3. The use of a street or highway as a stand for hacks or other vehicles, with the consent or acquiescence of the municipal authorities, cannot be enjoined at the suit of an abutting property owner.

(*Cartwright, Oh. J., dissents.*)

(October 16, 1899.)

**ERROR** to the Circuit Court for Cook County to review a decree in favor of defendants in a suit to enjoin the maintenance of a hack stand in a public highway adjoining complainants' property. *Affirmed.* The facts are stated in the opinion.

*Messrs. J. J. Brooks and Loesch Brothers & Howell* for plaintiffs in error.

47 L. R. A. 532; *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* (Va.) 50 L. R. A. 722; and *Boston & A. R. Co. v. Brown* (Mass.) 52 L. R. A. 418.

For denial of such exclusive privilege, see *Indianapolis Union R. Co. v. Dohn* (Ind.) 45 L. R. A. 427; *Lindsey v. Anniston* (Ala.) 27 L. R. A. 436; and *State v. Reed* (Miss.) 43 L. R. A. 134.

**Messrs. Stedman & Soelke**, for defendants in error:

The use of a street or highway with the consent or acquiescence of the municipal authorities cannot be enjoined at the suit of an abutting owner.

*Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Patterson v. Chicago, D. & V. R. Co.* 75 Ill. 588; *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Penn. Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Corcoran v. Chicago, M. & N. R. Co.* 149 Ill. 291, 37 N. E. 68; *White v. Metropolitan West Side Elev. R. Co.* 154 Ill. 620, 39 N. E. 270; *Pittsburgh, O. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Truesdale v. Peoria Grape Sugar Co.* 101 Ill. 561; *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654; *Dunning v. Aurora*, 40 Ill. 481; *Bliss v. Kennedy*, 43 Ill. 67; *Cook County v. Great Western R. Co.* 119 Ill. 218, 10 N. E. 564; *Tibbetts v. West & South Town Street R. Co.* 54 Ill. App. 180; *Chicago v. Union Bldg. Assn.* 102 Ill. 380, 40 Am. Rep. 598; *Clark v. Donaldson*, 104 Ill. 639; *Union Coal Co. v. La Salle*, 136 Ill. 119, 12 L. R. A. 326, 26 N. E. 560; *Hesing v. Scott*, 107 Ill. 600; *Miller v. Webster City*, 94 Iowa, 162, 62 N. W. 648.

The law above cited applies to a corporation as well as private individuals.

*General Electric R. Co. v. Chicago City R. Co.* 66 Ill. App. 362.

Plaintiffs in error have an adequate remedy at law, and relief in equity will not be granted.

*Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332; *Galt v. Chicago & N. W. R. Co.* 157 Ill. 125, 41 N. E. 643; *Rigney v. Chicago*, 102 Ill. 64; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Ottawa Gaslight & Coke Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263; *Illinois C. R. Co. v. Grabill*, 50 Ill. 242.

Where the relief prayed for, if granted, would be of great injury to the defendants, and not a corresponding benefit to the complainants, an injunction will be denied.

*Pratt v. New York C. & H. R. Co.* 90 Hun, 83, 35 N. Y. Supp. 557; *Gray v. Manhattan R. Co.* 128 N. Y. 509, 28 N. E. 498; *High, Inj.* 596; *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435; *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919; *Jacksonville, T. & K. W. R. Co. v. Adams*, 28 Fla. 656, 14 L. R. A. 533, 10 So. 465; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 64 Fed. 981; *Wason v. Sanborn*, 45 N. H. 171.

No railroad depot can make arbitrary rules discriminating as to who may occupy 53 L. R. A.

stands as provided by such depot, and as to who shall solicit passengers therefrom.

*Ray, Pass. Carr.* §§ 113-115; *Montana Union R. Co. v. Langlois (Mont.)* 8 L. R. A. 753, and note; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819, 47 N. W. 667; *Old Colony R. Co. v. Tripp*, 147 Mass. 43, 17 N. E. 89; *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499; *Re Palmer*, L. R. 6 C. P. 194; *Camblos v. Philadelphia & R. R. Co.* 9 Phila. 411; *New England Exp. Co. v. Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637.

**Messrs. Charles S. Thornton and J. R. Corrigan** for city of Chicago.

**Phillips, J.**, delivered the opinion of the court:

The Pittsburg, Ft. Wayne, & Chicago Railway Company, one of the plaintiffs in error, is the owner, and the Pennsylvania Company, the other plaintiff in error, is the lessee, of the tract of land occupied by the Union Passenger Station in Chicago, bounded by Madison, Van Buren, and Canal streets, and the Chicago river. Several railway companies use this station under an agreement which provides that the Pennsylvania Company shall have control of the station and property. It is alleged that passenger trains to the number of 233 arrive and depart from the station every twenty-four hours; that the average daily number of passengers arriving and departing is over 31,000; that the pieces of baggage received and delivered daily number over 2,900, and the United States mail received and delivered averages 178 tons per day. The passenger station fronts on Canal street, and the entire length of the building on that street is 1,070 feet, with thirty entrances in constant use in the transaction of business. There are five other stations at different places in Chicago. All tickets beyond the terminus at Chicago, and known as "through tickets," have attached thereto a coupon for conveyance through the city of Chicago from this station to the station of the connecting line of railway, and each railway company entering the station has a contract for the use of a line of coaches for the performance of this service called for by the coupon. All coaches and wagons leaving the railway station perform this service of carrying passengers and baggage, and stand in front of the station as long as necessary to receive passengers, baggage, and mail. On December 31, 1885, the city council of the city of Chicago passed an ordinance establishing stands, which was approved by the mayor, and which provided that "any duly licensed hackney coach, cab, or other vehicle for the conveyance of passengers may stand, while waiting for employment, at any of the following places and for the period of time hereinafter provided: Stand No. 1: The north side of Washington street, between Clark and La Salle streets. Stand No. 2: That portion of the

west side of Clark street beginning 50 feet from the southwest corner of Randolph and Clark streets, and running thence to Washington street. Stand No. 3: The east side of La Salle street, between Washington and Randolph streets. Stand No. 4: The east side of Canal street, occupying 110 feet, between Adams and Madison streets, as the superintendent of police shall direct. Stand No. 5: All theaters and other places of public amusement fifteen minutes before the conclusion of the performance. Stand No. 6: At all railroad depots ten minutes previous to the arrival of all passenger trains. Stand No. 7: On all such street corners, from ten p. m. until sunrise, as the superintendent of police shall designate. Stand No. 8: At such other places where the occupants of the premises in front of which it is desired to stand for employment shall give permission, in writing, to the owner or driver so to do, and it shall be approved in writing by the superintendent of police: provided, it shall not be lawful to stand for employment in front of a hotel where such stand has been established on the opposite side of the street from such hotel." On January 20, 1896, the city council passed another ordinance, as follows: "That when, at or near any railroad passenger depot in the city of Chicago, a place has been or shall be designated as a licensed carriage stand, it shall be lawful for the driver of the first double and first single vehicle in line to stand in front of such railroad depot and solicit business: provided such driver shall not, in so soliciting business, obstruct the sidewalk or stand thereon at a greater distance than 2 feet from the curb line." Hack stands Nos. 1, 2, and 3 are in front of public property. Hack stand No. 4 is in front of the railroad station. Plaintiffs in error allege in their bill that since the passage of the ordinance this stand in front of the station has had hacks, cabs, and express wagons standing continuously, against the protest of the complainants, in front of the station, for a distance of about 300 feet from the south side of Madison street, and that they occupy this stand continuously from 7 o'clock a. m. until 10 o'clock p. m., and the drivers occupy a part of the sidewalk, soliciting passengers and baggage. It is averred that fifteen hacks and coupés and six express wagons, and from eighteen to twenty men, are at this hack stand continuously during the hours named; that twenty-three to twenty-five horses are fed daily at the stand; and that the drivers of the first single and first double vehicles have stood in front of the main entrance of the passenger station soliciting business.

On February 24, 1896, the plaintiffs in error filed their bill alleging the foregoing facts, and charged that the space in front of the station is necessary for the transaction of the business to which the station is devoted; that said ordinances are illegal and void; that the interference, interruption, and daily damage and inconvenience to complainants and occupants of the station constitute irreparable damage; that the

hack stand prevents ingress and egress to and from their property; and that its establishment is a damage and interference with their private rights, and causes an unjust burden upon their property, without compensation, and gives for a private use a portion of Canal street, in front of their property, which is held in trust by the city of Chicago solely for use as a public street. The city of Chicago and John J. Badenoch, superintendent, were made defendants, and the bill prayed for an injunction restraining them from continuing the stand for hacks and express wagons, and from permitting the drivers of first single and first double vehicles to occupy the sidewalk in front of the station for the purpose of soliciting passengers. On leave granted for that purpose, Thomas J. Doyle and Walter Owen, representing the hackmen occupying this stand, were admitted to the suit, and filed answers denying that the ordinances are illegal, or that the hack stand prevents complainants from the use of, or ingress to and egress from, their property, or that the space in front of the station is necessary for the transaction of the business of the station, or that the portion occupied by the hack stand is necessary or important for such business; alleging that along the entire space occupied there is no public traffic which is interfered with or damaged by the hack stand, and that on the station grounds and premises of the complainants, and at the entrance to the power house, are stationed hacks and cabs belonging to another proprietor, which wait there for passengers by an arrangement with the complainants. No answer was filed by the city of Chicago, but it appeared by its corporate counsel. Replications were filed to the answers of Doyle and Owen, and on the hearing, by agreement, the application for injunction was made a final hearing, and affidavits were filed in support of the bill and answers. On hearing, the circuit court found that the ordinance passed by the city of Chicago on the 20th day of January, 1896, and which went into force on the 28th day of January, 1896, entitled "An Ordinance Regulating the Drivers of Vehicles at Railroad Depots," was illegal, null, and void, and the enforcement thereof should be restrained, as prayed in complainants' bill of complaint. The court further found that the ordinance passed by the common council of the city of Chicago on the 31st day of December, 1885, entitled "An Ordinance Establishing Hack Stands," published as § 1705 in the laws and ordinances of the city of Chicago published in 1890, is a valid ordinance so far as it establishes stand No. 4, upon the east side of Canal street, occupying 110 feet between Madison and Adams streets, as the superintendent of police shall direct, and that said ordinance is a reasonable and valid exercise of the powers conferred upon the common council of the city of Chicago, to the extent of the frontage of 110 feet named in said ordinance.

The title of the streets is vested in the city, and it has the conservation, control,

management, and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for public use, for purposes of travel and the like. *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Hibbard v. Chicago*, 173 Ill. 91, 40 L. R. A. 621, 50 N. E. 256; *Barrois v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934. The rule is that all public highways, from side to side and from end to end, are held for the use of the public, and no other safe rule can be adopted. It does not follow, however, that every obstruction of a street would constitute a purpresture or be illegal. Necessary and temporary obstructions of the streets for the purposes of or incident to their repair, and interruptions caused by the improvement of adjoining lots, if not continued for an unreasonable time, are not such encroachments as would amount to a public nuisance. The construction of street railroads, the erection of telegraph and telephone poles, and the running of stage lines are all increased burdens on the streets which may be authorized by the municipality. A stage line running along the street, or cabs to be used by persons desiring that method of locomotion, would have a right to stop and take up and discharge passengers and use the street for such public use; but mere inconvenience to the owner of property by reason of a hack hailed to stop in front of his premises a sufficient period of time for one to mount or alight would not give such owner the right to resort to a court of equity and have an injunction. The use of the street or highway with the consent or acquiescence of the municipal authorities cannot be enjoined at the suit of an abutting property owner. This court has frequently determined this question, and held that where an additional use of the street has been granted by the city an injunction will not be granted to restrain such use, as the right to so occupy is a question between one so occupying and the municipality having the control of the streets, and charged with the duty of keeping the same free from unlawful obstructions and protecting the public. The remedy of an individual—the abutting owner—is in an action for damages for an injury resulting to his property by reason of what is claimed by him to be a use of the street inconsistent with his rights. He cannot, however, be permitted to invoke the remedy by injunction for the protection of the public, and under that guise seek to protect himself. *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Corcoran v. Chicago, M. & N. R. Co.* 149 Ill. 291, 37 N. E. 68; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520, and cases cited.

The depot of the complainants, extending over 1,000 feet in length, is for the use of its passengers entering therein or departing

therefrom over the different lines of railways which receive and discharge passengers therein. A railroad company, while in a certain sense a private corporation, is in many other respects a public corporation, and amenable to public control, and different from a mere private corporation. Such a corporation is invested with extraordinary powers, under which it may condemn a right of way, and by the exercise of eminent domain take to its own use, on payment of damages (or, rather, of compensation) found by a jury, the property of others against the will of the owners, and use and exercise control over it for its corporate purposes. Invested with such power, it becomes more than a mere private corporation, and in consequence of its vested powers, in every character, it partakes of a public corporation, and is, and always must be, held amenable to public control. One of the duties discharged by the various railroads entering this depot is the carriage of passengers. From the facts shown by this record, on an average over 31,000 passengers are received and discharged daily at this depot. There are five other depots in the city of Chicago at which passengers arrive and depart. The transfer of passengers from one railroad depot to another, or their transfer to various places in the city which they may be desirous of reaching, renders means of transportation necessary by which passengers so arriving and desiring to depart may have access to the various railroad depots or to other places in the city to which access is desired; and this in many cases is most conveniently met on the part of the traveling public by the use of hacks, which, to be of advantage, must be so accessible that unnecessary waste of time and inconvenience in trying to find the same may not result.

Recognizing that the use of this depot for the purposes for which the land was acquired on which this building was erected, and the use of the same by the railroad companies having access thereto, cannot be prejudicially interfered with by any ordinance of the city to the damage of the complainants, the question as to public and private rights is presented. It does not appear that ingress to and egress from complainants' property is prevented in connection with the complainants' building. It does appear that those who control this depot (complainants herein) have permitted other persons to have a lease on certain ground belonging to and connected therewith, on which such persons may stand their cabs and carriages while awaiting passengers thus arriving at said depot. Taking into consideration the character of buildings such as depots of the railroads in the city, and recognizing their right to exercise the power of eminent domain, it may well be held that such buildings are in the nature of public buildings. It never has been held that the city council may not establish hack stands in front of public buildings in the city, and no public want of access to such a convenience as hack stands can be greater on the part of the traveling public at any other point than

at the depots of the city. A hack stand cannot, of itself, interfere with passenger or freight traffic of a railroad unless it prevents access to or egress from its buildings. In *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520, it was held (p. 519, 165 Ill., page 102, 36 L. R. A., and p. 522, 46 N. E.): "The real ground upon which relief by injunction is denied in such cases is that the use of the street being within the purposes for which it is laid out, and therefore a proper use, the right to occupy is properly a question between the defendant and the municipality having the control of its streets, and charged with the duty of keeping them free from unlawful obstructions, or between the defendant and the public generally; the individual being left to his action for damages for any injury resulting to his property."

It appears from the record that certain property owned by the complainants, and adjacent to the depot, was leased to one Leroy Eighme for use as a hack stand, and that the lessee, by using the property and excluding others therefrom, would have privileges of access to the depot and of carrying passengers which others would not have. While we recognize that the companies which control the depot grounds and buildings may make needful rules for their regulation, yet they cannot grant special privileges beyond the limits of their own land, and make a contract with one which gives him the right to carry passengers from their depot beyond their own lines, and exclude others from such privilege of carriage. If such companies control the transportation of passengers and merchandise beyond their own lines, such power might be exercised solely for their own benefit, and not for that of the public. They cannot make a rule under which certain persons are allowed to occupy the streets or control travel, and exclude others therefrom, regardless of any wrongdoing or misconduct on the part of the persons so excluded. An attempt to exercise a power of that character would be unreasonable and unauthorized under the law. *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209, and authorities cited; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637.

*Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819, 47 N. W. 667, was a case where a construction company operating a railroad had leased to the plaintiff a piece of land used for depot purposes in the city of Kalamazoo, to be used by it for carriage and hack-stand purposes only. Notices of this lease were posted up, and the superintendent of the railroad company also notified others that the property was for the exclusive use of the lessee company. The defendant placed his hack on the ground, and, on being notified to leave, refused to do so, and remained there until an incoming train, when he procured a passenger and drove away with him, whereupon the hack company sued in trespass. The court says: "The granting of this exclusive privilege to

occupy this favored spot of ground, and one theretofore used customarily by all hackmen and busmen, to the plaintiff, was a discrimination against the defendant, as well as all other hackmen . . . not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds for the standing of hacks and busses, and the solicitation of passengers therefor," and is contrary to the provision of the statute that "all railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies or corporations." The court further says: "This statute evidently does not relate entirely to the mere carriage in the cars of the road. To be effective, it must be construed to include, also, not only the receiving of such passengers and freight at its depots, but as well the receiving of them by other 'persons, companies, or corporations' at the point upon its road where the carriage ends. The access to its depots must be free and equal to all, whether it be to take passage or leave the trains. No railroad company, under this statute, would be permitted to give to one hack or bus company exclusive access to its depots . . . in the carriage of passengers or freights to its trains. Nor can it any more properly give such exclusive or better privilege to such company taking passengers or freights from its trains to be transported from them elsewhere. . . . But, independently of the statute upon principle, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or the passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot arbitrarily admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure. Such rules and regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company upon any pretense except of wrong or misconduct on the part of the person excluded, to allow one hackman or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company, and to exclude the others therefrom, would be, in the language of Justice Field in *Old Colony R. Co. v. Tripp*, 147 Mass. 43, 17 N. E. 95, 'to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public.'" *Montana Union R.*

*Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. 209, was an action for an injunction brought by the railway company against the defendant, in which the bill, answer, and stipulated facts showed that the railroad company had contracted with Lovell Bros., by which contract they were to carry the mail for the railway company from its station to the postoffice, in consideration of which they were to have the exclusive use of certain grounds belonging to the complainant, which it had inclosed. The defendant had insisted in driving his wagons and busses onto said lands, and leaving them standing on the ground, the exclusive use of which had been granted to said Lovell Bros. The court, on hearing, dissolved the temporary injunction granted, and based their reason for so doing on the ground that to permit the injunction to stand, restraining other cab drivers than Lovell Bros., to whom the exclusive use had been given, from using the depot grounds, would aid in causing a monopoly, destroy just competition, and cause thereby a hardship, not only on other cab drivers, but on the general public. The court cite *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499, in which case the complainant alleged that he brought passengers to the defendant's railway station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other companies, and upon this showing the injunction was granted. *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15, was a case in which a contract similar to that in the case last above cited had been entered into between the railroad company and McConnell, by which an exclusive privilege was sought to be given to him in consideration that he would carry the mails for the company. The injunction sought was denied. To the same effect is the recent case of *State v. Reed*, 76 Miss. 211, 43 L. R. A. 134, 24 So. 308.

The law furnished a full and complete remedy to the complainants for any injury to their property by the creation of a hack stand by the city. The complainants may, for any injury sustained, have a remedy at law separate and distinct from the public interests, and have compensation granted for damages sustained, which can be determined and admeasured by a jury, without resort to the extraordinary remedy by injunction. *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Rigney v. Chicago*, 102 Ill. 64; *Lake Erie & W. R. Co. v. Scott*, 132 Ill. 429, 8 L. R. A. 330, 24 N. E. 78; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520. These complainants cannot, in the interest of the public, resort to this remedy, and have shown no special or peculiar injury to their property entitling them to an injunction.

*There was no error in the decree of the Circuit Court, and its decree is affirmed.*

**Cartwright**, Ch. J., dissenting:

The occupation of a street as a place for the owners of hacks, carriages, and express

wagons to keep them in the intervals when they are not employed in the carriage of persons or property, and while waiting for such employment, is purely a private use. It is of the same nature as the occupation of premises for a livery stable, or stable yard; and in *Rea v. Cross*, 3 Campb. 224, Lord Ellenborough characterized it as making a stable yard of the King's highway. In *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457, it was said to be a mere private use, like booths or structures for the use of dealers; and the same doctrine was affirmed in *McCaffrey v. Smith*, 41 Hun, 117. This is not controverted by the counsel in this case, nor in the foregoing opinion, but the propositions laid down in the opinion as rules of law which, as I understand, lead to the affirmation of the decree, are these: First, all public highways, from side to side and from end to end, situated in the city of Chicago, are held by said city in trust for the use of the general public for the purposes of travel, subject only to such interruption as necessity, accident, or the ordinary requirements of business may demand, and the city has no power to appropriate Canal street to any other purpose than such public use as a street, or to surrender it to any individual or individuals for private uses; second, if any portion of a street so held in trust for the general public for public purposes lies in front of public property, the city may divert such portion from the purpose for which it was established to the private uses of individuals for a hack stand; third, a railroad company is a common carrier of passengers, may acquire property by the exercise of eminent domain, and is amenable to public control, and therefore its depot buildings are in the nature of public buildings, and a street in front of such buildings may be devoted to private use for a hack stand; fourth, if a railroad company has leased property owned by it and situated near its passenger depot to an owner of hacks for use in his business, then the city may grant the adjacent street to other owners of hacks and express wagons, for their private use as a hack stand; fifth, violation of the trust upon which a street is held, by its diversion to the private interests of a hack stand, with the consent or acquiescence of the municipal authorities, cannot be enjoined at the suit of an abutting property owner; sixth, equity will not interfere in such a case, because the law furnishes a full and complete remedy to the abutting owner for an injury to his property by the use of the street as a hack stand, and such owner may have recourse to law and recover damages for the injury sustained.

A large part of the opinion is taken up with the proposition that a railroad company cannot grant the exclusive privilege of going upon its depot grounds to one hackman, and exclude other carriers of passengers from like privileges. But that has nothing whatever to do with this controversy, either as matter of fact or question of law. The entrances and exits for passengers



are near Adams street. The next street north is Monroe street, and the second street north is Madison street. It appears from the answers and proof that carriages belonging to Leroy Eighme are permitted to stand for the service of passengers at the power house next to Madison street, north of the passenger station, on the grounds of the railroad company, and his agents solicit passengers, and call the carriages from the entrance by pressing an electric button. The evidence is that he was allowed this privilege, and was required to keep neat and clean carriages, with drivers in uniform, and suitable and satisfactory horses for drawing the carriages, and to charge no more than the fare ordinance of the city of Chicago. There is no allegation in the answers, nor any testimony, that complainants attempted to give him any rights on the public street. No relief was asked by the defendants in respect to going upon the station grounds and occupying complainants' premises equally with him, and none could have been granted. So far as the equal rights of hackmen are concerned, the circuit court, by its decree, which is affirmed, held the ordinance which permitted them to solicit passengers and ply their business in front of the passenger station to be void, and left the agents of Eighme to solicit passengers and call carriages at that place, while it sent the hackmen to the hack stand between Madison and Monroe streets, about a block distant. With that decree the hackmen were content, and did not appeal or assign a cross error. The authorities cited and quoted from in the opinion to the effect that a railroad company cannot give one hackman exclusive access to its station, and the observations touching public duties, public control, and the granting of monopolies and special privileges, do not relate to any question in the case, and cannot influence the decision.

As to the propositions of law pertinent to the case, the first, as stated above, is the law, and is sustained by the unanimous opinions of all courts. The remaining propositions seem to me to be inconsistent with the first, and to be destructive of public and private interests, and I feel compelled to record my dissent. I cannot see how the public character or public ownership of adjoining property can in any way change the legitimate uses of a public street. I do not see how the conclusion that a street may be diverted to private use for a hack stand follows from the fact that the adjacent property is owned by the public, or is used for a state house, court house, public school, public library, engine house, or other building that may be devoted to public use. If a street may be perverted from its general uses as such because it adjoins public property, and be devoted to the private uses of hackmen, it may be occupied for any other sort of business with the public. *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457. There is no greater public want of access to a hack stand than to stands where articles which the public is

accustomed to use are sold, and a city is neither bound nor authorized to furnish premises for either kind of business. In fact, a hack stand does not supply any general public want, but is a convenience to only a very small fraction even of the traveling public. It seems to me absurd to say that because property is owned by the state for a state house, or the county for a court house, or by a school district for a school house, the city may obstruct the street in front of it, and turn it into a market place or a stable yard. So, too, the power of eminent domain may be invoked to acquire property for these public uses, and for parks and other public purposes, as well as a railroad station, but I cannot see how that has anything to do with the legitimate uses of a street.

The undisputed facts in this case are that under the ordinance establishing this hack stand an average of fifteen hacks and coupés, and an average of six express wagons, with from eighteen to twenty men, occupy the allotted space along the sidewalk in front of complainants' property continuously from 7 A. M. to 10 P. M.; that from twenty-three to twenty-five horses are fed there one or more times daily; and that the standing of so many horses, and the custom of feeding them there, create a great amount of dirt and filth. This constitutes as much a permanent obstruction as a fish stand, fruit stand or any other business carried on at the same place would be. It is necessarily an obstruction and interference with the ingress and egress to and from complainants' property, and the fact that there may be enough room left to enable them to transact their business is no justification for it. The same thing might be said of residence property,—that the owner would have room enough left although a hack might stand in front of it continuously. If the owner did not keep a carriage, and had no driveway from the lot to the street, it might be said that he had no need for the ingress and egress to and from his property to the street; and that is the most that can be said here. The owner's right is that his easement shall not be interfered with unlawfully, and to say that an obstruction such as a row of hacks and express wagons does not obstruct is a mere solecism. Any permanent obstruction to travel, whether it be little or great, is an encroachment on the public right, and constitutes a nuisance, and the city has no right to permit such an obstruction, so as to deprive the public and the adjacent property owners of the use of streets. *Smith v. McDowell*, 148 Ill. 51, 22 L. R. A. 393, 35 N. E. 141; *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850; *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096; *Hibbard v. Chicago*, 173 Ill. 91, 40 L. R. A. 621, 50 N. E. 256. A city has no right to so obstruct its streets as to deprive property holders of free access to and from their lots (*Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619); nor can it, by ordinance or otherwise, devote them to a private use. This was expressly

held in *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850, where the city of Chicago, by an ordinance, attempted to authorize the building of an overhead private passageway across an alley, not obstructing travel, for the benefit of a party in the transaction of his business; and this court said (p. 566, 149 Ill., page 409, 24 L. R. A. and p. 852, 37 N. E.): "The fee of the street passed to the city of Chicago, but the city held the fee in trust for the public, and for no other purpose. While the city had ample power to control, regulate, and improve the street in such manner as the demands of the public required, the law conferred no authority on the city to devote the alley to private uses."

In *King v. Russell*, 6 East, 427, the defendant was found guilty, upon an indictment for a nuisance, for wrongfully and unlawfully causing and permitting twenty wagons to stand or remain for a long time, viz., ten hours on each day, before his warehouse, situate in a public street and highway called "Southgate Street," in London. The court said, in sustaining the conviction (p. 430): "It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance; that, if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot. But the courts could not be parties to any compromise for his using the street as his own for any part of his business." In *Re v. Cross*, 3 Campb. 224, the defendant was proprietor of a Greenwich stage-coach, which came to London twice a day, and stood for three-quarters of an hour in the street near Charing Cross Station, waiting for passengers where stages were accustomed to stand. Lord Ellenborough, in sustaining a conviction, said: "Every unauthorized obstruction of a highway to the annoyance of the King's subjects is an indictable offense. Upon the evidence given, I think the defendant ought clearly to be found guilty. The King's highway is not to be used as a stable yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. . . . A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. No one can make a stable yard of the King's highway." In *Cohen v. New York*, 113 N. Y. 532, 4 L. R. A. 406, 21 N. E. 700, the city granted a license to a grocer, permitting him to keep his delivery wagon standing in front of his

store night and day. It was held that the wagon constituted a public nuisance, and that for damages resulting therefrom the city was liable. Peckham, J., in delivering the opinion of the court, said: "It is no answer to the charge of a nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. . . . Familiar as the law is on the subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies in which the power to grant them for such purposes is reposed, and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever, and the permit confers no right upon the party who obtains it." The city of Cincinnati, by ordinance, established a hack stand on the side of Central avenue, in that city, next to the property of the hotel company. In *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457, the court sustained a perpetual injunction at the suit of such abutting owner, and said: "This ordinance granted a permanent use of the street for mere private uses. As well might the city authorize permanent booths or structures for the use of dealers in the various articles of trade. Having no rent to pay, the occupants could accommodate the public at better rates. The supervision and control of the public highways of a city is a public trust, and while additional uses may be imposed, not subversive of or impairing the original use, such as laying down gas and water mains, yet the rights of the public to use it as a street, and of the adjacent lot owner to enjoy it as the means of access to his property, cannot be materially impaired. The city has the right to regulate hackney coaches. . . . and also the right to appropriate private property for the use of the corporation, but it has no power to appropriate the easement of an adjacent owner to a mere private use. So, in *McCaffrey v. Smith*, 41 Hun, 117, the court enjoined the use of a street in the village of Saratoga, adjoining plaintiff's property, for a hack stand, under the assumed authority of a village ordinance, upon the ground that the village had no authority to pass such ordinance. The court, in holding this ordinance illegal, said: "The public interest in the highway is nothing but an easement which gives to individuals the right to pass and repass on foot or with animals and conveyances, and, as an incident, they may do all acts necessary to keep the highway in proper repair for traveling purposes. . . . Any use of a highway, except for the purposes of traveling and the making of necessary repairs under the direction of proper authorities, constitutes a trespass against the ad-

joining owner. . . . But the legislature had not the power, neither had the municipal authorities, as against the adjoining owner, to confer upon any person the right to make use of the highway for any other purpose than to pass and repass, without the consent of the owner of the fee." See also 2 Dill. Mun. Corp. § 660; *Com. v. Passmore*, 1 Serg. & R. 217; *Laing v. American*, 86 Ga. 756, 13 S. E. 107; *Lockwood v. Wabash R. Co.* 122 Mo. 86, 24 L. R. A. 516, 26 S. W. 698; *Elliott, Roads & Streets*, 478; *Rea v. Jones*, 3 Campb. 230.

These authorities establish that such a use as is here attempted to be made of Canal street is a perversion and violation of the trust on which the city holds the street, and I cannot agree to the holding that such use cannot be enjoined at the suit of complainants, as abutting owners. In the foregoing opinion such a holding is rested on the ground that there is a remedy at law, by an action for damages. In the first place, that question cannot be raised in the case. It was not raised in the circuit court by demurrer, answer, or in any other way. Cases already cited show that the subject is not foreign to equity jurisdiction, which has been freely exercised, and the question, not having been raised below, cannot be brought into the case here. *Stout v. Cook*, 41 Ill. 447; *Dodge v. Wright*, 48 Ill. 382; *Hickey v. Forristal*, 49 Ill. 255; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Girdley v. Watson*, 53 Ill. 186; *Know County Supers. v. Davis*, 63 Ill. 405; *Ryan v. Duncan*, 88 Ill. 144; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728. If the proposition is considered, it is unsound and against the authorities. Mr. High, in his work on Injunctions, 3d ed., § 816, says: "The remedy by injunction is the most efficient means of preventing obstructions to public highways, and where the facts are easy of ascertainment, and the rights resulting therefrom are free from doubt, the relief will be granted at the suit of a citizen having an immediate and special interest in the matter. And the owner of a lot abutting upon a street sustains such a special injury, different from that sustained by the public, as to entitle him to maintain an action to restrain the unauthorized obstruction of the street in front of his premises." In 1 Am. & Eng. Enc. Law, 2d ed. p. 225, it is said: "The owner of property abutting on a public highway is entitled, as one of the primary incidents of his ownership, to the right of free ingress and egress. This right exists whether the abutter owns the fee to the center of the street, leaving the public with merely an easement of passage, or whether the title to the entire highway is vested in the latter. The right is a species of private property, of which the owner may not be deprived without due compensation, and it is a right which he may have enforced by the writ of injunction." In *Lewis on Eminent Domain* it is said (§ 114): "The abutting owner has a private right of access to his property over the street, which is as inviolable as his property." 53 L. R. A.

erty in the lot itself;" and (§ 637) "the abutting owner may, in general, enjoin any use of the street which is foreign to its purpose as a public highway, and is calculated to produce special damages to his property." To the same effect are *Hilliard, Inj.* 273, and *Waterman's Eden, Inj.* § 262, note. This court is firmly committed to the same doctrine. *Green v. Oakes*, 17 Ill. 249, was a bill in chancery to enjoin the obstruction of a public road. The answer alleged that the court had no jurisdiction, and that complainant had adequate relief at law. This court said (p. 251): "Where the right is clear and appertains to the public, and an individual is directly and injuriously affected by the obstruction of the easement or the creation of the nuisance, they [courts of equity] will interfere, on the application of such individual, to prevent the threatened wrong or invasion of the common right. In such case equity can give complete remedy,—prevent irreparable mischief and that continuous and vexatious litigation that would arise out of resort to the remedies afforded by law," citing authorities. That case was referred to and indorsed in *Craig v. People ex rel. Neville*, 47 Ill. 487. In *Carter v. Chicago*, 57 Ill. 283, an abutting owner filed his bill to restrain an abuse of power by the city in establishing a roadway next to his lot line so as to deprive him of a sidewalk, and the jurisdiction of equity was sustained. Although that was a subject on which the city had unquestioned power to act, the action being unjust and oppressive, the lot owner was not left to his remedy at law, which would be inadequate. The court there quoted from *Smith v. Bangs*, 15 Ill. 399, as follows: "So a court of equity has jurisdiction to interpose by injunction where public officers, under claim of right, are proceeding illegally to impair the rights or injure the property of individuals or corporations, or where it is necessary to prevent a multiplicity of suits." In *Field v. Barking*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 860, upon a full discussion and citation of authorities, the right to an injunction was again sustained.

The cases cited in the opinion do not sustain its doctrine. In *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307, Murphy sued the city in an action on the case for damages occasioned by the city allowing a railroad company's track to be laid in Water street, and raising the grade of the street, and the court said: "It is the settled law of this court, as well as in most of the other states of this Union, that it is a legitimate use of a street or highway to allow a railroad track to be laid down in it, and for doing so the city is not liable for any damages which may accrue to individuals." In that case it was held that there was no remedy at law against the city, and there was no question about equity. In *Corcoran v. Chicago, M. & N. R. Co.* 149 Ill. 291, 37 N. E. 68, it was held that if the ordinance could be regarded as not attempting to exclude the general public from the use of

Archer avenue, but subjecting it to an additional public use, the abutting owner would be remitted to his action at law to recover compensation for the consequential damages resulting to his property. That was not to be an action against the city, which was denied in *Murphy v. Chicago*, and which no one supposes could be brought, but an action against the person or corporation occupying the street. It was a case of the lawful and legitimate use of the street within powers expressly conferred on the city. In *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 46 N. E. 520, the use of the street permitted was for an elevated railway for passenger travel, and the settled law of this state is that such a use is not unlawful. It was there held that such erection, which greatly accommodated the public business, increasing the facilities and safety of transit, did not subject the street to a new servitude or unlawful use. Where such a use of a street as is entirely lawful is granted by the city, an injunction will not be allowed to the abutting property owner, although there may be damage to him, because the use is a proper one. The city having a right to grant such a use, the question whether it has been granted is between it and the one claiming as grantee. A grant to a street railroad is only adding an additional mode of conveyance, and, as the abutting property owner holds his land subject to the exercise of that right, necessarily he cannot enjoin its exercise. This is a different question, for the use of a street for a hack stand is a purely private use. The property owner is not bound to resort to his action at law, as the use granted is of a kind he is not required to submit to. In the case of an attempt to pervert a street to an improper use foreign to the uses of a street, an abutting owner has a right which is entitled to protection in equity. Where there is a substantial legal right, and a threatened wrong to which a party is not bound to submit, the amount of damages which will result from the illegal and wrongful act does not bar relief in equity. In *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406, 37 N. E. 850, this question was disposed of, and it was said that "irreparable injury" does not mean that it must be very great, and the fact that no damage can be proved, so that in an action at law the jury could only award nominal damages, often affords the very best reason why a court of equity should interfere. The question is whether the private use is an encroachment on the street, and, if there is a breach of the trust upon which the streets are held by the city, the abutting owner may have relief, although the injury may be small. These cases make it very clear that the remedy of complainants is in equity. If the use is unlawful and foreign to the purposes of a street, the abutting owner may have an injunction; and if, as assumed in the opinion, the grant of such use is legitimate and within the power of the city, the remedy at law which is offered to the complainants cannot 53 L. R. A.

be against the city, but must be against the various hackmen who occupy the hack stand. Not only would the injury not be compensated for in the trifling damages which would be obtained in the numerous suits against each individual hack driver, where the cost and trouble would exceed the recovery if it should ever be collected, but a new action would have to be brought against every subsequent hackman who should place his hack there under color of the city ordinance. To remit an injured property owner to such interminable litigation and a multiplicity of suits for trifling damages in each particular instance would be a mockery of justice.

Writ of error dismissed by Supreme Court of United States, March 6, 1901.

Fred CLARK, *Appt.*,  
v.

CHICAGO TITLE & TRUST COMPANY,  
Receiver of Globe Savings Bank.

(186 Ill. 440.)

A cashier's check given to a depositor as a mere acknowledgment of indebtedness on the part of the bank to him, being in legal effect the same as a certificate of deposit or a certified check, does not amount to an assignment to him by the bank of the amount of the check, so as to give him any better right against the receiver of the bank than he had by reason of his original deposit.

(June 21, 1900.)

APPEAL by intervener from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County denying his right to priority in the funds of the Globe Savings Bank, the affairs of which were being wound up because of its insolvency. *Affirmed.*

Statement by Wilkin, J.:

This is an appeal to reverse a judgment of the appellate court for the first district affirming a decree in favor of appellee rendered in the circuit court of Cook county. On Saturday, April 3, 1897, appellant had on deposit in the Globe Savings Bank of Chicago over \$3,000. Shortly before 12 o'clock of that day, the hour for closing business on Saturdays, appellant called at the bank, and received what is called a "cashier's check" for \$3,000, payable to his order. This check was deposited in another bank, and on Monday morning following was thrown out by the clearing house; the Globe Savings Bank having meanwhile passed into the hands of the appellee, as receiver, by appointment of the court. In the proceeding to wind up the affairs of the bank, appellant filed an intervening peti-

NOTE.—For an important case as to cashier's checks, see also *Henry v. Allen* (N. Y.) 36 L. R. A. 658.

tion, alleging that "by the giving of said check the said bank assigned to the petitioner \$3,000 in cash out of its account, and thereupon credited itself with the said sum of \$3,000, leaving your petitioner with a deposit of \$60.30, and that at the time of giving said check by the cashier he handed to the bank his pass book, from which book a copy of the page showing deposit and payment is attached, and thereupon the said bank marked in said book payment of said \$3,000; that the said bank had on hand at the time of giving said check more than \$3,000, and continued to have the same until the time the receiver took possession on Monday morning, April 5, 1897, before the opening of said bank for business on April 5, 1897; and that the said sum of \$3,000 out of the moneys taken possession of by said receiver on April 5, 1897, belongs to your petitioner, and is unlawfully detained." The prayer is for an order directing the receiver to turn over to appellant \$3,000. A copy of the order or cashier's check is as follows:

Capital, \$200,000.

Globe Savings Bank, Chicago, Monadnock Building.

Chicago, April 3, 1897.

Pay to the order of Fred Clark three thousand dollars (\$3,000.00).

C. E. Churchill, Cashier.

The entry on appellant's pass book, referred to in the petition is as follows:

63. Bank Book of Fred Clark.  
Globe Savings Bank, in account with Fred Clark.

Date	Withdrawn.	Deposits.	Balance.
1896.			
Sept. 28.	.....	3000.00	3000.00
Interest January 1st, .....			
1897.	.....	30.00	
Interest April 1st, 1897....		30.30	
3	3000.00		3060.30
			60.30

The answer of the defendant, receiver of the bank, denies the claim made by the petitioner, and sets up that no money was in fact set apart by the bank at the time of drawing the check, but that a credit, merely, was changed from the passbook of appellant to a cashier's check, and that the relation of creditor and debtor between the bank and appellant was in no wise changed; also that all the moneys received by it from the Globe Savings Bank were in one fund, and that no separate fund came to its hands as receiver.

On a reference to the master to take the evidence and report the same, with his conclusions, he found the facts as to the original deposit by appellant, the making of the cashier's check, the entry upon the pass book, and the having on hand of more than enough money to pay the check, as alleged in the petition; but found, as a matter of law, that petitioner was not entitled to a preference over other depositors, and that

the cashier's check was an evidence of indebtedness merely, of no higher character than the check of any other person having a sufficient deposit in the bank to meet the amount of his check, and recommended the dismissal of the petition. Objections to this report by the petitioner being overruled, the petition was dismissed, at his costs. There is no pretense—in fact it seems to have been agreed by the parties—that no money was set apart by the bank for the payment of the cashier's check; also that the receiver, at the time of filing the petition by the appellant, held all the assets of the bank for distribution subject to the order of the court; that at the close of business, on the 3d of April, 1897, there was due from the bank to its savings depositors \$288,144.97, and to individual depositors \$107,150, not including cashier's checks; and that its assets were wholly insufficient to pay its indebtedness.

Mr. Lynden Evans, for appellant:

Before five minutes to 12 o'clock, April 3, 1897, i. e., before the cashier's check herein was drawn, the title to the \$3,060.30 which Fred Clark had on deposit in the Globe Savings Bank was in that bank, and the relation of debtor and creditor existed between the bank and Fred Clark.

*First Nat. Bank v. Burkhardt*, 100 U. S. 680, 25 L. ed. 766; *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. ed. 785; *Folcy v. Hill*, 2 H. L. Cas. 28; *Marsh v. Onida Cent. Bank*, 34 Barb. 293.

The drawing of the cashier's check was an assignment by the bank of the amount of the check to appellant, the bank having that amount in its possession, and no fraud having been claimed or proved.

*Munn v. Burch*, 25 Ill. 35; *Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Marine Bank v. Ogden*, 29 Ill. 248; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Occana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 643, 12 L. R. A. 492, 27 N. E. 533; *Bank of Antigo v. Union Trust Co.* 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146; *Lester v. Given*, 8 Bush, 357; *Fogarties v. State Bank*, 12 Rich. L. 518; *Gordon v. Muohler*, 34 La. Ann. 608; *Fonner v. Smith*, 31 Neb. 107, 11 L. R. A. 528, 47 N. W. 632.

After the drawing of the check the bank had no title to the money named therein; it had only naked possession; and before the rights of any third person intervened, with the money still in its possession, the receiver took possession of all its assets, including the \$3,000. The receiver therefore took \$3,000 which belonged in law to appellant.

*Munn v. Burch*, 25 Ill. 35; *Bickford v. First Nat. Bank*, 42 Ill. 241, 89 Am. Dec. 436; *Brown v. Leckie*, 43 Ill. 497; *Morse*,

*Banks & Banking*, §§ 491-496; *Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 171, 81 Am. Dec. 270.

Appellee herein, as receiver of the Globe Savings Bank, is bound by the books of that bank.

*Schalucky v. Field*, 124 Ill. 617, 16 N. E. 409; *Cook, Stock & Stockholders*, 3d ed. §§ 972, 1438; *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 167, 12 L. R. A. 328, 25 N. E. 680.

*Mr. Henry W. Magee*, for appellee:

The transaction of April 5 was in fact only a change of the evidence of the indebtedness which had been existing between the parties, and was not a payment in fact, and could not be treated by the bank as a payment in fact.

The evidence discloses that there was only a credit,—that Clark never had any special money in the bank to have a "title to," but only a right to recover so much money from the bank.

Even in a case where a definite and actual trust fund, which possesses all the attributes of a separate and distinct identity, has been so mixed and mingled with other funds as to render identification impossible, the *cestui que trust*, in the event of the insolvency of the trustee, is remitted to the position and the rights of a general creditor; and where the relation between the parties is primarily that of debtor and creditor, and there is a mere unperformed agreement on the part of the debtor to create a specific fund which shall possess a separate identity, and to hold the same in trust, it would be illogical and inconsistent with these adjudications to hold that such creditor occupies a stronger position than one who is primarily the beneficiary of a distinct and identified trust fund.

*School Trustees v. Kerwin*, 25 Ill. 73; *Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157; *Union Nat. Bank v. Goetz*, 138 Ill. 127, 27 N. E. 907; *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904; *Mutual Assn. v. Jacobs*, 141 Ill. 261, 16 L. R. A. 516, 31 N. E. 414.

In general, cashier's checks are governed by the same rule and practices as ordinary checks.

*Van Schaack, Checks*, 225.

**Wilkin, J.**, delivered the opinion of the court:

It is impossible to perceive upon what theory of law appellant can maintain or claim that the transactions had by him with the bank on the 3d of April amounted to an assignment by the bank to him of the amount of the check. The claim seems to be based upon the law announced by this court 53 L. R. A.

in *Munn v. Burch*, 25 Ill. 35, and many later cases, to the effect that "the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and when presented to the banker he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time it is presented." That doctrine can have no application to the facts of this case. What is here termed a cashier's check is in no sense a check within the definition of such an instrument as used in *Munn v. Burch*, 25 Ill. 35, and other similar cases. The check was not drawn by a depositor against a deposit, but was simply an acknowledgment of an indebtedness on the part of the bank to the payee of the order. As between the bank and appellant, it was, in legal effect, the same as a certificate of deposit or a certified check.

We concur in the views of the appellate court in the opinion by Mr. Justice Freeman (85 Ill. App. 293), where it is said: "The drawing of the cashier's check, even if it changed the form of indebtedness, did not change the fact. The Globe Savings Bank was still indebted to the appellant for the \$3,000 represented by its cashier's check. There was no change in the nature of the debt. The only change was in the evidence of it. . . . Appellant's counsel insist that 'it is not a question of preference; it is a question of title to money,—to whom does it belong?' A creditor is entitled to money due him from any debtor. In a sense, the money due belongs to him; but that fact does not change—it establishes—the relation of debtor and creditor, and subjects the parties to the rules of law governing that relation. It is urged that the giving of the check 'passed the title to the money.' That might be so . . . had the check been drawn against a fund in another bank, as against a claim for the same money by some third party. But, as against a bank drawing a check upon itself, no change in title was thereby made. The check was equivalent to an acknowledgment of indebtedness. The payee was entitled to the money before the check was drawn, and he or the holder of the check was entitled to it afterwards, in the same manner, and to the same extent."

*The judgment of the Appellate Court will be affirmed.*

Petition for rehearing denied October 4, 1900.

## IOWA SUPREME COURT.

P. KLOS, Appt.,  
v.  
A. M. ZAHORIK.

(.....Iowa.....)

1. The action of a priest in the discharge of his duties and office, in conducting the public functions of his calling, is the proper subject of comment in the public press, for which, within proper limits, an action for libel will not lie.
2. A publication condemning the conduct of a person if certain accounts of it which have appeared in the public press are true is not libelous, although the newspaper statements are false, since it does not involve a false statement of fact.
2. An action for libel will not lie, against one who contributes an article to a newspaper, for libelous matter inserted therein by the publisher of the paper.
4. Recovery for the publication of a libel cannot be denied because the plaintiff fails to prove the falsity of the publication, since the burden of proving the truth by way of defense is on defendant.
5. The right to recover for the publication of a libelous article in a foreign language cannot be made to depend upon the absolute accuracy of the translation introduced in evidence.
6. The burden of showing that an article published in a newspaper over the signature of defendant in an action for libel is identical with the article furnished by the latter is upon the plaintiff, and he is not entitled to have the article actually contributed set out in the answer.

(January 26, 1901.)

**A**PPEAL by plaintiff from a judgment of the District Court for Linn County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

*Messrs. C. Nichols and Remley, Ney, & Remley*, for appellant:

All persons who knowingly participated in the act of publication are equally liable to prosecution for this offense.

3 Greenl. Ev. 15th ed. § 170.

The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication, and is an indictable offense.

*Maloney v. Bartley*, 3 Campb. 213.

And printing the libel, or causing it to be printed, is prima facie evidence of publication.

*Burdett v. Abbot*, 5 Dow P. C. 201; *Baldwin v. Elphinstone*, 2 W. Bl. 1037.

The newspaper publisher is liable though he was ignorant of and forbade the publication.

*Storey v. Wallace*, 60 Ill. 51; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447;

**NOTE.**—For libel or slander by expressing opinion of clergyman, see note to *St. James Military Academy v. Gaiser* (Mo.); 28 L. R. A. 667; also *Redgate v. Boush* (Kan.) 48 L. R. A. 236. 53 L. R. A.

*Scripps v. Reilly*, 38 Mich. 10; *Dunn v. Hall*, 1 Ind. 344; *Huff v. Bennett*, 4 Sandf. 120; *Curtis v. Mussey*, 6 Gray, 261; *Com. v. Morgan*, 107 Mass. 199.

Every person who requests, procures, or commands another to publish a libel is answerable as though he published it himself.

13 Am. & Eng. Enc. Law, p. 371; *Townsend, Slander & Libel*, 3d ed. § 115, note 2.

Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action.

*Odgers, Libel & Slander*, \*161; *Watkin v. Hall*, L. R. 3 Q. B. 396, 37 L. J. Q. B. N. S. 125, 16 Week. Rep. 857, 18 L. T. N. S. 561; *M'Pherson v. Daniels*, 10 Barn. & C. 270. 5 Mann. & R. 251.

If A sends a manuscript to the printer of a periodical publication, and does not restrain the printing and publishing of it, and he prints and publishes in that publication, A is a publisher, and liable to an action.

*Burdett v. Abbot*, 5 Dow P. C. 201; *Bond v. Douglas*, 7 Car. & P. 626.

The embellishment of headlines does not relieve the defendant, if he wrote the libelous part of the article, and the plaintiff is only required to prove the material part of his allegation, and the rest may be considered as surplussage.

Code, § 3630; *Robbins v. Diggins*, 78 Iowa, 522, 43 N. W. 306; *Rea v. Scully*, 76 Iowa, 343, 41 N. W. 36; *Way v. Chicago, R. I. & P. R. Co.* 73 Iowa, 463, 35 N. W. 525; *Little v. McGuire*, 38 Iowa, 560; *Green v. Cochran*, 43 Iowa, 544; *Knapp v. Cowell*, 77 Iowa, 528, 42 N. W. 434; *Engle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 661, 37 N. W. 6, 42 N. W. 512; *Schrader v. Hoover*, 80 Iowa, 243, 45 N. W. 734.

The offense was committed and the wrong done by publishing the article in any manner, although additions were made by a third person.

*Bower v. Deideker*, 38 Iowa, 418; *Robbins v. Diggins*, 78 Iowa, 522, 43 N. W. 306.

*Messrs. Bingham & Mekota* for appellee.

**McClain, J.**, delivered the opinion of the court:

The facts of the case, so far as necessary to the understanding of the questions of law raised on this appeal, are, without controversy, as follows: A newspaper published in the Bohemian language at Chicago, in its regular issue, early in May, 1898, contained an article, over defendant's name, commenting on the reported action of plaintiff, as a Catholic priest, in soliciting contributions from his congregation, at a regular service, in aid of the Spaniards, and the indignation of some of his parishioners in regard thereto, and extended comment condemnatory of his supposed action, and of any person who should sympathize with him in such actions or act in a similar manner. It is not questioned in this case that

the article is libelous in its nature, and the only issues tried were as to whether the defendant was chargeable with the article, or any part thereof, and whether there were any matters of mitigation in his behalf. From the evidence appearing of record it must be conceded that the article, as published, was not wholly written by defendant. It was shown to have been more or less rewritten and changed by the editor of the paper, and the principal question to the jury was as to the extent to which, if at all, the article as it appeared was based upon the matter communicated to the editor by defendant. Appellant's objections to instructions given and to the refusal to give instructions asked involve the legal rules of liability with reference to comment on the action of clergymen, and also those relating to the contribution to or participation in the publication of a libel.

A clergyman is a public man, in such sense that public comment in a proper manner upon his sayings and doings in his public capacity is justified. In *Kelly v. Tilling*, 1 L. R. 1 Q. B. 699, Chief Justice Cockburn says: "I cannot think that a dispute between a clergyman and his churchwarden as to what he allows to be done in his church during divine service, and the uses to which he puts part of it, namely, the vestry room, which were the matters involved in the correspondence between them [and published by defendant in his newspaper], is not a subject of public interest. The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it, is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this." And it was held that defendant's publication of the matter complained of was privileged. And in *Kelly v. Sherlock*, L. R. 1 Q. B. 686, which was an action for having published in a newspaper a series of libels on plaintiff as the incumbent of a church, the judge, in summing up the case to the jury, says (p. 689): "A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury,—we are all of us the subjects for public discussion. So, also, is it matter of public interest,—the dispute between the plaintiff and his organist, and the way in which the church is used,—they are all public matters, and may be publicly discussed." And see *Webb's Pollock, Torts*, 320; *Odgers, Libel & Slander*, 34. On this theory that their functions are public, the proceedings of a church or congregation are privileged. *Farnsworth v. Storrs*, 5 Cush. 412. And see *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239. The true grounds of justification in a case of the comment upon or criticism of the conduct of public men with reference to public affairs are succinctly stated by a leading text writer as follows: "Everyone has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, 53 L. R. A.

however severe in their terms, unless they are written intemperately and maliciously. Every citizen has full freedom of speech on such subjects, but he must not abuse it. . . . The right to comment upon the public acts of public men is the right of every citizen, and is not the peculiar privilege of the press. . . . Every one of the public is entitled to pass an opinion on everything which in any way invites public attention." *Odgers, Libel & Slander*, 34-36. The action of plaintiff, therefore, in the discharge of his duties and office as a priest, in the conduct of the public functions of his calling, was a proper subject of comment on the part of defendant; and so long as such comment was kept within proper limits the defendant would not be liable in damages for anything he should say, and this would be regardless of the question whether plaintiff had done any act or said any word which he ought not to have done or said. The defendant would have no right to make false statements with regard to what plaintiff did or said, nor would he have a right to extend by publication false statements made by others. But freedom of criticism would secure him in the right to comment upon what was done or said, or even upon what was supposed to have been done or said, so long as no false statements were published. The tenor of the article which it appears from the evidence defendant did send to the Chicago paper was that, if certain accounts which had appeared in the newspapers with reference to the acts of plaintiff in soliciting contributions from his congregation for the Spaniards were true, then plaintiff had acted in an improper manner; and should be condemned by the public, etc. We do not think this to have been a false statement of fact, but, rather, a criticism of supposed acts, which criticism would not be libelous, even though the facts were improperly stated in the newspaper accounts which defendant had seen, and, if properly stated, would not have furnished any ground for the adverse criticism which was made. Can it be supposed for a moment that if a citizen sees in newspaper accounts of the proceedings of this court that the justices have, on the bench, been guilty of intoxication or indecent behavior, he would be guilty of libel if he should write to a newspaper his condemnation of such supposed conduct, not stating the facts as of his own knowledge, but as derived from newspaper reports? Any such rule as this would certainly be an unjust and improper limitation upon the right to comment upon and criticize acts of those in public life. It is to be borne in mind, however, that this action is not based on the communication which was written by defendant to the Chicago paper, but upon the publication made in that paper; and it therefore became necessary to submit to the jury the question whether defendant had caused or contributed to such publication, and, if such contribution was only partial, then whether his contribution thereto or participation therein was of such character as to render him li-



able. It may here be said, in a preliminary way, as furnishing a basis for our rulings on instructions, that while all persons who cause or participate in the publication of libelous matter are responsible in full for such publication, without apportionment as to their particular share, yet it must be shown that the publication or participation related to the libelous matter published, and not simply to the article published which contained the libelous matter. The distinction becomes very important in view of the evidence in this case, which tended to show, and from which the jury would have been justified in finding, that the article written by defendant and sent to the Chicago paper was merely the occasion of, or the basis for, the matter written by the editor which constituted the so-called libelous article, which was prepared and published without any authority whatever from the defendant. And it is too plain to require extended comment that, if the communication from defendant to the paper was in itself unobjectionable, then defendant could not be held liable for improper matter contained in the newspaper article, even though that article might have been to some extent instigated by or based upon defendant's communication. Suppose, for instance, that the defendant had made use of some beautiful and appropriate quotation from Horace; is it to be supposed that he should be held legally liable for the entire contents of the newspaper article because the editor had had defendant's communication before him, and had extracted the appropriate quotation? The illustrations which we have used may seem extreme, but they throw light on the possibilities of interpretation of the instructions asked by plaintiff and refused by the court, the refusal of which is made ground of complaint.

The second, third, and fourth instructions asked by plaintiff and refused by the court each contained propositions which were erroneous, in view of the principles we have above enunciated. For instance, in the second it is said that defendant is liable if, having seen the publications in other newspapers, he wrote an article to the Chicago paper which "contributed to or was used in the construction of the article" in question; in the third it is stated that defendant's repetition in his own contribution of matter which he had seen in the newspapers would render him liable for the repetition of such matter, although he did not affirm the truth thereof, provided the article in question was based in part on said communication by defendant; and in the fourth it is announced that it is not essential to plaintiff's recovery that he prove that defendant wrote the article complained of, but that it is sufficient if defendant contributed to the article which was in fact published, by writing and sending the letter which he says he did write and send. The first instruction asked by defendant and refused explains what is meant by "publication," but we think that this was fully and correctly covered by the instructions given. 53 L. R. A.

The part which is not thus covered erroneously announces the doctrine that defendant is liable for damages as a publisher if he in any way knowingly and wilfully aided or assisted in making, publishing, or circulating the said article. It is plain he might have assisted in making the article, so far as it was not libelous, without being responsible for portions thereof which were libelous. The instruction is wrong in referring to the article, rather than the libelous matter in the article, as the basis of the action.

Appellant's counsel complain of the refusal to submit a special interrogatory asked by them, but such interrogatory did not call for any ultimate fact which would be involved in the finding of a general verdict. All the facts inquired about, which related to the communication of defendant to the Chicago paper, might have been true, without defendant being in any way chargeable with the communication or publication of the libelous matter contained in that article.

Error is assigned in the statement to the jury in the instruction given by the court stating the issues that "the burden is on plaintiff to prove by a preponderance of the evidence the facts upon which this action is based." In plaintiff's petition the allegation is directly made that the matter published was false and untrue. Defendant, in his answer, and again in his substituted answer, explicitly denies each and every allegation in the petition. The court included this allegation and this denial in his statement to the jury of the issues. Under this instruction the jury would have been justified in returning a verdict for defendant on the sole ground that plaintiff had not proved the falsity of the statements complained of. This is not the law. The burden of proving the truth of the libelous matter by way of defense is upon the defendant. *Heilman v. Shanklin*, 60 Ind. 424, 444; *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695; *Proctor v. Houghtaling*, 37 Mich. 41, 45; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314; *Odgers, Libel & Slander*, 169; *Cooley, Torts*, 31. The error of the court in this respect is emphasized by the fact that it refused to give an instruction on this subject asked by plaintiff, which instruction was as to its other matter unobjectionable, but covered by an instruction given by the court, while on this point it correctly stated the rule of law which was not in any way enunciated in the court's instructions. In this respect the court erred.

In another instruction the court tells the jury that if they find that defendant caused the article in question to be published in the Chicago paper, "and that the translation introduced in evidence is a true and correct translation of the same in the English language," then the article is libelous, and the defendant is liable. There was considerable controversy during the taking of the evidence with reference to the correct translation of some parts of the article, which was published in the Bohemian language, and the plaintiff's right to recover ought not to

have been made to depend upon the absolute accuracy in every word or phrase of the translation of the article which he offered in evidence. He confessed the error of this translation in two respects, and amended his petition to conform to the evidence, which he certainly had a right to do. This instruction also makes defendant's liability depend upon his writing the article or causing it to be published, while under the evidence the question was raised as to whether defendant contributed to some extent to the libelous matter contained in the article; and, if the jury so found, they might properly have found for plaintiff, although defendant did not write the entire article as published. The instruction was erroneous. Another instruction which was dependent upon this one is, perhaps, also faulty, in view of the connection in which it was given.

We will not interfere with the action of the lower court in overruling appellant's motion to strike defendant's amended and substituted answer, based on the ground that it was filed too late, nor in overruling the motion for a more specific statement of the matters alleged in such answer. Plaintiff is not entitled, so far as we can see, to have defendant set out the communication which he did send to the Chicago paper. As

to how far that article was like or contributed to the article published is a matter to be established by plaintiff's evidence.

The assignments based on exceptions to rulings as to admission or exclusion of evidence need not be considered. So far as the questions involved are not settled by the previous discussion, they are not likely to arise upon another trial.

Objection is made to the course pursued by defendant's counsel in stating his case to the jury. It is doubtful if any objection is properly preserved. The court cautioned counsel as requested on behalf of the plaintiff, and no subsequent action of the court was invoked. A mere exception noted by counsel at the end of the opening statement is hardly enough to bring before the court the question whether counsel had conformed to the directions of the court as to the course to be pursued in his argument. Nevertheless, we think there are one or two suggestions made in the argument of defendant's counsel, relating to the church to which plaintiff belonged, and in which he was a priest, which might well have been omitted.

For the errors pointed out in the instructions given by the court, *the judgment is reversed.*

#### MAINE SUPREME JUDICIAL COURT.

Lucy H. PULSIFER

v.

Edwin C. DOUGLASS.

(94 Me. 556.)

1. A man who has consented to the burial of the body of his deceased wife in the lot of another cannot, without the consent of the lot owner, enter upon the lot and remove the body.
2. Damages for the unlawful entry upon a woman's burial lot, and the removal therefrom of the body of her deceased sister, at the instance of the latter's former husband, will be measured by the injuries done to the lot, where the proceeding was with due propriety and decency.

(January 29, 1901.)

**R**EPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the Law Court of an action brought to recover damages for the alleged wrongful removal of a body from a cemetery lot. *Judgment for plaintiff for nominal damages.*

The facts are stated in the opinion.

*Messrs. Onkes, Pulsifer, & Ludden,* for plaintiff:

A husband is bound to bury his deceased wife, and a wife must bury her deceased husband.

3 Am. & Eng. Enc. Law, p. 52; *Durell v.*

**NOTE.**—As to liability for disinterment of dead body and actions relating thereto, see *State v. McLean* (N. C.) 42 L. R. A. 721, and *note*. 53 L. R. A.

*Hayward*, 9 Gray, 249, 69 Am. Dec. 234; *Lakin v. Ames*, 10 Cush. 221.

The plaintiff offered to furnish the lot for the burial of her sister, and to pay for the digging of the grave. The offer made by the plaintiff was accepted by the husband, and became an arrangement agreed to by the defendant and assented to and acquiesced in by the husband.

After a burial had taken place under circumstances such as these, all rights of the husband as to further control over the body of the deceased had terminated.

*Fox v. Gordon*, 40 Phila. Leg. Int. 374; 3 Am. & Eng. Enc. Law, p. 53; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 513.

A dead body after burial becomes a part of the ground to which it is committed. When a body has once been buried no one has a right to remove it without the consent of the owner of the grave.

2 Waterman, Trespass, § 845; *Weld v. Walker*, 130 Mass. 423, 39 Am. Rep. 465; *Pierce v. Swan Point Cemetery Proprs.* 10 R. I. 227, 14 Am. Rep. 667; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 513; *Reg. v. Sharpe*, Dears. & B. C. C. 160, 163, 7 Cox C. C. 214; *Beesmer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; 3 Am. & Eng. Enc. Law, p. 53; *Crocker v. Oarson*, 33 Me. 437.

On suit against a cemetery company for wilfully removing the body of plaintiff's child from a lot which the defendant sold to him, without notice to plaintiff, a verdict

for plaintiff of \$1,150 will not be set aside as excessive.

*Thirkfield v. Mountain View Cemetery Asso.* 12 Utah, 76, 41 Pac. 564.

**Mr. A. K. P. Knowlton**, for defendant:

The husband of the deceased woman, by his consent to the burial, thereby acquired such an interest in the burial lot as to warrant his request for removal, under the legal restrictions.

The statute as to removal of interred bodies abrogates the common law, and provides for grants or licenses for such removals.

*Com. v. Cooley*, 10 Pick. 37.

**Wiswell**, Ch. J., delivered the opinion of the court:

Action of trespass *quare clausum* for an alleged unlawful entry upon the cemetery lot of the plaintiff, and the removal therefrom of the body of the plaintiff's sister, which had been buried therein about a month prior to the disinterment. The body was that of Mrs. Sarah A. Webb, and we think that it must be inferred from the case that the burial in the plaintiff's lot was with the consent of the husband of the deceased. The disinterment and removal of the body of Mrs. Webb were done by the defendant at the request of her husband. The case comes to the law court upon report.

It is not only the duty of a husband to provide a suitable place for the burial of the body of his deceased wife, but he unquestionably has the paramount right to determine upon the place of her burial. *Durrell v. Hayward*, 9 Gray, 248, 69 Am. Dec. 284. But when that duty has been performed, and the body has been buried in the lot of another with the consent both of the husband and of the owner of the lot, the husband does not have the right, without the consent of the lot owner, to enter thereon and remove the body. A dead body, after burial, becomes a part of the ground to which it has been committed; and an action of trespass may be maintained by the owner of the lot, in possession, against one who disturbs the grave and removes the body, so long, at least, as the cemetery continues to be used as a place of burial. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 18 So. 505.

But under some circumstances a court of equity, which, in this country, where there are no ecclesiastical courts, has jurisdiction of controversies relative to the place of burial of a dead body, may permit a husband to remove the body of his deceased wife from the lot of land of another, as where the burial was not with the intention or understanding that it should be her final resting place. *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465. See also a discussion of the law upon this subject in *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

The defendant is therefore liable for a technical trespass, at least, notwithstanding he was acting at the request of the husband. 53 L. R. A.

The plaintiff claims large damages, both actual and punitive, including damages for her distress of mind, upon the ground that the defendant's acts were wanton and malicious, and performed without due regard to the proprieties of the occasion.

We do not think that the evidence substantiates the plaintiff's contention in this respect, but, upon the contrary, we are of opinion that in removing the body to another place of burial the defendant and those employed by him proceeded with due propriety and decency, and, as the body was removed for and at the request of the husband, that the plaintiff should be confined to a recovery of actual damages, measured by the injuries done to her lot, which we assess at \$20.

*Judgment for plaintiff.*

Damages assessed at \$20.

Oscar C. S. DAVIES

v.

EASTERN STEAMBOAT COMPANY.

(94 Me. 379.)

1. The authority of the captain of a steamship to receive a telegram for delivery to a passenger, so as to charge the steamship company in case of its nondelivery, must be established by the evidence and found by the jury.
2. A steamship company is not, merely by reason of its relation as carrier to its passengers, bound to receive telegrams to be delivered to them.
3. A steamship company is not liable for the nondelivery to a passenger of a telegram which the captain has taken for him, where no habit or custom is shown,—no holding of the captain out to the world as having authority to do such an act.

(November 26, 1900.)

**E**XCEPTIONS by plaintiff to rulings of the Superior Court for Kennebec County made during the trial of an action brought to recover damages for failure to deliver a telegram, which resulted in a verdict in favor of defendant. *Overruled.*

The facts are stated in the opinion.

**Messrs. Williamson & Burleigh**, for plaintiff:

Wentworth, the addressee of the telegram, was a fare-paying passenger, and as such the defendant company owed him all the duties, and assumed toward him all the obligations, of a common carrier of passengers.

The telegram in question related to the business for which he was employed and for which he was traveling, and its nondelivery to him, the agent or servant, resulted in

NOTE.—The above case decides a novel proposition. Whether the captain himself could be held liable or not for taking charge of a message and then failing to deliver it is not decided. The intimation is that the steamship company might be liable in such a case if such delivery of messages had become customary.

damage to his principal or master, the plaintiff in this case.

For a breach of the carrier's duty toward the servant while so engaged in the master's business, the breach being in relation to a matter directly connected with that business and resulting in damage therein to the master, and to the master alone, the carrier is responsible to the master.

1 Am. & Eng. Enc. Law, 2d ed. pp. 1179, 1180; *St Johnsbury & L. C. R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

Negligence is the lack of due care under the circumstances of the case.

16 Am. & Eng. Enc. Law, pp. 398 *et seq.*

The defendant company is a mandatory, and must exhibit diligence appropriate to what it undertakes.

A telegram from its very nature implies importance, the necessity of haste, of prompt delivery.

There is no right to assume that the addressee will call for it, or that he knows anything about it. The only thing that the sending of the telegram implies is that the sender knows the course of travel of the addressee. The degree of care required, from the nature of the circumstances, is a high one, and failure to observe that care would be actionable negligence.

*Bacon v. Casco Bay S. B. Co.* 90 Me. 46, 37 Atl. 328; *Palmer v. Penobscot Lumbering Assn.* 90 Me. 193, 38 Atl. 108.

This case is governed, not by the law of bailments, but by the law regulating the carriage of passengers. What, then, were the duties and obligations of the defendant company toward its passenger Wentworth in relation to this telegram?

The telegram was directed to the boat, for a passenger on the boat, was offered to the captain, and by his direction was delivered to the purser, who could easily have found the addressee in the usual round of his duties while collecting fares and tickets.

If the captain had declined to receive the telegram, the plaintiff would doubtless have been promptly notified of that fact, and would have had a chance to take any other measures possible to prevent loss. But the telegram was accepted.

The captain of a steamer is the supreme authority while on board his vessel.

*Ardesco Oil Co. v. Gilson*, 63 Pa. 146; *Hutchinson, Carr.* §§ 629, 631, 632; *Farmers' & M. Bank v. Champlain Transp. Co.* 23 Vt. 186, 56 Am. Dec. 68; 2 Am. & Eng. Enc. Law, p. 754; *Moore v. Fitchburg R. Corp.* 4 Gray, 465, 64 Am. Dec. 83; *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171; *Coleman v. New York & N. H. R. Co.* 106 Mass. 160; *Finley v. Hudson Electric R. Co.* 64 Hun, 373, 19 N. Y. Supp. 621.

The delivery to and acceptance by the captain of that telegram was a delivery to and acceptance by the company.

The acceptance of that telegram for a passenger was clearly incidental to the business of carrying passengers.

*Edwards v. Lord*, 49 Me. 279; *Knight v. Portland, S. & P. R. Co.* 56 Me. 234, 96 Am. Dec. 499; *Hutchinson, Carr.* § 515. 53 L. R. A.

A passenger pays, not only for his carriage, but also for all the comforts, courtesies, and conveniences, and all the care and attention which the carrier should extend to him in connection with his passage.

*Mr. John Scott*, for defendant:

The carrying or delivering of telegrams was no part of the business habit or custom of the company; neither had it authorized, known, or permitted it to be done by its officers, agents, or servants. The acts of the captain and purser were unauthorized and outside the scope of their employment. The company itself, therefore, never received the telegram, and was under no liability to the sender.

*Lloyd v. West Branch Bank*, 15 Pa. 172, 53 Am. Dec. 583; *Bowler v. O'Connell*, 162 Mass. 320, 27 L. R. A. 173, 38 N. E. 498.

*Powers, J.*, delivered the opinion of the court:

This is an action against a common carrier of passengers by water to recover damages resulting from the nondelivery of a telegraphic message directed to "G. L. Wentworth, Str. to Boothbay, Bath, Maine." Wentworth was a carpenter employed by the plaintiff to go from Augusta via Bath to Isle of Springs, and there build a cottage. The message directed a change in the building, and was offered by the telegraph company to the captain of the defendant's steamer, upon which Wentworth was a fare-paying passenger, and by direction of the captain it was delivered to the purser of the same steamer. The case was tried in the superior court of Kennebec county, resulting in a verdict for defendant, and the plaintiff excepts to the instruction to the jury that the defendant would be required to use slight diligence only in endeavoring to deliver the telegram, and would be liable only for gross negligence for failure to deliver it to the proper party.

The defendant sets up that in directing the telegram to be delivered to the purser the captain acted in excess of his authority, and outside of the scope of his employment and of the business in which he was engaged, and that therefore the defendant itself never received the telegram or became charged with the duty of its delivery.

The nature and scope of the defendant's business, whether the particular act was necessary for its successful prosecution, the usual and ordinary course of its management by those engaged in it at the time and place where it was carried on, were questions of fact for the jury, to be determined from all the circumstances of the case; and from them it was for the jury to say whether the act in question was within the authority of the agent, or the scope of the business of the principal which he was employed to transact. The court cannot infer, as matter of law, the authority of the captain of a passenger steamboat to charge the owners with the duty of delivering telegrams to its passengers. It is a matter of fact, to be established by evidence and found

by the jury. The exceptions fail to show that any evidence was offered in this case which would warrant such a finding.

The defendant was a common carrier of passengers by water. Its contract resulting from the relation of carrier and passenger, nothing else appearing, was to transport its passenger safely and with proper regard for his comfort and convenience, together with such articles and money as might be properly contained in the baggage which he brought with him. The exceptions show no express contract with the passenger for more than this, and nothing from which more can be implied. They utterly fail to show that it was any part of the defendant's business, habit, or custom to accept telegrams for delivery to its passengers, or that it knew or permitted this to be done by its officers, servants, or agents. In general, the business of common carriers of passengers on our inland waters, and that of receiving and delivering telegrams, are entirely separate and distinct, and the latter is in no proper and legal sense incidental to or connected with the former. Common carriers of passengers make no charge for such a service, and its very responsible duties and burdens should not be imposed upon them without their consent unless some rule of public policy requires it.

We cannot infer that it is necessary for the safety, comfort, or even convenience of the passenger that the duty of the delivery of a telegram addressed to him should be gratuitously imposed upon the passenger carrier. The telegraph company to whom the message has been intrusted is engaged in that business, and has the equipment and servants specially trained for carrying it on. For an adequate consideration it has entered into an express contract to deliver the message, and usually knows its contents, importance, and urgency. In discharging that duty it may select its own means and agents, and is responsible for any neglect on their part. The defendant therefore owed no contractual duty to its passenger to receive and deliver the telegram. It does not appear that it was a part of its business or incidental thereto. If not, it necessarily fol-

lows, nothing else appearing in the case, that the act of the captain of the defendant's steamboat was outside of the scope of the business in which he was engaged, and not connected with the service which he had been employed to perform. For such acts the defendant is not liable unless it held the captain out to the world as having authority, and the case is barren of any such showing. *Bowler v. O'Connell*, 162 Mass. 320, 27 L. R. A. 173, 38 N. E. 498.

It is true, as urged by the plaintiff, that the captain is the general agent of the owners, but a general agent is not an unlimited agent. His authority is necessarily restricted to the transactions and concerns within the scope of the business of the principal. 1 Am. & Eng. Enc. Law, 2d ed. p. 990. To bind his principal, he must act within the usual and ordinary scope of the business he is employed to transact. His authority is measured by the usual extent of his employment. 1 Parsons, Contr. p. 41. A shipmaster is a limited agent, and can only bind the owners by contracts relative to the usual employment of the ship, and means requisite to that employment. Kent, J., in *Lemont v. Lord*, 52 Me. 389. The principal is liable for the authorized act of his agent, because it is his own act, and for the acts of his agent within the scope of the authority which he holds him out as having, or knowingly permits him to assume, because to permit him to deny it would be to permit him to commit a fraud upon innocent persons. 1 Am. & Eng. Enc. Law, 2d ed. p. 990.

In the case at bar no habit or custom is shown,—no holding out to the world of the captain as having authority to do the particular act. It was his own act, and not that of his principal. The defendant itself never received the telegram, and never became charged with the duty of its delivery, and it is therefore unnecessary to consider the instruction given as to the degree of diligence to which the defendant was bound, or the degree of negligence for which it would be liable.

*Exceptions overruled.*

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

William E. VEASEY

v.

W. F. CARSON *et al.*

(177 Mass. 117.)

**The concealment of the identity of the purchaser from his principal will not preclude a broker from recovering his commission on a sale of land where it does not appear**

**NOTE.**—*Duty of broker to disclose to his principal the identity of a purchaser.*

No prior decision seems to have been made on the exact point in *VEASEY v. CARSON*. This case holds that the concealment of the name of the real purchaser of land, and the substitution of the name of a fictitious purchaser, is not the 53 L. R. A.

that there was anything in the facts or circumstances to render that fact of any importance to the seller.

(October 19, 1900.)

**EXCEPTIONS** by defendants to rulings of the Superior Court for Hampden County made during the trial of an action brought by a real-estate broker to recover

concealment of such a material fact as will preclude the broker from recovering commissions if it does not appear that the name of the real purchaser was a matter of any interest whatever to the seller.

A few cases hold that such concealment and substitution will preclude the recovery of com-

commissions on a sale of property, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

*Messrs. C. L. Gardner and C. G. Gardner*, for defendants:

The deliberate concealment by the plaintiff of facts which the defendants had a right to know, the deception practised, and the reports from time to time made by him that he "had a party" from whom he had received certain offers,—without stating that the party referred to was Delaney, a man having a liquor license, who was obliged to vacate the premises he then occupied and had no place to go to,—and who, he believed, would pay the defendants his price before he got through, was sufficient evidence that the plaintiff, if not acting directly for Delaney, was in collusion with him and guilty of fraud, which precludes his right to recover.

*Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499; *Pratt v. Patterson*, 112 Pa. 475, 3 Atl. 858; *Young v.*

*Hughes*, 32 N. J. Eq. 372; *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211; *Jansen v. Williams*, 36 Neb. 869, 20 L. R. A. 207, 55 N. W. 279; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Collins v. McClurg*, 1 Colo. App. 348, 29 Pac. 299; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984, 11 Sup. Ct. Rep. 303; *Bookwalter v. Lansing*, 23 Neb. 291, 36 N. W. 549; *Cow v. Haun*, 127 Ind. 325, 26 N. E. 822; *Hobart v. Sherburne*, 66 Minn. 172, 68 N. W. 841; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Bollman v. Loomis*, 41 Conn. 581; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; 1 Story, Eq. Jur. §§ 315, 316, 316a; Story, Agency, § 210.

For a thorough discussion of the duties and obligations of a broker to his principal, see—

*Leathers v. Canfield* (Mich.) 45 L. R. A. 33, and note.

*Messrs. William G. Bassett and Edward J. Tierney*, for plaintiff:

The plaintiff, who sold the property, was entitled to recover the commission. His duty was performed when he had found a purchaser who was ready, willing, and able

missions if the principal suffered any injury thereby.

Thus, in *Pratt v. Patterson*, 112 Pa. 475, 3 Atl. 858, affirming 12 Phila. 460, the broker concealed the name of the real purchaser, who was a responsible party, and gave the name of an irresponsible person at the request of the real purchaser, who believed that the knowledge of his ownership of such land, by the owner of adjoining land which he also wished to purchase, would induce the latter to charge an increased price therefor. The purchase price was \$140,000, \$30,000 of which was to be paid in cash and a bond and mortgage given for the balance. On discovery of the facts the principal broke off the negotiations, and the court held that the broker could not recover commissions although no fraudulent intent existed on his part, and that the claim that the land was sufficient security for the mortgage was not available, as the principal was entitled to determine for himself whether he wished to have a responsible person instead of an irresponsible one on his bond.

And the broker is not entitled to commissions where he inserts the name of a third person as the ostensible purchaser, and refuses on demand to give the name of the real purchaser, for whom he had previously bought an adjoining lot, because he knows his principal will increase her asking price if she knows that fact, although the principal, after breaking off her negotiations on such refusal, subsequently sells to the same person at a much larger price. *Wilkinson v. McCullough*, 196 Pa. 205, 46 Atl. 357.

And *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211, affirming 60 Ill. App. 592, holds that one employed to sell corporate stock for another is not entitled to commissions where he conceals from his principal the identity of the real purchaser, and a third person is sent to the principal as the ostensible purchaser under an arrangement between the real purchaser and the broker because it is believed that the principal will not sell for so small an amount if he knows who the real purchaser is. The court in this case says that such holding is required from considerations of public policy, even though no injury might result to the principal, which seems to be opposed to the holding in the principal 53 L. R. A.

case. The broker was, however, held to be entitled to commissions because he brought the real purchaser to the principal before the deal was completed and while there was still opportunity for the latter to withdraw from the contract, and the principal completed the contract without objection, thereby accepting the benefit of what the broker had done.

And other cases hold that the failure of the broker to disclose the name of the purchaser on a demand therefor will preclude the recovery of commissions.

Thus, where the broker is trying to sell to a syndicate, and, when asked by the owner who compose it, is unable to tell who all the different members will be, and the owner sells to another before the syndicate is fully formed, the broker is not entitled to commissions, as he cannot demand compensation so long as there is any uncertainty as to the purchasers. *Gerding v. Haskin*, 141 N. Y. 514, 36 N. E. 601.

And a refusal by a broker employed to sell bonds to disclose to his principal to whom or on what terms he has sold them amounts to a repudiation of his contract of employment as broker. *Holmes v. Lakeside R. Co.* 60 Minn. 197, 62 N. W. 264.

And in *Hayden v. Grillo*, 26 Mo. App. 289, the brokers claimed to have sold the property for the price asked by the principal, and to have received \$100 as earnest money, which they tendered to the principal, who refused it on the ground that the premises were then worth more than such amount. The brokers did not, either at the time of the tender or in their petition, disclose the name of the purchaser, and the trial court refused to require an amendment of the petition to show such fact, and the purchaser's name was not disclosed until the trial. The court held on appeal that, as the brokers had not shown that the purchaser was able to comply with his contract, and the owner had not, because of the failure to give the name of the purchaser, had a fair opportunity to show that he was unable to comply, a verdict should have been directed for the principal.

And on a second appeal, *Hayden v. Grillo*, 35 Mo. App. 647, the court held that, as the receipt for the \$100 tendered was made out in the broker's name instead of that of the purchaser,

to purchase upon the terms specified. Omission to name Delaney to the owner cannot, as matter of law, deprive him of his remedy.

*Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150; *Holden v. Starks*, 159 Mass. 503, 34 N. E. 1069; *Ward v. Cobb*, 148 Mass. 518, 20 N. E. 174; *Mechem, Agency*, § 966; *Hollis v. Weston*, 156 Mass. 357, 31 N. E. 483; *Graves v. Dill*, 159 Mass. 74, 34 N. E. 336; *Newhall v. Pierce*, 115 Mass. 457; *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000; *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754.

**Hammond, J.**, delivered the opinion of the court:

This is an action of contract to recover a commission for selling real estate of the defendant Effie M. Carson. The case was tried before a jury against her alone. At the trial the defense was that the plaintiff was not the agent of the seller, but the purchaser, and that, even if he was the agent of the seller, he did not act in good faith towards her, but concealed from her the name of the real purchaser, and that such

the owner might refuse to sell without becoming liable for commissions, on the ground that the broker was himself the purchaser.

But on a third appeal, *Hayden v. Grillo*, 42 Mo. App. 1, a judgment in favor of the broker was affirmed, the court holding that under the evidence the necessity of producing a purchaser able and willing to complete the purchase had been waived, nothing being said as to the principal's right to assume that the purchaser was in reality made for the broker himself.

In *Hackmann v. Gutweller*, 66 Mo. App. 244, the court says that the rule as to sales of real estate governs in agreements by brokers for the negotiation of a loan, and that when the broker has found one who is willing and able to make the loan on the security offered, and the principal when so informed signifies his willingness to proceed, it is the duty of the broker to produce the lender, or a contract binding him to make a loan, but that it is unnecessary to do so if the borrower refuses to accept the money or revokes the broker's authority.

And in some cases a specific performance of the contract of purchase has been refused because the broker, in collusion with the purchaser, has concealed the latter's identity and substituted another person as the ostensible purchaser.

Thus, in *Young v. Hughes*, 32 N. J. Eq. 372, reversing 31 N. J. Eq. 60, a tenant of the land in question, desirous of purchasing the same and with whom previous negotiations had taken place, colluded with the broker having the property for sale to have the latter introduce a third person to his principal as the intending purchaser. The broker also concealed the amount which he knew the tenant was willing to pay, and tried to induce the owner to take a smaller price. The court held that the broker had neglected his duty, and that because of the collusion of the purchaser with him the contract of purchase could not be specifically enforced; and said that the fact that the result was not injurious to the principal, and that no fraud was intended, would not affect the result.

And in *Hesse v. Briant*, 6 De G. M. & G. 623, 5 Week. Rep. 108, the purchaser was also a client of the solicitor whom the vendor authorized to make the sale. The solicitor failed to disclose to the seller who the proposed pur-

a concealment was of a material fact, which it was the duty of the plaintiff, if he was acting as her agent, to communicate to her. The court refused to rule that the plaintiff could not recover, and instructed the jury that in order to recover the plaintiff must show that he was employed by the defendant with the understanding that he should be paid for his services, and that in making the sale he acted in entire good faith towards her, and solely for her interest, and not in the interest of any other person. Under these instructions the jury found for the plaintiff. The evidence, although conflicting, warranted the verdict, unless the defendant's seventh request for a ruling should have been given, namely, "that concealing the name of the real purchaser, and substituting therefor the name of a fictitious purchaser, was a failure to discharge that duty to the defendant which is essential to the plaintiff's right to recover." It was not disputed at the trial that Delaney was the real purchaser; that Williams, so far as he appears in the transaction, acted simply for him; and that this was known to the plaintiff at and before the time of the

chaser was, and the court held that on this account the contract of sale could not be specifically enforced by the purchaser, stating that it was very important that the name of the proposed purchaser should be disclosed to the vendor, as, if he had known, he might have insisted on his giving a higher price, and there was not that fair, open dealing required by the condition of the parties.

But in *Glover v. Layton*, 145 Ill. 92, 34 N. E. 53, the broker employed to sell made an arrangement with the real purchaser, who did not wish to give his notes for the deferred payments, that the conveyance should be made to a third person who was to convey to him, and the vendor brought an action for a reconveyance after the entire purchase price had been paid on the ground that the broker was acting in behalf of the purchaser in fraud of the vendor. The court held, however, that the vendor was not prejudiced in any way by being kept in ignorance as to who the real purchaser was, as he received the price asked for the land, which was all it was worth at the time of the sale, and which had been paid in full.

This note does not include the right to commissions of a broker who was the procuring cause of the sale, where the principal was not notified and made the sale in ignorance of the broker's connection with the transaction, nor the concealment of the fact that the broker was himself the real purchaser.

As to when a real-estate broker is considered the procuring cause of the sale or exchange, see *note to Hoadley v. Savings Bank* (Conn.) 44 L. R. A. 321.

As to the performance by a real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property, see *note to Lunney v. Healey* (Neb.) 44 L. R. A. 593.

As to real-estate brokers' commissions as affected by the negligence, fraud, or default of the principal, and a defective title, see *note to Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

As to fraud and secret dealings or interest of real-estate brokers as affecting their commissions, including the concealment of the fact that the brokers themselves are the real purchasers, see *note to Leathers v. Canfield* (Mich.) 45 L. R. A. 33.

J. H. H.

sale, and not to the defendant. The question is whether, under the circumstances disclosed in this case the failure of the plaintiff to communicate this information to the defendant was, as matter of law, a breach of good faith, so as to preclude a recovery by the plaintiff. The general rule is well settled that a broker must act with entire good faith towards his principal, and he is bound to disclose to his principal all facts within his knowledge which are or may be material to the matter in which he is employed, or which might influence the principal in his action, and, if he has failed to come up to this standard of duty, he cannot recover. This rule has been frequently applied where the broker has concealed from the knowledge of his principal the fact that he was acting for both sides, as in *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, and similar cases, or that he was personally interested, directly or indirectly, in the transaction, as in *Smith v. Townsend*, 109 Mass. 500, and in *Porter v. Woodruff*, 36 N. J. Eq. 174; and the principle is applicable wherever the broker has an interest of any kind in the transaction antagonistic to that of his employer, or where he is so situated as to be subject to temptation to act adversely to his employer. Story, Agency, § 210; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499. In every such case good faith requires that the principal should be informed of the facts. The true identity of the purchaser, also, may be sometimes a material fact which ought to be known to the principal, since such knowledge might affect his action; and illustrations of this are to be found in the reported cases. In *Young v. Hughes*, 32 N. J. Eq. 372, for instance, it appeared that one Moore, who became the real purchaser, was at the time of the negotiations a tenant of the land to be sold; that he had had some prior agreement with the owner, by which he had either agreed to buy, or had taken the refusal of, the property, at the price of \$20,000; that he was desirous of buying, but believed that the owner might be unwilling to treat with him on as favorable terms as with a stranger. He therefore employed one Hughes to act for him, and the broker, who knew Moore's motives, and that Hughes was acting for him, introduced Hughes as an intending purchaser, without disclosing to the owner, his principal, the fact that Hughes was acting for Moore. The principal contracted to sell to Hughes for \$13,000. The court said that the failure to disclose Moore's connection with the purchase was a breach of duty on the part of the broker. Again, in *Pratt v. Patterson*, 112 Pa. 475, 3 Atl. 858, Harding, the real purchaser of the land, was desirous also of purchasing some land adjoining, and fearing that, if it was known that he was the purchaser of the land in question, the owners of such adjoining land would advance the price, put forward one Nott, his clerk, as the purchaser. Harding was responsible financially, while his clerk had no means. The broker knew all this, but, by an arrangement between him and Harding, reported to his principal that Nott was the

purchaser; and his name was put in the written contract of sale as such, and the name of the real purchaser was never communicated to the seller. The land was sold for \$140,000, of which only \$30,000 was to be paid in cash, and the remainder by the purchaser's bond, secured by a mortgage upon the land. The court held that this concealment by the broker precluded his recovery. In each of these cases it is easy to see that the identity of the real purchaser proposed might have had a very marked influence upon the action of the principal. In the first case it might have induced him to stand out for a higher price, and in the last for a better bond. No doubt, there are other situations in which, for financial or personal reasons, the identity of the purchaser may have a very material influence upon the seller, either to induce him to sell or to refrain from selling. On the other hand, it is easy to conceive of cases where the identity of the purchaser is of no consequence to the seller, and can have no influence upon his action, and can in no sense be regarded as a material fact. In the case at bar the jury have found that the plaintiff acted solely for the interest of the defendant, and in no way in his own interest or that of Delaney or Williams. The sum obtained was that originally named by the defendant as the price she desired. No note or other security was given for the purchase money, or any part thereof, but the full sum was paid in cash. The defendant therefore had no interest in the financial responsibility of the purchaser, and the identity of the purchaser, so far as that was concerned, was absolutely immaterial. In this respect the case plainly differs from cases like *Pratt v. Patterson*, 112 Pa. 475, 3 Atl. 858. It further appears that neither the defendant nor her husband had any remaining business property in the town. It does not appear that she was interested in any other property whatever which might in any degree be affected by the occupancy or ownership of the property sold. Nor does it appear that there had been any prior dealings between the defendant and Delaney about the property, nor even that she knew, or cared to know, either Delaney or Williams. Nor does it appear that Delaney's desire to conceal his name was for the purpose of procuring the property at a lower rate, or that it had any connection whatever with the defendant's interests in the transaction, nor that the plaintiff supposed, or had any reason to suppose, that it had any such connection. Nor was it a matter in which the plaintiff had any interest whatever. And even now it is not suggested by the defendant in what way or for what purpose it was of any interest to her to know beforehand that Delaney, and not Hughes, was the real purchaser, or how the knowledge of such a fact was or could be useful or beneficial to her, or would or could have influenced her in her decision. Under the circumstances, we think it cannot be said, as matter of law, that the identity of the real purchaser was a material fact which should have been communicated



to the defendant, and that in concealing it from her the plaintiff was guilty of such a breach of good faith as to preclude a recovery by him. The first and seventh requests

therefore were rightly refused. There appears no error in the manner in which the court dealt with the other requests.  
*Exceptions overruled.*

# KENTUCKY COURT OF APPEALS.

Caleb POWERS, Appt.,

v.

COMMONWEALTH of Kentucky.

(.....Ky.....)

1. No pleading is necessary to support the production of a pardon in a criminal case.
2. A pardon by one who received a certificate of election as governor, and who was inducted into office, but whose title has been adjudged invalid in a contest duly inaugurated, in which another has been declared elected, is of no effect.
3. An indictment for conspiracy to procure a murder will not be adjudged insufficient because of lack of grammatical construction, if its meaning is plain and a person of ordinary intelligence could not be misled as to the nature of the charge.
4. Upon trial of an indictment for criminal conspiracy to murder, evidence is admissible of threats by an unknown person who was subsequently seen among guards under control of the alleged conspirators, but not of statements by persons in no-wise identified as members of the conspiracy.
5. Evidence that a witness for the prosecution had said that that hundred thousand dollars could be taken and Jesus Christ and the twelve apostles convicted does not show that he was bribed, and is properly excluded.
6. A witness to avoid impeachment for contradictory statements may explain the meaning of spoken words, but not of written ones unless ambiguity exists.
7. Evidence of statements by one of the conspirators to murder, that the killing had been determined upon and pardons prepared in advance, is admissible against co-conspirators.
8. Evidence of statements made at a meeting in a public place, indicating violent and improper intentions, is admissible upon trial of an indictment for conspiracy to murder, as tending to show the existence of the conspiracy.
9. One on trial for conspiracy to murder, against whom evidence has been introduced of statements by members of an assemblage tending to show the conspiracy, has a right to introduce evidence of all that was done at the meeting.
10. An instruction permitting one charged with conspiracy to murder to be found guilty as an accessory before the fact, whether he was present at the time of the shooting or not, is not prejudicial error

**NOTE.**—For earlier cases in this series as to the liability of one engaging in conspiracy to do an unlawful act, for murder committed by co-conspirator, see *United States v. Lancaster* (C. C. S. D. Ga.) 10 L. R. A. 833; and *State v. Taylor* (Vt.) 42 L. R. A. 878.

See also, in connection with the above case, that of *Taylor v. Beckham* (Ky.) 49 L. R. A. 258.

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where there is no evidence that accused was present.

11. It is not sufficient to charge one with murder that the killing was in pursuance of his advice, counsel, or encouragement, unless it was induced thereby.
12. One who advises and counsels the killing of members of the legislature is guilty of murder without any reference to the question whether he engages in a conspiracy to do or procure the doing of some other unlawful act, if, in pursuance of such advice and counsel, and induced thereby, a member is killed.
13. An erroneous instruction may be corrected after four of the five speeches to the jury on each side of the case have been made.
14. To render one responsible for an act committed in furtherance of a conspiracy, his will must contribute to the thing actually done, so that if the conspiracy is to commit a wrongful act not requiring a depraved, wicked, or malignant spirit a conspirator merely as such will not be guilty of murder in case, in carrying out the common design, a co-conspirator kills a person.
15. One charged with conspiracy to murder is entitled, where the evidence tends to show a conspiracy to bring a large number of men to the state capitol to alarm legislators, to have the jury pass upon the question whether the killing of a legislator would necessarily or probably result from such an assemblage.
16. To render a conspirator guilty of a murder committed by a co-conspirator it must have been committed in furtherance of the conspiracy, and have been the necessary and probable result of the execution of the conspiracy.
17. A conspirator cannot be convicted upon the testimony of an accomplice or accomplices, unless such testimony is corroborated by other evidence tending to connect him with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.
18. Failure to charge, in an indictment for conspiracy to murder, that the killing was done in pursuance to and in furtherance of the conspiracy, is not fatal if defendant is directly charged with counselling, aiding, and procuring the killing, and that, having been so counseled, aided, and procured, the co-conspirators did commit the offense.
19. The principal need not be named in the indictment, to justify conviction of an accessory before the fact to the crime of murder.

*On rehearing.*

20. The denial on cross-examination, by a witness for the prosecution, of statements indicating that his testimony was purchased, may be contradicted.

(*Paynter, Ch. J., and White and Hobson, JJ., dissent.*)

(*Du Relle, Burnam, and O'Rear, JJ., dissent from Proposition 7.*)

(March 28, 1901.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Scott County convicting him of being an accessory to a murder. *Reversed.*

The facts are stated in the opinion.

**Messrs. James B. Finnell and George Denny**, for appellant:

One to whom a certificate of election has been issued by the proper legal authorities, and who has accepted and been installed into office, and who is performing the duties of the office under color of title and by the authority thus conferred, and is performing these duties while in possession of the office, and in the place where they are to be performed, is in fact a *de facto* officer, and his acts are binding upon the public and upon every citizen of the commonwealth, and fully protect every citizen of the commonwealth.

*State ex rel. Fairbanks v. Snohomish County Super. Ct.* 17 Wash. 12, 48 Pac. 741; *State ex rel. Van Amringe v. Taylor*, 108 N. C. 196, 12 L. R. A. 202, 12 S. E. 1005; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *Leach v. Cassidy*, 23 Ind. 449; *State ex rel. Leal v. Jones*, 19 Ind. 358, 81 Am. Dec. 403; *State v. Durkee*, 12 Kan. 314; *Braidv. v. Theritt*, 17 Kan. 471; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 412; *Waterman v. Chicago & I. R. Co.* 139 Ill. 658, 15 L. R. A. 418, 29 N. E. 689; *Weatherford v. State*, 31 Tex. Crim. Rep. 530, 21 S. W. 251; *Cooley, Const. Lim.* 5th ed. 750; *Smith v. Cansler*, 83 Ky. 372; *Stine v. Berry*, 96 Ky. 67, 27 S. W. 809; *Creighton v. Com.* 83 Ky. 147; *Field v. People ex rel. McClernand*, 3 Ill. 79; *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *State ex rel. Coogan v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65, 22 Atl. 686; *Hallgren v. Campbell*, 82 Mich. 255, 9 L. R. A. 408, 46 N. W. 381; *Hamlin v. Kassafer*, 15 Or. 458, 15 Pac. 778; *Angell & A. Priv. Corp. & 287*; *State ex rel. Jones v. Oates*, 86 Wis. 634, 57 N. W. 296.

The pardon granted by the *de facto* governor is valid and binding upon the public, and protects the one named herein.

*Oliver v. Jersey City*, 63 N. J. L. 634, 48 L. R. A. 412, 44 Atl. 709; *Ex parte Johnson*, 15 Neb. 512, 19 N. W. 504; *State ex rel. Grosshans v. Gray*, 23 Neb. 365, 36 N. W. 577; *Morton v. Lee*, 28 Kan. 286; *Norton v. Shelby County*, 118 U. S. 445, 30 L. ed. 187, 6 Sup. Ct. Rep. 1121; *Carli v. Rhener*, 27 Minn. 292, 7 N. W. 139; *Leach v. People ex rel. Patterson*, 122 Ill. 420, 12 N. E. 726; *People ex rel. Ballou v. Bangs*, 24 Ill. 184; *Trumbo v. People*, 75 Ill. 561; *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786, 47 53 L. R. A.

N. W. 280; *Cooley, Const. Lim.* 5th ed. 751; *Morgan v. Vance*, 4 Bush, 324; *Creighton v. Com.* 83 Ky. 149; *Stine v. Berry*, 96 Ky. 67, 27 S. W. 809; *Patterson v. Miller*, 2 Met. (Ky.) 496; 17 Am. & Eng. Enc. Law, p. 330; *Ex parte Smith*, 8 S. C. N. S. 495.

**Messrs. John Young Brown, W. C. Owens, R. C. Kinhead, and James C. Sims** also for appellant.

**Messrs. Robert J. Breckinridge, R. B. Franklin, T. C. Campbell, and Joseph L. Meyer** for appellee.

**Du Relle, J.**, delivered the opinion of the court:

This appeal is from a judgment of conviction in the Scott circuit court, to which the case was transferred by change of venue from Franklin county, upon an indictment charging appellant as accessory before the fact to the murder of William Goebel. The indictment charges the murder to have been the result of conspiracy between appellant and others, and is as follows: "The grand jury of the county of Franklin, in the name and by the authority of the commonwealth of Kentucky, accuse Caleb Powers of the crime of being accessory before the fact to the wilful murder of William Goebel, committed as follows, *viz.*: The said Caleb Powers, in the said county of Franklin, on the 30th day of January, A. D. 1900, and before the finding of this indictment, unlawfully, wilfully, feloniously, and of his malice aforethought, and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and others to this grand jury unknown, and did counsel, advise, encourage, aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and other persons to this grand jury unknown, unlawfully, wilfully, feloniously, and of their malice aforethought, to kill and murder William Goebel, which one of the last five above-named persons, or another person acting with them, but who is to this grand jury unknown, so as aforesaid then and there, thereunto by the said Caleb Powers before the fact counseled, advised, encouraged, aided, and procured, did, by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel ball and other hard substances, and from which said shooting and wounding the said Goebel died on the third (3d) day of February, 1900, but which of said last above-mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel is to this grand jury unknown; against the peace and dignity of the commonwealth of Kentucky."

In the discussion of the questions involved, we shall state such facts only as are necessary to a correct understanding of the questions considered and decided, and those

facts will be stated in connection with the questions to which they relate.

On the trial a pardon was produced, purporting to have been issued by W. S. Taylor, as governor of Kentucky, dated March 10, 1900. The production of this paper was accompanied by filing what is termed in the record a "plea of pardon." As we understand the law, no plea was necessary. The simple production of a valid pardon of the offense whereof appellant was charged would put an end to the proceedings, and render void any proceeding thereafter taken in the trial.

In order to decide the validity of the paper produced as a pardon, we must consider the situation at the time it was issued. This court takes judicial notice of the official signature of any officer of this state (Ky. Stat. § 1625), and is presumed to know judicially who is the executive of the state at any time the fact is called in question. *Devees v. Colorado Co.* 32 Tex. 570. See also 12 Am. & Eng. Enc. Law, p. 162, and notes. It is conceded by counsel upon both sides that the court can take judicial cognizance of the facts necessary to the decision of this question.

On January 30, 1900, William Goebel, a member of the Kentucky senate, was shot by an assassin in the state-house yard, in front of the capitol building, at Frankfort, and died some days later. This occurred during a period of political excitement and bitterness perhaps unexampled in the history of the commonwealth. William Goebel, William S. Taylor, and John Young Brown had been candidates for the office of governor of Kentucky at the preceding November election. The state board of election commissioners, elected under the act of March 11, 1898, examined and canvassed the returns of election, and issued a certificate of election to W. S. Taylor. This gave a prima facie title to the office to Taylor, who accordingly was duly inaugurated as governor, took the oath of office, and took possession of the state building, and the archives and records appertaining to the office. This did not give him an absolute, indefeasible title to the office of governor, but his title was subject to be defeated by the determination of a contest for the office. *State ex rel. Fairbanks v. Snodgrass County Super.* Ct. 17 Wash. 12, 48 Pac. 741. Until the certificate was set aside in some appropriate proceeding, he was entitled to retain possession and perform the duties of the office without interference. If the time should pass within which such proceeding might be instituted, that title became absolute and indefeasible. A contest was instituted by Goebel before the legislature, and was pending at the time of the murder, as were also contests before the state board of contest for the minor state offices, certificates of election to which had been issued to the candidates upon the same ticket with Taylor. After the shooting, the militia was called out by Taylor, and the legislature prevented from meeting in the state capitol, and at certain other places at which they attempted

to hold meetings. The records of the legislature show, however, that a meeting was held, at which it was determined by the legislature that William Goebel, and not William S. Taylor, had been elected governor of Kentucky, and that J. C. W. Beckham, and not John Marshall, had been elected lieutenant governor. After Goebel's death, Taylor retained possession of the executive building, archives, and records, and continued to act as governor. Beckham opened an office in the Capital Hotel, a few blocks away from the capitol, which was called the "governor's office," and he also acted as governor. There were thus two persons present at the seat of government, each claiming to be governor *de jure*, and each assuming to perform the duties of the office. Only one of them could, by any possibility, be governor *de jure*, and only one of them could be governor *de facto*. *State ex rel. Harris v. Blossom*, 19 Nev. 312, 10 Pac. 430. The legal doctrine as to *de facto* officers rests upon the principle of protection to the interests of the public and third parties, and not upon the rights of rival claimants. The law validates the acts of *de facto* officers as to the public and third persons upon the ground that, though not officers *de jure* they are in fact officers whose acts public policy requires should be considered valid. *Oliver v. Jersey City*, 63 N. J. L. 634, 48 L. R. A. 412, 44 Atl. 709. So, when both are acting officially, that one who has the title *de jure* is both *de jure* and *de facto* officer. Especially must this be so when the act whose validity is questioned is not an act affecting the rights of third parties, but is an act of the commonwealth's grace asserted against the commonwealth. So the question is narrowed to an inquiry as to who was *de jure* governor on March 10, 1900. The legislative record shows that the general assembly determined the contest. By the Goebel election law of March 11, 1898 (Ky. Stat. § 1596a, subsec. 11), that decision was a judgment determining the title to the office. It was a self-executing judgment: "When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is not adjudged to another it shall be deemed to be vacant." If this judgment of the legislature was valid and final, it settles the question. In an opinion of this court, from which the writer of this opinion dissented emphatically, and in the views of which dissent Judge O'Rear concurs, in the case of *Taylor v. Beckham*, 21 Ky. L. Rep. 1735, 49 L. R. A. 258, 56 S. W. 177, it was said that the judgment of the legislature was final and conclusive. That decision settled the question finally, and the pardon must be adjudged invalid. The authorities upon this question are collated more fully in the opinion of Judge White, who concurs upon this question.

The next question in logical order is as to the sufficiency of the indictment. It has been set out in full. It is objected that the acts constituting the offense are not stated in "ordinary and concise language," so as

to enable one of "common understanding to know what is intended." We think the objection is not well taken. The indictment notifies the defendant that he is charged with conspiring to procure the murder of Goebel, that he procured the murder, and that the murder was done by someone who was by the defendant counseled and procured to do the act. In attempting to parse this indictment, there is at first blush some difficulty. The use of the word "which" in the clause, "which one of the last five above-named persons," etc., is somewhat ambiguous; but, on careful examination, it seems to be used as a relative pronoun, whose antecedent is found in the clause, "to kill and murder William Goebel." There is, however, no trouble as to the meaning, nor do we think a person of ordinary intelligence could be misled as to the nature of the charge. As said by the Massachusetts court in *Com. v. Call*, 21 Pick. 515, 32 Am. Dec. 284: "The grammatical and critical objections, however ingenious and acute they may be, cannot prevail. The age has gone by when bad Latin, or even bad English, so it be sufficiently intelligible, can avail against an indictment, declaration, or plea. The passage objected to may be somewhat obscure, but, by a reference to the context, is capable of pretty certain interpretation." In our opinion, the indictment is sufficient.

In the grounds relied on in the motion for a new trial it is stated that the court overruled the motion of appellant, after the regular panel of the jury was exhausted, to draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that, in a case concerning which so much feeling existed, the simple and easy mode was not adopted which would have put beyond cavil the question of the accused having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial.

We need not consider the debate between court and counsel, which is complained of in the argument, as it is not necessary to the decision of the case, and in the nature of things cannot, upon a subsequent trial, occur as it did in the trial now under review.

Complaint is made that the witness Watts was permitted to state a conversation with an unknown person, who made threats of violence concerning the legislature. It was afterwards shown by the witness, however, that he subsequently saw the unknown person, in the uniform of a sergeant, among the guards in charge of the capitol square. On the trial of offenses committed in furtherance of conspiracies, there must be considerable latitude left to the discretion of the trial court in the admission of testimony of circumstances tending to show that acts apparently isolated have sprung from a common object. As said by Judge King in *Com. v. McClean*, 2 Para. Sel. Eq. Cas. 368: "The adequacy of the evidence, in a prosecution for a criminal conspiracy, to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question 53 L. R. A.

for the jury." This testimony seems to have been admissible to go to the jury for what it was worth, in support of the theory of the commonwealth as to the nature of the conspiracy charged. The rule as to the admission of evidence in such cases is nowhere better stated than in Carson's edition of Wright on Criminal Conspiracies, p. 218. Says Mr. Carson: "The concise, yet comprehensive, statement of Mr. Archbold may be accepted as a correct epitome: 'Wherever the writings or words of any of the parties charged with, or implicated in, a conspiracy can be considered in the nature of an act done in furtherance of the common design, they are admissible in evidence, not only as against the party himself, but as proof of an act from which, *inter alia*, the jury may infer the conspiracy itself.' Wherever the writings or words of such a party amount to an admission merely of his own guilt, and cannot be deemed an act done in furtherance of the common design, in that case they can be received in evidence merely as against the party, and not as evidence of the conspiracy, and in strictness ought not to be offered in evidence until after the conspiracy had been proved *aliunde*; but wherever the writings or words of such a party, not being in the nature of an act done in furtherance of the common design, merely tend to implicate others, and not to accuse himself, they ought not to be received in evidence for any purpose." Tested by this rule, the language testified to by the witness McDonald, as to a conversation between two unknown men, in no wise identified as members of any conspiracy, or connected in any manner with those alleged as the co-conspirators with appellant, is clearly incompetent.

The testimony of the witness Sinclair as to telegrams was competent. As suggested by counsel for the commonwealth, if true it would tend to show the telegrams were written and sent before the killing.

The trial court refused to allow the witness J. C. Owens to testify as to a conversation with the accomplice—witness Wharton Golden. The question sought to bring out the fact that Golden had said that someone—possibly meaning one of the counsel for the prosecution—"could take that hundred thousand dollars and convict Jesus Christ and the twelve apostles." Evidently this conversation was asked for on the theory that it tended to show the witness was not impartial, and that he had an interest in the result of the case. If it did so, it was not collateral or irrelevant to the issue, and Golden having been asked in regard to it, and his answer being adverse, the defense would have the right to contradict him by other testimony for the purpose of discrediting him. *Stephen, Digest of Ev. art. 180; 1 Greenl. Ev. 446; Schuster v. State*, 80 Wis. 107, 49 N. W. 30; 3 Best, Ev. 221. But we are unable to see that the statement sought to be proved against Golden indicates any interest. At the most, it could indicate only that, in his opinion, witnesses could be obtained by bribery. No

inference that he himself had been bribed can be drawn from the language, without violent exercise of the imagination. In our opinion, it was collateral to the issue and was properly excluded.

Some of the witnesses for the defense, upon cross-examination with a view to impeachment by contradiction, were not permitted to explain the statements they made. We are of opinion that this view of the rule is too narrow. In 3 Best, Ev. § 229, what we regard as the correct rule is thus stated as to the requirement that the witness's attention shall be called to the supposed contradiction: "The rule which prescribes this condition rests on the principle of justice to the witness. The tendency of the evidence was to impeach his veracity, and common justice demands that before his credit is attacked he should have an opportunity to declare whether he made such statements to the person indicated, and to explain what he said, and what he intended and meant in saying it."

The court refused to instruct the jury that the statements of the witnesses Reed and Hazlewood as to a conversation with the witness Sparks should be considered as affecting only the interest and credibility of Sparks. These statements to which Reed and Hazlewood testified were to the effect that the killing of Goebel had been determined upon, and pardons prepared for the perpetrators. Assuming that there was evidence to connect Sparks with the conspiracy charged, these declarations, if admissible, were evidence in chief. But we do not think they were competent at all as against appellant. They were not part of the *res gestæ*, or such as tended to promote the common object. The rule is thus stated in Mr. Carson's edition of Wright on Criminal Conspiracies [p. 217]: "But if the acts and declarations of a conspirator with the accused are made in his absence, they are not admissible against him to prove either the body of the crime or the existence of the alleged conspiracy, unless they either so accompany the execution of the common criminal intent as to become part of the *res gestæ*, or in themselves tend to promote the common criminal object. The acts and declarations of a conspirator, to be admissible in evidence to charge his fellows, must have been concomitant with the principal act, and so connected with it as to constitute a part of the *res gestæ*." The cases of *Clawson v. State*, 14 Ohio St. 234, and *State v. Larkin*, 49 N. H. 39, 6 Am. Rep. 456, fully support Mr. Carson's text, as does also the third instruction given by the court on its own motion in *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898: "The acts of each defendant should be considered with the same care and scrutiny as if he alone were on trial. If a conspiracy having violence and murder as its object is fully proved, then the acts and declarations of each conspirator in furtherance of the conspiracy are the acts and declarations of each one of the conspirators; but the declarations of any conspirator before or after 53 L. R. A.

May 4, which are merely narrative as to what has been or would be done, and not made to aid in carrying into effect the object of the conspiracy, are only evidence against the one who makes them." We cannot conceive how these statements which were merely narrative of what had been or would be done, could be held to be made in aid of the object of the conspiracy charged. What is here said as to the testimony of Reed and Hazlewood expresses the views only of Judges Burnam, O'Rear, and the writer of this opinion; the majority of the court being of opinion that the evidence is competent.

On January 25, 1900, as shown by testimony for the commonwealth, there was a meeting in front of the capitol, at which speeches were made and resolutions adopted. Testimony was introduced by the commonwealth of actions and statements of certain persons who were apparently members of this assemblage, indicating violent and improper intentions. This evidence, we think, was proper, under the circumstances. But the defense was not permitted to show what the resolutions were which were adopted. The declarations of the members of this meeting were admitted, and were admissible, on the ground that they were acts part of the *res gestæ*, and were themselves evidence to go to the jury to show the existence of the conspiracy charged. If the statements of persons in the crowd were admissible, the defense had a right to all the statements of the crowd that could be shown, because they occurred at the same time and place, and in the same connection. If the commonwealth proved part of what was done there, the defense might prove all that was done; if the commonwealth showed violent language to have been used, the defense had the right to show that peaceable language was also used; and, if the acts or expressions of individual members of the meeting are shown for the purpose of showing an evil intent in all, surely the official utterance of the body might be shown for what it was worth, to rebut the inference that the views of the individuals were the views of the entire body. In 1 Roberson, Ky. Crim. Law, p. 149, § 107, the rule is stated: "The acts and declarations of the defendant and his associates may be received in evidence as well in his favor as against him, when they are a part of the *res gestæ*, or a conversation offered by the prosecution, but not statements at other times."—referring to *Cornelius v. Com.* 15 B. Mon. 539. The introduction of the commonwealth's testimony made the testimony for the defense admissible.

By the exceptions to the admission and rejection of testimony many other questions of evidence are presented which are not referred to in the briefs, but we think the principles which should govern their decision have been sufficiently stated in this opinion, and in the opinion in *Howard v. Com.* 22 Ky. L. Rep. 1845, 61 S. W. 756.

We shall next consider the instructions of the court. There seems to be no objection

to the first instruction. The second is objected to for the reason that there is no repetition of the phrase, "if the jury believe from the evidence beyond a reasonable doubt." This phrase, however, at the beginning of the instruction, clearly applies to every one of the ingredients detailed therein as constituting guilt of the offense charged. It not only applies grammatically, but, we think, could not be otherwise understood by a person of average intelligence.

It is objected to the third instruction that it permits the jury to find appellant guilty "whether he was present at the time of the shooting or wounding or not," and that the jury were thereby permitted to find a verdict of guilty upon the theory that he was present, notwithstanding he is charged only as accessory before the fact, and, if present, would not be an accessory, but a principal, in either the first or second degree. This objection is not tenable, for there is no testimony tending in the slightest degree to show that appellant was present at the time of the shooting. On the contrary, all the testimony shows he was elsewhere. It could therefore, under no supposition, have prejudiced him. This part of the instruction would have been more directly applicable to the case presented if, instead of the phrase quoted, the court had used language similar to that used in the fifth instruction, "although he was not present at the time of the shooting or wounding."

The fourth instruction is also objected to. It is as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant, Caleb Powers, conspired with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, James Howard, Berry Howard, Charles Finley, W. S. Taylor, Harlan Whitaker, Richard Combs, Henry Youtsey, or either or any of them or other person or persons unknown to the jury acting with them, to bring a number of armed men to Frankfort, for the purpose of doing an unlawful or criminal act, in the pursuance of such conspiracy defendant did advise, counsel, or encourage the killing of members of the legislature, said William Goebel being a member thereof, and said Goebel was killed in pursuance of such advice, counsel, or encouragement, then the defendant is guilty of murder, whether the person who perpetrated the act which resulted in the death of William Goebel be identified or not; and, if the killing of said William Goebel was committed in pursuance of such advice, counsel, or encouragement, and was induced and brought about thereby, it does not matter what change, if any, was made by the conspirators, if any was made, as to their original designs or intentions, or the manner of accomplishing the unlawful purpose of the conspiracy." This instruction seems open to the objection that, after the words, "and said Goebel was killed in pursuance of such advice, counsel, or encouragement," there should be added the words, "and said killing was induced thereby," or an equivalent expression. It is also objected that it as-

sumes the fact to exist that Goebel was a member of the legislature, when that was a matter to be proved.

A further objection to this instruction is that the recital of a conspiracy to bring armed men to Frankfort, for the purpose of doing an unlawful or criminal act, is unnecessary to the instruction, and it might tend to confuse the jury. If, without any conspiracy, appellant advised and counseled the killing of members of the legislature, and in pursuance of such advice and counsel, and induced thereby, the killing of Goebel was done, he was guilty of murder, without any reference to the question whether he engaged in a conspiracy to do, or to procure the doing of, some other unlawful act. But it is not necessary to consider whether these objections amount to reversible error.

The objections to the fifth and sixth instructions do not seem to us to be valid.

The seventh instruction is as follows: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant Caleb Powers conspired with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or any one or more of them, or with some other person or persons unknown to the jury, acting with them, or either of them, to do some unlawful act, and that in pursuance of such conspiracy, or in furtherance thereof, the said Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or some one of them, or some other person unknown to the jury acting with them, or with those who conspired with the defendant, if any such conspiracy there was, to do an unlawful act, did shoot and kill William Goebel, the defendant is guilty, although the jury may believe from the evidence that the original purpose was not to procure or bring about the death of William Goebel, but was for some other unlawful and criminal purpose." After the instruction had been given, and after four of the five speeches upon each side had been made to the jury, this instruction was amended as follows: "The words 'some unlawful act,' as used in this instruction, mean some act to alarm, to excite terror, or the infliction of bodily harm." We do not regard the amendment of the instruction as improper on account of the time at which it was done. If the court erred in the instruction given, it was, we think, its right and its duty to so amend it as correctly to state the law. Abundant time remained for the discussion to the jury of the amendment, and the trial court would doubtless have further extended it upon that account if requested.

In considering the other objections to this instruction, it is necessary to examine the doctrine of the responsibility of one conspirator for the acts of his co-conspirators in furtherance of the common design, although not specifically intended by him. This doctrine, in its application to the varying facts of individual cases, is founded

upon several distinct and well-recognized legal principles, not, however, always distinguished by the earlier writers; and, first, there is the common-law doctrine which transfers the evil intent of a person attempting one kind of crime to the unexpected results produced by his acts. If a man in the commission of a wrongful act, were it only a civil trespass, committed another wrong unmeant by him, he was punishable. So, if he attempted to kill one individual, and by accident killed another, whether by striking, shooting, giving poison, or in any other way, as his intent was murder, and slaying was accomplished, he was guilty of murder. So, also, if, in the attempt to commit one variety of crime, an entirely different crime was accidentally accomplished, the malice of the intended crime was imputed to the act done, in all cases where general evil intent was a constituent of the committed act. In the application of this doctrine, a distinction was made resting upon the grade of the intended offense. If the crime intended was a felony, as at common law practically all felonies were punishable with death, either with or without benefit of clergy, the felonious intent of the intended crime was imputed to the committed act, and, if it were homicide, made it murder; for it was considered immaterial whether a man was hanged for one felony or another. If he succeeded in his original felonious design, his intent was sufficiently evil to justify hanging. If he, by misadventure, accomplished another offense requiring general malevolence, the evil intent of the intended act, being sufficient to justify the death penalty, was imputed to the act committed. His intent, if successful, was worthy of death; the deed he did was worthy of death, if it had that intent; and so it was considered by the judges as making no difference whether the committed act was the one intended. On the other hand, if the intended act was not felonious, a resultant homicide was not murder, but manslaughter. So we find that unlawfully, but not feloniously, to shoot at the poultry of another, and thereby accidentally to kill a human being, was manslaughter; but as larceny was, at common law, a felony, if the shooting were done with intent to steal the poultry, the homicide was murder. But as with advancing civilization the savage cruelty of the ancient English common law, under which some hundreds of offenses were punished with death, became softened by statutory amendment, this doctrine, even in Great Britain, became modified. The reason for its existence, that it made no difference to the prisoner or the judges for what reason the death penalty, or its practical equivalent, was inflicted, having failed, the doctrine itself ceased to be applied with its ancient rigor; and in *Reg. v. Faulkner*, 19 Moak, Eng. Rep. 578, we find a case in which a sailor, who, in attempting to steal rum, accidentally set fire to the spirits, and thereby burned the ship, was held not guilty of arson. An interesting discussion of this

doctrine is found in 1 Bishop, New Crim. Law, chap. 21.

With the adoption of the English common law in the various jurisdictions in this country, and its modification by statute, there came the question whether this doctrine applied to statutory felonies which were not felonies at common law. In some of the jurisdictions it was held without qualification that it did. It may be remarked that, in many of the earlier cases, the attempted offense was abortion; and it may be that the moral turpitude of this offense, not at common law a felony, had effect in determining the question. It was held in a Maine case (*Smith v. State*, 33 Me. 43, 54 Am. Dec. 607), and the same doctrine was announced in a number of cases, that the grade of the committed offense depended upon the graduation of the attempted offense by the statute, and not upon the common-law classification. This is also justified upon the ground that, such an attempt being done without lawful purpose and dangerous to life, malice is imputed. But in that case it was held that procuring a miscarriage resulting in death was manslaughter only, as such procuring was a misdemeanor. This doctrine was emphatically stated by Chancellor Walworth, delivering the opinion of the New York court in *People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197, holding "that as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of a killing of a human being by a person who is engaged in the perpetration of a newly-created felony. So, on the other hand, when the legislature abolishes an offense which at the common law was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely."

This doctrine, manifestly, should have no application in a jurisdiction where, as in Kentucky, every offense punishable by confinement in the penitentiary, no matter for how short a term, has, by one sweeping enactment, been raised to the grade of felony (Ky. Stat. § 1127), except it be qualified by the limitation foreshadowed by Mr. Bishop (1 Bishop, New Crim. Law, § 336), "by requiring the act towards the proposed crime to have a natural tendency to produce the unintended result." This limitation has been indicated in a number of cases of attempted crime which resulted in the commission of a wrong not intended. It has, as we shall see, been applied with striking unanimity in the modern cases of conspiracy. We take it there can be no question of its application in this state. To illustrate: Under our statute, the removal of a corner stone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his

fellows accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation.

This doctrine of imputed malice was a part of the common law as to conspiracy (1 Bishop, New Crim. Law, § 633), though, as said by Mr. Bishop, "the books furnish little judicial reasoning on the question." So, also, was the doctrine that "a sane man must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. 3 Greenl. Ev. §§ 13, 14; *Rex v. Farrington*, Russ. & R. 207; *Com. v. Webster*, 5 Cush. 305, 52 Am. Dec. 711." 3 Best, Ev. § 286. Underlying the whole law of conspiracy is the doctrine of agency. As said by Mr. Bishop (1 Bishop, New Crim. Law, § 631): "Since in law an act through an agent is the same as in person, one who procures another to do a criminal thing incurs the same guilt as though he did it himself. Nor is his guilt the less if the agent proceeds equally from his own desires or on his own account." It is on these principles that it is said in Wharton, Crim. Law, § 220: "All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime." This is a correct application of the principle, for the reason that "there is a general presumption in criminal matters that a person intends whatever is the natural and probable consequences of his own action." 1 Phillipps, Ev. 632. Besides the various groups of facts which, in the older books, are held to constitute murder under one or the other of these principles, we find classed with them a number of cases where the responsibility is really that of principal in the second degree, under the law as now administered; that is, the responsibility of one "who is present, lending his countenance, encouragement, or other mental aid, while another does the act," and who, by the ancient law, was accessory at the fact. 1 Bishop, New Crim. Law, § 648. They are thus grouped because the responsibility was the same, whether the homicide was committed in the attempt to commit a felony, and was therefore murder under the doctrine of imputed malice; whether it was done by the defendant by himself or his agent, or "happened in the execution of an unlawful design, which, if not a felony, is of so desperate a character that it must ordinarily be attended with great hazard to life; and *a fortiori*, if death be one of the events within the obvious expectation of the conspirators" (*Foster*, Crown Law, 261; *United States v. Ross*, 1 Gall. 624, Fed. Cas. No. 16,196), in which case malice was imputed from the dangerous nature of the act engaged to be done; or whether it occurred with the defendant standing by and ready to help, if necessary, in which case he was accessory at the fact by the ancient law, and aider and abettor and principal in the

second degree under the present practice. Illustrating this grouping of crimes, we find it stated in 1 Hale, P. C. 441 (quoting from Mr. Dalton, p. 241): "Note, also, that if divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act, or ready to aid him, although they did but look on." And in 1 East, P. C. 257, it is said: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent dis-sesin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, at their peril, abide the event of their actions." As we have indicated with regard to unintended results of intended wrongful acts done by the offender in person, the common-law doctrine of imputed felonious intent has been modified. With much greater uniformity has this doctrine been disregarded in cases of conspiracy, so that for many years the test of guilt in such cases has in no wise depended upon the doctrine of imputed felonious malice, but either upon the doctrine of aider and abettor, or upon the doctrine that the act for which the accused is to be held responsible must be, either expressly or by implication, within the scope of his agency, and upon the legal presumption that he intends the necessary or probable consequences of his acts, whether done by himself or through the agency of another. In every case his will must contribute to the thing actually done. This change has taken place in strict accord with the principles of growth which are a part of the common-law system. The ancient doctrine in one of its applications depended upon the existence in the accused "of a depraved, wicked, and malignant spirit," which would justify the death penalty if he succeeded in his undertaking. That spirit was supposed to exist whenever the act attempted was a felony. But such a doctrine, manifestly, can have no application to a class of offenses the commission of which does not, and cannot, indicate such a spirit. And when, in many of the states of this country, we made the question of felony depend upon the place in which a brief imprisonment might be passed, and acts were made statutory felonies which by the ancient law were not offenses at all, and were then not even considered to be morally wrong, the doctrine that felonious malice could be imputed, so as to transform incidental homicide into murder, passed away forever. The reason of the rule passing, the rule passed also; and, in place of looking to the graduation of the attempted wrong under the statutory classification, we look to that on which the ancient classification was founded,—"the depraved, wicked, and malignant spirit"



which the offender actually had in his heart, or which we impute to him because we suppose him to have intended the necessary or probable consequences of that which he actually did or tried to do. This is upon the wise, just, and humane principle which has enabled the common law to adapt itself to the changing necessities of human society, and has made it, as Burke said, "an edifice having the principles of growth within itself." The law, as declared to-day, is in exact accord with what has been said. It is so stated in the textbooks and the cases.

In 1 Roberson, Ky. Crim. Law, pp. 133, 134, § 101, it is said: "No responsibility attaches, however, for acts not contemplated, and which are not within the purpose of the conspiracy, or the natural consequence of executing that purpose; and the question is for the jury whether the act done was in furtherance of the common purpose, or independent of it, and without any previous concert."

In the article on *Conspiracy*, by Mr. Archibald R. Watson (6 Am. & Eng. Enc. Law, 2d ed. p. 870), the doctrine as to the responsibility of a conspirator for acts of co-conspirator is thus stated: "When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all. And this mutual coequal responsibility of each conspirator for the acts of his associates, done pursuant to, and in furtherance of, the common design, extends, as well, to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan. This doctrine, however, holding each conspirator liable for the acts of his associates, as well as for the consequences of such acts, is subject to the restriction indicated in the statement of the rule, namely, that it is only for such acts as are naturally or necessarily done pursuant to and in furtherance of the conspiracy, and for the natural or necessary consequences of such acts, that a co-conspirator is responsible. And it is for the jury to determine whether an act done by a member of a conspiracy is done in furtherance of the common design, as well as what are the natural and necessary consequences of such acts."

In *Martin v. State*, 89 Ala. 115, 8 So. 23, a case of murder, it was said: "When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, and encourage each other in whatever may grow out of the enterprise upon which they enter, each is responsible, civilly and criminally, for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all, or less than all, of the conspirators. . . . 'It should be observed, however, that, while the parties are responsible for consequent acts growing out of the general design, they are not for

independent acts growing out of the particular malice of individuals.' 1 Wharton, Crim. Law, § 397. And this is the general doctrine on the subject. *Smith v. State*, 52 Ala. 407; *Jordan v. State*, 79 Ala. 9; *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179; *Amos v. State*, 83 Ala. 1, 3 So. 749; 1 Bishop, New Crim. Law, § 849."

In *Gibson v. State*, 89 Ala. 121, 8 So. 98, an indictment for murder, the law was thus stated by Judge Somerville: "There was evidence tending to show a conspiracy on the part of the defendants to attack the deceased,—circumstances from which the jury were authorized to infer a common design, at least, to assault and beat him. Each would therefore be criminally responsible for the acts of the other in prosecution of the design for which they combined, i. e., for everything done by the confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. The law on this subject is fully discussed in *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179, and in *Martin v. State*, 89 Ala. 115, 8 So. 23."

In *Evans v. State*, 109 Ala. 22, 19 So. 535, there seems to have been some evidence from which the jury might have inferred a combination to do an unlawful act, and the court said: "If several conspire to do an unlawful act, and death happens in the prosecution of the common object, they are all alike guilty of the homicide. Each is responsible for everything done, which follows incidentally in the execution of the common purpose, as one of its probable and natural consequences, even though it was not intended, or within the reasonable contemplation of the parties, as a part of the original design. *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179; *Gibson v. State*, 89 Ala. 122, 8 So. 98; *Martin v. State*, 89 Ala. 115, 8 So. 23; *Tanner v. State*, 92 Ala. 1, 9 So. 613; *Jolly v. State*, 94 Ala. 19, 10 So. 606. The thirtieth charge was a proper one, and should have been given." The thirtieth charge referred to was as follows: "(30) The court charges the jury that if they believe from the evidence that Boman, Crawford, and Evans went to the house of Alice Palmer on the night the killing is said to have been done, and an offense was committed by one of them from causes having no connection with the common object for which they went there, the responsibility for such offense rests solely on the actual perpetrator of the crime, and the jury cannot find the defendant guilty simply because he happened to be present at the time the offense was committed."

*Bowers v. State*, 24 Tex. App. 548, 7 S. W. 247, was a case of mayhem, the maiming being done in the course of the execution of a conspiracy to whip. Said the court: "Upon the subject of the responsibility of a conspirator for the acts of his co-conspirators, the rule, as we deduce from the authorities, is that each conspirator is responsible for everything done by his confederates

which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. 1 Wharton, *Crim. Law*, 9th ed. §§ 214-220, 397; 1 Bishop, *Crim. Law*, 7th ed. §§ 640, 641; *Lamb v. People*, 96 Ill. 73; *Ruloff v. People*, 45 N. Y. 213; *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Ala. 37; *Williams v. State*, 83 Ala. 16, 3 So. 616; *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165. . . . In the recent and celebrated case of *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, the court said: 'Whether or not the act done by a member of a conspiracy naturally flowed from, and was done in furtherance of, the common design, are questions of fact for the jury.' We are of the opinion that the court erred in not submitting the question above stated to the jury, accompanied by proper instructions explaining the rules of the law hereinbefore announced."

*Com. v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705, was an indictment for murder, the homicide occurring during a riot growing out of the enforcement of a draft of men for the army. An instruction was asked that, whether the deceased was killed by a shot from within or without the armory, all the parties unlawfully engaged in the homicide were at common law guilty at least, of manslaughter. It was said by Bigelow, Ch. J.: "There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable *criminaliter* for the acts of each and all who participate with him in the execution of the unlawful design. . . . These citations, to which many others of a similar tenor might be added, show that the rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a party, for which his associates and confederates are to be held liable, must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together. Without such limitation, a person might be held responsible for acts which were not the natural or necessary consequences of the enterprise or undertaking in which he was engaged, and which he could not, either in fact or in law, be deemed to have contemplated or intended. No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act, in either sense, unless committed by his own hand, or by some one acting in concert with him, or in

furtherance of a common object or purpose.

. . . The real distinction is between acts which a man does either actually or constructively, by himself or his agents or confederates, and those which were done by others acting, not in concert with him or to effect a common object, but without his knowledge or assent, either expressed or implied. For the former, the law holds him strictly responsible, and for all their necessary and natural consequences, which he is rightfully deemed to have contemplated and intended. For the latter, he is not liable, because they are not done by himself, or by those with whom he associated, and no design to commit them, or intent to bring about the results which flow from them, can be reasonably imputed to him."

The case of *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, which is the celebrated case of the Chicago anarchists, was much criticised at the time the decision was rendered as extending the doctrine of criminal responsibility for acts of co-conspirators beyond reasonable limits. Much of this criticism seems to have arisen from the fact that, in the opinion of the court of last resort, those instructions only were stated and discussed of which complaint was made by the accused, and little, if any, notice taken of the counter instructions given on the motion of the defendants, or by the court on its own motion, which limited, qualified, and explained the instructions asked by the prosecution. Under the Illinois practice, it seems to be the custom to give instructions asked by the prosecution and to give counter qualifying or limiting instructions asked by the defense, and for the court to add such general instructions as it deems necessary. The instructions in this case are given at length in Sackett, *Instructions to Juries*, 2d ed. 707 *et seq.*, and an examination of them shows that, with respect to the acts shown in that case, they fully give the limitation which we think should have been either given in the seventh instruction now under consideration, or embodied in a separate instruction, namely, that the accused was not guilty of murder unless the killing was the necessary or probable consequence of the act conspired to be done. Seemingly actuated by a desire to err, if at all, upon the safe side in a case which had excited such deep feeling, the court in that case gave instructions that if a reasonable doubt was raised in the minds of the jury "by the ingenuity of counsel, upon any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal;" that a verdict of not guilty meant only that the guilt had "not been demonstrated in the precise, specific, and narrow forms prescribed by law;" that they were not to convict upon mere suspicion; that the burden was on the prosecution, and that the presumption of innocence was not a mere form. In instruction 36 the jury were told: "It will not do to guess away the lives or liberty of the people, nor is it proper that the jury should guess that the person who threw

the bomb which killed Degan was instigated to do the act by the procurement of the defendants, or any of them; that fact must be established beyond all reasonable doubt in the minds of the jury, and it will not do to say that, because the defendants may have advised violence, therefore, when violence came, it was the result of such advice. There must be a direct connection established, by credible testimony, between the advice and the consummation of the crime, to the satisfaction of the jury beyond a reasonable doubt." And in instruction 37 it was said: "Therefore the jury must be satisfied, beyond all reasonable doubt, that the person throwing said bomb was acting as the result of the teaching or encouragement of the defendants, or some of them, before the defendants can be held liable therefor, and this you must find from the evidence." Several other instructions were given upon this line, notably instructions 35 and 36.

There seems to be no material or substantial difference of opinion among the members of this court as to the propriety of such a limitation as we have indicated. The difference is upon the question whether the failure to give to the jury such a limitation of the doctrine was prejudicial error. To consider this question, we must refer to the contentions on behalf of the commonwealth and the accused, as shown by the evidence. On behalf of the commonwealth, the evidence was directed to showing that there existed a bloody-minded conspiracy, having for its object the killing of various members of the legislature, and especially the killing of Goebel; that the accused, who held a certificate of election as secretary of state, and whose office was in contest, was a party to this conspiracy, with full knowledge of its atrocious object, and in pursuance and furtherance thereof was instrumental in bringing armed men to the state capital to assist in its execution. On the other hand, the evidence for the defense was directed to establishing the fact that the men who were brought to Frankfort were brought for the purpose of peacefully assembling to petition the legislature, in the exercise of the privileges guaranteed to them as citizens in the Bill of Rights, and that such of them as bore arms bore them openly, and solely for the purpose of self-protection. Between these two extremes of object in the proof there was room for many varieties of purpose which might be ascribed to the assemblage, and there was some evidence to support almost any of the theories which might thus be constructed. There was evidence to support the theory that the assemblage was for the purpose of impressing the minds of the members of the legislature by the physical presence of a large number of men. This might be regarded as a species of intimidation, and need not imply the intent to do actual violence. And this view was submitted by the court to the jury, though without the necessary limitation as to its effect; for by the amendment the jury were instructed that the purpose was unlawful if

it was "to alarm, to excite terror, or the infliction of bodily harm." There was undoubtedly evidence to support the theory that there was a combination; that the purpose of the assemblage was to alarm, and to do nothing else. Whether that evidence was to be believed or not was a question solely for the jury, under proper instructions. The accused had the right to have the jury pass upon the question whether that was the sole object of the assemblage, and upon the further question whether the killing of Goebel necessarily or probably would result from such an assemblage. It will not do to say that because the judges would have disregarded such evidence had they been jurors at the trial it is not prejudicial, for the jurors are the sole judges of the weight of the evidence, and to hold otherwise would be for the court to assume to perform those functions which from time immemorial have been regarded as within the sacred province of the jury.

It was said by Judge Lewis in *Bowlin v. Com.* 94 Ky. 395, 22 S. W. 543: "In fact, it is not the province of the lower court, any more than of this, to weigh evidence for the purpose of determining whether a person on trial for his life is entitled to an instruction as to manslaughter. But, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis." See also *Bush v. Com.* 78 Ky. 269; *Buckner v. Com.* 14 Bush, 603; *Brown v. Com.* 14 Bush, 398.

In *Gibson v. State*, 89 Ala. 121, 8 So. 98, it was said: "The testimony of the defendants themselves tended to support every phase of the instruction requested. It mattered not that this testimony may have sprung from parties deeply interested, and have been contradicted by many disinterested witnesses, so as to be entitled to but little weight in the estimation of the trial judge. It was for the jury, and not the court, to pass on the credibility of the witnesses and the sufficiency of the evidence. Every prisoner at the bar is entitled to have charges given which, without being misleading, correctly state the law of his case, and are supported by any evidence, however weak, insufficient, or doubtful in credibility. The charge under consideration was a correct enunciation of the law, and, being supported by the evidence, its refusal must operate to reverse the judgment of conviction. *McDaniel v. State*, 76 Ala. 1."

We are clearly of opinion that the instruction as given was not only erroneous, but highly prejudicial. This instruction should be qualified by requiring the jury to believe that the murder was committed in furtherance of the conspiracy, and was the necessary or probable result of the execution of the conspiracy.

The eighth instruction is as follows: "The jury cannot convict the defendant upon the testimony of an accomplice unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration

ration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." It is objected to this instruction that it permits the jury to find guilt from the unsupported testimony of more than one accomplice, and instruction No. 2 was asked by the defense in these words: "The evidence of an accomplice in this case is not sufficient to convict unless the same is corroborated by other evidence tending to show the commission of the offense, and connecting the defendant therewith, and the evidence of one accomplice or co-conspirator does not and cannot corroborate another accomplice or co-conspirator." The instruction asked and refused may not be strictly accurate in form, for it may be said that while one accomplice by his testimony does, or at least may, corroborate another, nevertheless the idea is accurate that they do not corroborate each other for the purpose of conviction, in the absence of other testimony. The jury should have been told that they could not convict the defendant upon the testimony of an accomplice or accomplices, unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. In 2 Roberson, Ky. Crim. Law, p. 1076, it is said: "If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other." In *United States v. Logan*, 45 Fed. 872, it was held that a conviction for a conspiracy cannot be had on the uncorroborated testimony of a co-conspirator, nor can conspirators corroborate each other. See also 1 Greenl. Ev. § 381, and *Smith v. Com.* 13 Ky. L. Rep. 369, 17 S. W. 182. This doctrine is distinctly recognized in *Blackburn v. Com.* 12 Bush, 181. It is agreed that this was erroneous, but there is variance of opinion as to whether it was prejudicial. Unless we can assume to invade the province of the jury, and weigh the evidence, this instruction was necessarily prejudicial, or, at least, may have been so. The most material testimony upon the question whether the conspiracy was to murder was that of confessed accomplices, and if the jury, in the exercise of their prerogative, disbelieved the other evidence upon this question, they might have reached a different conclusion had they been told that they could not convict upon the uncorroborated testimony of accomplices. Our views upon this question are sufficiently stated in considering the prejudicial character of the seventh instruction.

For the reasons given, *the judgment is reversed*, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

**White, J., dissenting:**

Not agreeing with the views of the majority of the court on all the questions presented, we feel that the importance of the questions justifies us in this separate and dissenting opinion. Appellant, Caleb Powers, 53 L. R. A.

was indicted in the Franklin circuit court charged with the crime of being accessory before the fact to the wilful murder of William Goebel. On change of venue, the prosecution was taken to Scott county, and there tried; the result being conviction, the punishment being confinement in the penitentiary for life. Appellant's motion for a new trial being denied, he appeals.

The indictment reads, after the caption: "The grand jury of the county of Franklin, in the name and by the authority of the commonwealth of Kentucky, accuse Caleb Powers of the crime of being accessory before the fact to the wilful murder of William Goebel, committed as follows, viz.: The said Caleb Powers, in the said county of Franklin, on the 30th day of January, A. D. 1900, and before the finding of this indictment, unlawfully, wilfully, feloniously, and of his malice aforethought, and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, Jno. L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and other persons to this grand jury unknown, and did counsel, advise, encourage, aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and others to this grand jury unknown, unlawfully, wilfully, feloniously, and of their malice aforethought, to kill and murder William Goebel, which one of the last five above-named persons, or another person acting with them, but who is to this grand jury unknown, so as aforesaid, then and there, thereunto by the said Caleb Powers before the fact counseled, advised, encouraged, aided, and procured, did, by shooting and wounding the said Goebel, with a gun or pistol loaded with powder and other explosives, and leaden and steel ball and other hard substances, and from which said shooting and wounding the said Goebel died on the 3d day of February, 1900, but which of said last above-mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel, is to this grand jury unknown; against the peace and dignity of the commonwealth of Kentucky. Robt. B. Franklin, Commonwealth's Atty., 14th Cir. Ct. Dist.

Upon arraignment, appellant filed a special plea, producing a paper purporting to be a pardon issued by W. S. Taylor, governor, dated March 10, 1900, and asked to be discharged from custody. The court refused to discharge the appellant, thereby refusing to recognize the paper purporting to be a pardon as valid. Appellant then demurred to the indictment, which was overruled by the court, and that action is assigned as error. Appellant, after his special plea of pardon and his demurrer were both overruled, pleaded not guilty, and trial was had, with the result as stated.

The question of the sufficiency of the indictment, going to the very foundation of the prosecution, should be first considered: for, if the objection be good, the other questions

are not necessary to a consideration of the case. The charge laid in the indictment is that appellant is guilty of being accessory before the fact to the wilful murder of William Goebel. The accusing part is that appellant did conspire with Culton and others named, and other persons unknown, and did counsel, advise, encourage, aid, and procure Youtsey and others named, and others to the grand jury unknown, unlawfully, wilfully, feloniously, and of their malice aforethought to kill and murder William Goebel, with the further charge that it was unknown what person actually did the killing. The indictment then says these acts were done, "so as aforesaid, then and there thereunto by the said Caleb Powers, before the fact counseled, advised, encouraged, aided, and procured, did by shooting," etc., kill William Goebel.

Two objections are presented to the indictment and urged as fatal. One objection is that it is not charged in terms that the killing was done in pursuance to and in furtherance of the conspiracy charged to have been entered into. The other objection is that the principal (the one who actually fired the fatal shot) is not named, but the charge is that Youtsey, etc., or another person to the grand jury unknown, did the killing. The court is agreed that neither of these objections is tenable, and is agreed that the indictment is sufficient. While the indictment does not contain the words usually found, "in pursuance to, and in furtherance of, the conspiracy," yet it does say that appellant, Powers, did counsel, encourage, aid, and procure Youtsey, etc., wilfully, feloniously, and of their malice aforethought, to kill and murder William Goebel, and then charges, "so as aforesaid then and thereunto by the said Caleb Powers, before the fact, counseled, advised, encouraged, aided and procured, did, by shooting," etc., kill William Goebel. This charge is direct and certain that appellant is accused of counseling, aiding, encouraging, and procuring Youtsey, etc., to commit a wilful murder, and that, having been so counseled, advised, aided, and procured, they, or one of them did commit the murder. Instead of using the words so often used, "in pursuance to, and in furtherance of," the conspiracy, the indictment charges how it was done, so that appellant would be charged as accessory before the fact if he counseled, aided, or procured the murder to be done, and the conspiracy charged failed in the proof; that is, as to the other than the actual principal.

As to the other proposition, that the principal must be named before the accessory before the fact could be convicted, the court is agreed that this point is likewise without merit. This precise question was presented in the New York court of appeals in *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122, on an appeal by the prosecution. In a very exhaustive opinion, reviewing all the common-law authorities, the court held the indictment good. Again, in the case of *United States v. Babcock*, 3 Dill. 623, Fed. Cas. No. 14,487, the court held such an indictment 53 L. R. A.

valid. In *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223, the indictment charged a conspiracy with certain named persons, "and other persons," the word "unknown" being omitted, yet the court held the indictment good. In the *Anarchist Case (Spies v. People)* 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, this question was again presented, and, after an exhaustive review of all authorities, the court concluded the indictment was valid. This last case went to the supreme court on application for a writ of habeas corpus, and the indictment was held to charge a crime, and writ denied. These cases ought to settle the question beyond controversy. We are all agreed that the indictment is sufficient, and the demurrer thereto was properly overruled.

Counsel for appellant seriously and ably present the question that the pardon issued March 10, 1900, by W. S. Taylor to appellant, is valid and binding on the state, and that upon its production the appellant should have been discharged. The position of counsel on that point is that on the 10th day of March, 1900, W. S. Taylor, was *de facto* governor of the state, and so continued until the decision of the Supreme Court of the United States rendered May 21, 1900, (*Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1137, 20 Sup. Ct. Rep. 890, 1009), and that until Taylor surrendered the office, or was ousted after the mandate of the supreme court was issued, he was a *de facto* officer, and his acts were binding. It is said that the judgment of the circuit court and of this court was superseded, and that as a consequence J. C. W. Beckham acquired no more rights under the judgment in that case than before it was rendered; that as Taylor had been awarded the certificate of election, and had been inaugurated as governor, he held that he was ousted by due process of law, or vacated. It is also suggested that the court will take judicial notice of the official public acts, as well as the signature of the chief executive; that the court must judicially know who is the governor at any given time. We take it to be well settled that there cannot be two *de facto* officers for the same office, to be filled by only one person, at the same time. If, on March 10, 1900, Taylor was *de facto* governor, then on the same day Beckham was not, and *vice versa*. Counsel for appellant cites in support of his position the case of *State ex rel. Fairbanks v. Snohomish County Super. Ct.* [17 Wash. 16, 48 Pac. 742] of April 12th. and quotes as follows: "One in possession of an office by virtue of a certificate of election issued by the proper officer, and regular upon its face, is entitled to retain possession and perform the duties of the office, without interference, until such certificate is set aside in some appropriate procedure." A case in 82 Mich. 255, 9 L. R. A. 408, 46 N. W. 381 (*Hallgren v. Campbell*), is also cited, where the court said: "There could not be two incumbents of this office." The case of *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, is also cited. The court there

said: "An 'office' is defined to be a right to exercise the public function or employment, and to take the fees and emoluments, belonging to it, and Chief Justice Marshall says: 'He who performs the duties of that office is an officer.' From the inherent nature of an office, no less than from reasons of public policy, there cannot be two persons in possession of an office at the same time." The definition of Lord Ellenborough in *Rea v. Bedford Level*, 6 East, 368, is cited by counsel to support the contention that Taylor was *de facto* governor March 10, 1900. This definition is: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." The definition of Judge Cooley, in his work on Constitutional Limitations, is also cited. It reads: "An officer *de facto* is one who, by some color of right, is in possession of an office, and for the time being performs its duties, with public acquiescence though having no right in fact." There are many other citations to the same effect.

We do not propose to take issue with any of the authorities cited, for they seem to us to state the law clearly and correctly. The question is in the application. The court judicially knows that on the 31st day of January, 1900, the general assembly, in pursuance to the power given it under our Constitution, decided the contest over the office of governor in favor of the contestant, William Goebel. The court knows judicially that on that day William Goebel was inaugurated as governor; that he afterwards died, and J. C. W. Beckham became, by virtue of the law, he being lieutenant governor, the acting governor from the 3d day of February, 1900. The court further knows that it was decided by this court, and its decision was sustained by the Supreme Court of the United States, that the courts had no jurisdiction in the matter; that the decision of the contest before the general assembly was final and conclusive, from which there was no appeal. While W. S. Taylor executed a supersedeas bond to supersede the judgment of the circuit court and of this court, he did not and could not supersede the judgment and decision of the general assembly on the question as to whether he or William Goebel had been legally and duly elected governor in November, 1899. The appropriate procedure provided by law to set aside the certificate of election issued to W. S. Taylor is a contest before the general assembly, and when the contest was decided by that body, and the successful party took the required oaths, he became the governor. There is no writ provided, nor is one required, to induct a successful contestant into office, or remove an unsuccessful one from office. The judgment of a motion in the contest proceeding is self-executing. This judgment was not appealable, and therefore could not be suspended, arrested, or superseded. Even if the decision of contest had been appealable to any tribunal, it is well settled by authority that a supersedeas or writ of error will not prevent the

successful party in the contest from assuming the duties of the office. *State ex rel. Craig v. Woodson*, 128 Mo. 497, 31 S. W. 105; *People ex rel. Wagenseil v. Stephenson*, 98 Mich. 218, 57 N. W. 115; *Jayne v. Drorbaugh*, 63 Iowa, 711, 17 N. W. 433; *State ex rel. Matthews v. Chase*, 41 Ind. 356; *Elliott*, App. Proc. § 392, and case cited.

Stress is laid by the adjudicated cases on the color of right or title to the office, and not on the claim. In the case of *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184, the court of appeals said of the rule as to *de facto* officers: "It applies for the protection of third persons, or the public who have acquired rights upon the faith of an appearance of authority. . . . It does not apply where the official action is challenged at the outset, and before any person has been or can be misled by it. . . . His color of title was wholly destroyed by a public judicial decision, and he became a mere usurper and intruder, whose act was challenged at the moment it was done." In the case of *Oliver v. Jersey City*, 63 N. J. L. 634, 44 Atl. 709, cited by appellant as 48 L. R. A. 412, the court, speaking of the acts of a *de facto* officer said: "But this legal protection is not afforded where the defects in the title in the officer are notorious, and such as to make those relying on his acts chargeable with such knowledge. What, then, may be considered notice sufficient to warn third persons and the public? The expiration of the term of an officer, and the appointment or election and qualification of his successor, the resignation of a public officer, the abolition of the office itself by the act of the legislature, the refusal of the board or legislative body of which the officer is a member to recognize him, or the judgment of a court against the title of the officer are such facts as third persons and the public are, as a general rule, required to take notice of."

The decision of the contest by the general assembly was a judgment of the only court constituted by law to determine a contest over the office of governor, and of that decision the appellant is presumed to have had actual notice, and the public generally must take notice. The color of title that Taylor had by reason of the certificate of election and his inauguration was wholly destroyed by the judgment of the general assembly when the contest was decided against him, and thereafter, in the language of the court of appeals of New York, "he became a mere usurper and intruder, whose act was challenged at the moment it was done." The supreme court of Rhode Island, in the case of *Murphy v. Moies*, 18 R. I. 100, 25 Atl. 977, said: "Thus, it appears that reputation and acquiescence are controlling elements in determining the validity of official acts, as those of an officer *de facto*." Tested by this rule, it is clear that Taylor's acts on the 10th day of March, 1900, were not those of a *de facto* officer. His acts were not accepted by the lawmaking branch of the government. Prior to that day, and on that day, the senate had repeatedly ratified and confirmed the appointment of various and

sundry officers appointed by Governor Beckham, and both branches of the legislature had recognized Beckham as governor by presenting bills for his approval and signature, and he had in fact approved three of such. There was no acquiescence in the acts of Taylor on the 10th day of March, 1900. The rule that acts of a *de facto* officer are binding on the public and third persons cannot apply where the defects in the title of the assumed officer are notorious, and the persons dealing with him have notice of the facts. Mechem, Pub. Off. 328, and cases cited.

In this case, the appellant, being secretary of state when the contest was decided by the general assembly, must be conclusively presumed to have had knowledge of the defects in the title of Taylor, or rather that he thereafter had no title to the office. We think it clear, upon the plainest principles, that where a person has knowledge that one who assumes to be a public officer has, by a judgment of a competent tribunal, been adjudged not to have title to the office, such person cannot claim that the acts of such intruder and usurper are those of a *de facto* officer.

During the progress of the trial, many objections to the admission of testimony and many exceptions to the exclusion of testimony were made. Likewise objections and exceptions to instructions given and refused appear in the record, and, in order to an intelligent understanding of the case and the parts we propose to discuss here, we deem a short statement of the material facts the evidence tends to prove to be necessary.

These facts are that William Goebel was a member of the senate, and was also a contestant for the office of governor against W. S. Taylor, contestee, the case being heard before a joint committee, as provided by law. On the morning of January 30, 1900, after all the testimony in the contest case had been heard, while on his way to the session of the senate, and just in front of the state house, the contestant, William Goebel, was shot down, from which he died in a few days thereafter. The proof further tended to show, with reasonable clearness, that the shot was fired from a window in the private office of appellant, Caleb Powers, who was then secretary of state. (It had been agreed that the testimony heard before the committee on contest for governor should be heard and used on the trial of the contest over the office of secretary of state by C. B. Hill against appellant.) At the time of the shooting, the window was raised a few inches, and the blinds down. On that morning, just prior to the shooting, appellant Powers, together with his brother, John L. Powers, Walter Day, and F. W. Golden, had taken the train for Louisville. It is shown that on January 19, 1900, the militia company of Frankfort was secretly assembled, the members out of town were brought in, and board engaged for them in the city near the arsenal. This company was stationed at the arsenal, and given orders to be at all times in readiness to move on orders. They were drilled daily on up till the 30th, 53 L. R. A.

but in secret inside the arsenal. There were forty-four men in the company. It is also shown that about this time, probably 18th, a meeting was held, in which appellant was an active participant, if not the moving spirit, for the purpose of arranging to bring a large body of armed men from the eastern section of the state to Frankfort for the purpose, as appellant himself states it, of influencing the legislative action by their presence. These men were, as arranged in that meeting, to be brought from Bell, Harlan, Clay, Laurel, Whitley, Pulaski, Rockcastle, Metcalfe, and other counties. They were all to be brought over the Louisville & Nashville Railroad, and it seems, as first contemplated, were not to have tickets or passes, but were to climb on the train and come. To arrange for these men, and to have the requisite number come (there was about 1,500 contemplated), messengers were sent out to the various counties, and appellant provided these men with money to bring the men to the railroad stations. At this meeting to arrange for these men it was recognized that the undertaking was a serious one, appellant himself cautioning the persons present to secrecy, as they might all be indicted for conspiracy. To further arrange for these parties to come, the appellant, Powers, sent telegrams to parties in the eastern end of the state, to meet him on important business at London, Kentucky. Appellant had a conference there with some parties, and made further arrangements about the men coming on January 25. There was a third conference, at Barbourville, relative to the same matter, by appellant with other parties, Charles Finley, F. W. Golden, and John L. Powers being present. It was there determined that the men should have tickets and should come as passengers. In the town of Barbourville, there were two companies of militia. John L. Powers was the captain of one company, and J. F. Hawn the captain of the other. While at Barbourville, January 22, 1900, appellant addressed to Adj. Gen. Collier a letter, as follows:

My Dear Sir:

There are two of the companies in this end of the state that refuse to go unless they are called out regularly. The London company, under Capt. E. Parker, and the Williamsburg company, under Capt. Watkins, of Williamsburg, are the ones. We must have these men and guns. We are undertaking a serious matter, and win we must. Send someone to London and Williamsburg with such orders as will have these two companies join us Wednesday night. Don't fail. If you will see to it, wire me to-morrow. Golden is improving. Capt. Hawn, of one of the companies here, refuses to deliver up the keys to the armory. Give him such orders as will give us the key. Wire me, and also write me. We will be there Thursday morning with twelve hundred men or more. Arrange board and lodging.

Very sincerely,

Caleb Powers.

Capt. Hawn, of the Barbourville company, had been asked to give the key to the armory to his lieutenant, after he himself had refused to bring his military company to Frankfort with the large crowd to come on the 25th, Thursday, and to permit the members to bring their arms, ammunition, and uniform along. All of this Capt. Hawn had declined before this letter was written by appellant. Before the large crowd was to come, appellant ordered printed badges on white ribbon, bearing the picture and autograph signature of W. S. Taylor, contestee for governor, which were distributed to the men on the train, and worn on their coat lapels.

On the morning of January 25, 1900, between 1,000 and 1,200 armed men were brought to Frankfort, according to this prearranged plan. They filled the regular passenger train, and had an extra train following. Powers himself came on one train with part of the men. As part of this large body, there were several companies of state militia, with their officers, in citizens' clothing, but their uniform underneath, and with their arms and equipments. When this large body arrived in Frankfort, they were marched from the train to the building where the adjutant general keeps his office, and their guns were checked and stacked in the office of commissioner of agriculture, which is next door to the adjutant general's office. Checks had been provided. The men kept their pistols for the most part, but their guns, army rifles, shotguns, and such like were checked. The men were then fed from provisions that had been brought from Louisville. These men were assembled and speeches made to them, and some resolutions adopted. On the night of the 25th, the same day they came, a large part of the men were sent home, but about 200, maybe more, picked men, were kept and remained in Frankfort, with general headquarters at the commissioner of agriculture office, up till after the shooting. They slept in the state buildings, and cooked and ate on the public grounds. It is shown that these men, from the 25th, the day they came, up till the very day of the shooting, were each day seen in crowds in front of the capitol building, and on the walks leading from the front gate, and on around the buildings.

On the morning that William Goebel was shot, although these men were here in the city, none were to be seen on the walks or public grounds. It is shown that within a short time of the shooting, variously estimated from ten to thirty minutes, the company of militia stationed at the arsenal were at the capitol grounds, and took possession thereof, and excluded the civil authorities. It is also shown that there were probably as many as twenty-five persons on the first floor in the executive building, from whence the shot came, at the moment it was fired; there were several persons in the secretary's public office, adjoining the one from whence the shot came. The governor himself, W. S. Taylor, who is accused with appellant, was within 50 feet of the assassin when the shot was fired, and heard

the shot. The capitol policeman, John Davis, who is also accused, was in the public office of the secretary of state, and heard the shot. The appointees of the governor, Todd, private secretary, and Stone, stenographer, together with appointees of appellant in the office of secretary of state, Davidson, Hemphill, and Matthews, and the colored porter, were also in the adjoining room to the private office. It was also proved that Youtsey, who is charged as one of the principals, bought smokeless powder and steel ball cartridges of the size and caliber of the one shown to have killed William Goebel, and that immediately after the shooting Youtsey ran down the steps into the basement of the executive building, through the barber shop that was then there, and out and around the building, and into it again from the other side, very much excited. The top of the stairway down which Youtsey ran is within a few feet of the door into the private office of appellant. It is shown that appellant locked that door upon starting for Louisville, but that John L. Powers had the day before given Youtsey a key, and there were but two known. It also appears that, before the 30th, Youtsey had described how Goebel could be shot from the private office from the window,—the identical plan afterwards carried out. In describing this plan, Youtsey said it was the slickest scheme yet to settle the contest. Just before the shooting Youtsey called and stationed a body of men in the hall near the door of the private office, and near the head of the stair, down to the basement, telling them something was going to happen. Besides all these circumstances proved, there was direct evidence of two or three admitted conspirators, showing that a conspiracy was formed and its objects.

Without contradiction, even by appellant himself, it is shown that he was the leading spirit in organizing and bringing this large body of men to Frankfort, and in keeping them here, as he says, to influence the legislature by their presence, and to resist by force of arms the legally constituted authorities in any attempt to oust Taylor or himself from office. Frequently before the shooting appellant expressed himself as being in favor of war rather than surrender the offices claimed. After the assassination appellant wrote to a friend in eastern Kentucky, in substance: "The disorganization of the Democratic party is due to me more than to any other person." It is also shown that appellant said that, if necessary, he would kill William Goebel to prevent him being governor, and again he said that with Goebel dead there was no other person who could hold the Democratic party together. Youtsey was seen in appellant's private office at the window, with a gun, and this appellant knew and saw, and was in the room with Youtsey alone, and had a conversation with him on Friday or Saturday before the killing on Tuesday, yet this conversation is not detailed by appellant, nor is its substance or subject stated. There were many other facts and circumstances



proved on the trial, all tending to show that there was a conspiracy formed by appellant with others, known and unknown, for the purpose of preventing Goebel being declared governor, and to use such force as might be deemed necessary to that end..

During the trial the prosecution introduced and had sworn Pat McDonald, who testified that on Saturday before Tuesday, January 30th, when Goebel was shot, two men came from upstairs, where the general assembly was in session, and had just decided the contested seat of Van Meter against Berry, by which decision Berry, a political adherent and supposed friend of Taylor, had been unseated, and Van Meter, a political adherent and supposed friend of Goebel, had been given the seat; and these two men went rapidly towards the front door of the capitol building, and one said: "Come on. Come on, boys; get your guns; it is time to begin the killing." Witness could not name these two men, nor did he describe them so as to be identified. However, witness did say they went out and around to the office of the commissioner of agriculture, where the guns had been checked on Thursday before, and where was general headquarters of the 200 or more men kept here, out of the large crowd of Thursday. The opinion of the court holds the evidence to be incompetent because the parties were not identified, nor was it pretended that appellant was present and heard the statement. We are of opinion that the evidence was competent. Proof had been introduced that tended to show that a part of the plan of the conspiracy was to raise a disturbance in the legislative hall over the Van Meter-Barry contest, and in the fight that followed the men left over from Thursday, who wore Taylor badges and were to be stationed in the gallery and lobby of the legislative hall, were to kill Democratic members of the legislature, so that on a joint vote Taylor could be declared the governor in the contest proceeding. We have said above there were some 200 men retained here from Thursday, and there was proof tending to show that this was a part of the plan and purpose of keeping them. Their headquarters were in the very room where these two men, whom McDonald heard and saw, went. Their guns were deposited there. The very matter had come up about which the disturbance was to be raised, and the result had been adverse to Taylor. These men are shown by McDonald not to have been citizens of Frankfort, for he lived here. We think it was sufficiently shown that these men belonged to the large number kept here, and this testimony also tended to corroborate the other testimony of the conspiracy and of the plan to kill members of the legislature. The time, the place, the circumstances, and the fact that they proposed then to do the thing that was contemplated, and they went to headquarters, so to speak, for their guns, we think sufficiently show that these two were acting in conjunction with others who are shown to have known of, and were detailed to execute,

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the plan of assassination in the legislative hall, to permit the proof to go to the jury. We agree with the court that this was important testimony, and we think it was properly admitted.

The appellant offered to read to the jury what purported to be the resolutions adopted at the meeting in front of the capitol on January 25th, by the large body of men, and the court refused to permit it to be read as evidence for any purpose, and the majority opinion holds this to be error. We cannot assent to this proposition. We do not think these resolutions were competent evidence for any purpose. There was no attempt on the part of the prosecution to prove any action on the part of the body assembled, nor of anything said by any speaker that addressed the body. Indeed, it was not proved by the prosecution that a meeting was held at all, except as an incident to fix a time and place of a certain conversation had between two persons, Noaks and John L. Powers. Noaks details the conversation this way: "While I was leaning against the pillar, John L. Powers came to me, and tapped me on the shoulder, and said, 'Bob, keep close into the building;' and I said, 'What is the matter?' and he said, 'Some of our men are upstairs, and when Goebel and some of the rest of them fellows come in there we are going to do the work for them.'" The witness said the conversation took place in front of the capitol building, while the meeting was going on. The witness did not attempt to detail anything that was done at the meeting. On the contrary, the witness gave this as a private conversation between himself and John L. Powers, an alleged co-conspirator with appellant. We do not understand upon what principle of law or rule of evidence that this would entitle appellant to prove what the public meeting did, nor what any one of the thousand persons engaged therein said or did. Appellant was entitled to the whole of the conversation between Noaks and John L. Powers, and this the court permitted; but the rule would not extend to the admission of what was or may have been said in private conversation by others there present while the meeting was in progress. We do not understand that the statements of John L. Powers, *supra*, were admitted because of the time and place they were spoken, but because it had been shown *aliunde* that John L. Powers acted with appellant in bringing the large crowd to Frankfort, and knew and understood the full object in thus bringing them. Indeed, John L. Powers at that time is shown to have had his military company here, with their uniforms, arms, and equipments, and was a leader in command, and, it might be said, spoke as one with authority. This evidence would have been admissible if spoken at any other time and place, and because Powers spoke to Noaks the words of caution or warning to be on the alert at the time the meeting was in progress did not and could not render admissible evidence of the public proceedings of the meet-

ing, as neither was a part of the other, nor explanatory thereof, and, in fact, had no connection the one with the other, save that of time and place. There was proof also of statements made by more persons in the crowd, but the whole of these declarations was admitted, and such proof did not warrant evidence of other statements made at a different time, even by the same parties, and at the same place.

There is a yet stronger reason why this testimony was properly excluded. The whole testimony tends to show that the plans and purposes, as well as the fact, of their coming, was kept secret from the public. Cipher telegrams were sent, and messages were signed by initial instead of the full name, and such like acts, to keep the matter secret. Secrecy was enjoined by appellant on all. "It was a serious business they were undertaking," to use an expression of appellant; and no rule of evidence would permit this armed body to prove for themselves, to establish their innocence, the fact that they held a public meeting on the capitol steps, and there passed resolutions declaring their peaceful mission and intentions, when, at the same time, they had arms and ammunition ready at hand in abundance, as well as smaller arms on their person. The law will not permit such proof as a person's own declarations of innocence to show that he is not guilty. Would any person suppose that this body of men would have assembled on the capitol steps, and by resolution have declared their purpose to be that of terrorizing and intimidating the members of the general assembly, "or," if necessary, to use Powers' words, "kill Goebel to prevent him being governor?" We say, if this was their purpose, would any person expect them to publicly so declare by resolution? If their purpose was a peaceable one, as the resolutions must of necessity declare, to be of benefit to appellant, why were all these warlike preparations made? Why these arms, ammunition, and soldier equipments brought? We think this testimony properly excluded.

It is also maintained that instruction 12 asked by appellant should have been given, to the effect that the evidence of A. R. Reed, J. B. Watkins, Zepakeal Seats, and N. C. Hazlewood could only be considered by the jury for the purpose of discrediting the witness Sparks, and not as substantive testimony against appellant. It is held by four members of the court that this testimony might have been considered as substantive evidence on the merits of the case if it had been given in chief, as there was testimony tending to show that Sparks was one of the conspirators, and, if this was true, his declarations were competent against appellant. It was on this ground the court below refused to give the instruction; but it is said that, although this testimony would have been competent on the merits if admitted in chief, it could only be considered for the purpose of discrediting Sparks, as it was not introduced in chief, but as a part of the state's rebuttal

testimony. There might be force in this position, if it appeared that appellant was in any wise prejudiced by the failure of the state to introduce this testimony at the proper point; but where he was not misled, and has had full opportunity to introduce all the testimony on the subject that he desired, there seems little force in the objection. The trial court has a discretion to admit evidence in rebuttal which should have been admitted in chief, when, under the circumstances, it may appear right to do so, especially in a case involving a great multitude of facts like this; and this court never interferes with the exercise of a discretion of this character, unless palpably abused. The trial court did, however, give the jury instruction 6, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt that a conspiracy was formed between the defendant and W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or either or any of them, or with others to the jury unknown acting in concert with them, or either of them, to kill William Goebel, then, after the formation of said conspiracy, if any, every act and declaration of each of the conspirators, done or said in furtherance of the common design, before the consummation thereof, became the act or declaration of all engaged in the conspiracy." Under this instruction, no statement of Sparks could be considered by the jury, unless he was one of the conspirators, and not then, unless it was made in furtherance of the common design. This was more favorable to the accused than the rule usually laid down by the authorities. "When the fact of a conspiracy has been proved or established by reasonable inference, the acts and declarations of one conspirator in furtherance of, or made with reference to, the common design, are admissible in evidence against his associates." 6 Am. & Eng. Enc. Law, 2d ed. p. 866. In the notes to the above, a large number of cases are collected. Under the instructions of the court as given, the testimony as to the declarations of Sparks could not be considered by the jury at all, unless it was shown beyond a reasonable doubt that Sparks was one of the conspirators, and the statements were made in furtherance of the conspiracy. We are therefore unable to see that the appellant has any ground of complaint in this matter.

It is also maintained that the court erred in giving to the jury instructions 4, 7, and 8; but it is difficult to perceive how either of these instructions furnishes any ground for a reversal of the judgment.

First. As to instruction No. 4: The idea the court aimed to present to the jury by this instruction was that if appellant conspired with others to bring a number of armed men to Frankfort for the purpose of intimidating the legislature in its action on the contest before it, and in pursuance of said conspiracy advised the killing of mem-

bers of the legislature, and Goebel was killed by those in conspiracy or acting with them, in pursuance of said advice, appellant was guilty of murder. If the phraseology of the instruction is changed as indicated in the opinion, it would read as follows: "(4) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Caleb Powers, conspired with . . . or either or any of them, or other person or persons unknown to the jury, acting with them, to bring a number of armed men to Frankfort for the purpose of doing an unlawful or criminal act, and in pursuance of such conspiracy defendant did advise, counsel, or encourage the killing of members of the legislature, and that said William Goebel was a member of the legislature, and was killed in pursuance of such advice, counsel, or encouragement, and that said killing was induced or brought about thereby, then the defendant is guilty of murder, whether the person who perpetrated the act which resulted in the death of William Goebel be identified or not, and it does not matter what change, if any, was made by the conspirators as to their original design, or the manner of accomplishing the unlawful purpose of the conspiracy." If the instruction is put in this shape, the sense will be in no wise materially different from that given by the court below and quoted in the majority opinion. It undoubtedly expresses a sound principle of law; for if appellant, and those acting in concert with him, brought the armed men to Frankfort for an unlawful and criminal purpose, and he, in furtherance of the conspiracy, advised the killing by them of the members of the legislature, and thus brought about the killing of Goebel, he was certainly guilty of murder, although a change was made in the plan or the manner of executing it. We are unable to see that there was any error in this matter. The words, "unlawful act," are defined in instruction No. 7, which will next be considered.

Second. As to instruction No. 7: In 1 Roberson, Ky. Crim. Law, § 100, the author, illustrating the rule that "a conspiracy to commit a crime may be consummated, and the conspirators become guilty thereof, although the plan is not executed in exact accordance with the original conception," well states the result of the authorities as follows: "So, if several persons conspire to invade a man's household, and go there armed with deadly weapons, for the purpose of attacking and beating him, and in furtherance of this common design one of them gets into a difficulty with him and kills him, the others being present or near at hand, the latter are guilty of murder, although they did not intend to kill. Where persons combine together for a general unlawful purpose, as 'to resist all opposers in the commission of a breach of the peace,' and for that purpose assemble together and arm themselves, thus intending to resist the lawfully constituted authorities of the country, they are all answerable for anything done in the execution of it, and it is no de-

fense that the parties had no well-defined or particular mischief in view as the result of their combination. If persons illegally concur in doing an act, they are guilty of a conspiracy, although they were not previously acquainted with each other. And the time when one entered into a conspiracy does not make any difference as to his responsibility for acts done to carry out the common purpose, the rule being that those who join in a conspiracy previously formed, and assist in its execution, become a party to all acts done by other parties, before or afterwards, in furtherance of the original design. The addition of new parties, subsequent to the formation of the conspiracy, does not destroy its identity, but it continues as the same conspiracy." In *Peden v. State*, 61 Miss. 268, several persons conspired to take the deceased from his house and whip him. In executing this purpose, one of them struck him a fatal blow with a spade, from which he died. All were held guilty of murder, whether they entertained a purpose to kill him or not. The same rule was announced in *State v. Shelledy*, 8 Iowa, 478; *Miller v. State*, 25 Wis. 384; and *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179. In 1 Hale, P. C. 441, the law is thus stated: "If divers persons come in one company to do an unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting him and consenting to the act, or ready to aid him, although they did but look on." The same principle applies to those who set on foot and procure the unlawful undertaking, though absent from the scene when the deed is done. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, and note. Thus, in *Brennan v. People*, 15 Ill. 512, several persons were indicted for murder. Instructions were asked to the effect that the jury should acquit certain of the prisoners unless they actually participated in the killing of the deceased, or the killing was done pursuant to a common design to take his life on the part of the prisoners and those doing the act. The court said: "Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide." The rule is thus clearly stated in 6 Am. & Eng. Enc. Law, 2d ed. p. 870: "When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all." And in a note this is added: "It is immaterial, as affecting the question

of coequal responsibility on the part of conspirators for the acts of each other, that one or more were not actually present at the consummation of the preconcerted design." At common law, if the object of the conspiracy be the commission of a felony, and a homicide is committed in carrying its design into execution, the killing is murder; and the authorities concur that if the unlawful act designed is dangerous, and probably requiring the use of force or violence, which may result in the taking of life, all the conspirators are criminally liable for whatever any of them may do in furtherance of the common design, whether they are present or not. 1 Bishop, New Crim. Law, §§ 633a, 636; *Lamb v. People*, 96 Ill. 73; *United States v. Lancaster*, 10 L. R. A. 333, 44 Fed. 896; *Boyd v. United States*, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292; *United States v. Ross*, 1 Gall. 624, Fed. Cas. No. 16,196; *People v. Brown*, 50 Cal. 351; *Reeves v. Territory* (Okla.) 61 Pac. 828.

Section 1241a, Ky. Stat. contains, among others, the following provision: "(1) If any two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming, disturbing, or injuring any person or persons, . . . they or either of them shall be deemed guilty of a felony, and upon conviction shall be confined in the penitentiary not less than one nor more than five years.' It will thus be seen that it is made a felony for two or more persons to confederate themselves together for the purpose of intimidating or alarming another. Following the authorities we have cited and the foregoing statute, the court gave the jury instruction No. 7, in these words: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, Caleb Powers, conspired with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or any one or more of them, or with some other person or persons unknown to the jury, acting with them or either of them, to do some unlawful act, and that in pursuance of such conspiracy, or in furtherance thereof, the said Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or some one of them, or some other person unknown to the jury, acting with them, or with those who conspired with the defendant, if any such conspiracy there was, to do the unlawful act, did shoot and kill William Goebel, the defendant is guilty, although the jury may believe from the evidence that the original purpose was not to procure or bring about the death of William Goebel, but was for some other unlawful and criminal purpose. The words 'unlawful act,' as used in this instruction, mean some act to alarm, to excite terror, or the infliction of bodily harm." Not a few authorities hold that if the conspiracy involves the commission of a felony, and a homicide is committed by any of the conspirators collaterally to the main design,

and not in pursuance of it, all are guilty of murder. It will be observed that the court did not so instruct the jury, but that by the instruction quoted above they were plainly told that the homicide must have been committed in pursuance of the conspiracy or in furtherance of it. The instruction was intended to present to the jury this phase of the case shown by the evidence: While the legislature had before it the election contest, appellant and a number of others entered into a conspiracy to bring to Frankfort a large body of armed men, some of them feudists, and others known for their dangerous character, for the purpose of intimidating the legislature in the discharge of its official duties, and pursuant to this conspiracy they got together about 1,000 men, and brought them to Frankfort. This body reached Frankfort on January 25th. Most of them were sent home that evening, but about 200 picked men were retained, and were still at Frankfort, armed, collected about the state house, and crowding the lobbies from day to day, until the deceased was killed, on January 30th. On January 25, a number of these men undertook to force their way into the hall of the house of representatives, and a catastrophe was then narrowly averted by the prudence of the speaker. A conspiracy of such a character was of necessity dangerous to life, and subversive of the foundations of the state government. No one realized the gravity of the undertaking better than appellant, for, in his letter written while getting his men together, he said, as quoted above: "We must have these men and guns. We are undertaking a serious matter, and win we must." His friend, the banker, John A. Black, says: "He said he wanted an armed mob, . . . and that it would likely have an influence over the legislature." As we understand the court, the instruction is held erroneous for the reason that it does not submit to the jury the question whether the homicide was the natural result of the conspiracy, or such a thing as might be ordinarily expected to happen. It is not necessary that the death of the deceased should have been contemplated as the probable result of the conspiracy. If the conspiracy was such that the conspirators must naturally have contemplated that it would result in violence, or that the infliction of personal harm upon others might reasonably be anticipated in its execution, then all are responsible for the homicide. On the facts of the case, it would have been both idle and improper to have submitted to the jury whether the death of the deceased was a result reasonably to be anticipated by those entering the conspiracy; for the character of the conspiracy was such as necessarily involved a show of force, and deeds of violence were plainly within its probable consequences. It is wholly immaterial whether the death of the deceased was anticipated, or the death of any other person in particular. Such a crime against good government cannot be tolerated among a law-loving people, and those who undertake to stop the ordi-

nary processes of the law by intimidation and force must be held responsible for all the consequences of what is done in furtherance of the design. The court might properly have instructed the jury, in plain words, that if there was a conspiracy to bring a band of armed men to Frankfort for the purpose of intimidating the legislature in the discharge of its official duties, and the men were so brought to Frankfort, and the deceased was killed in furtherance of this conspiracy, or in pursuance of it, by anyone of these men or of those in the conspiracy, appellant, if a party to the conspiracy, was guilty of murder. The instruction he gave is more favorable to the appellant than the one indicated; for the reason that it states to the jury the general rule of law, without directing their attention to the particular facts of the case. The court, no doubt, put his instruction in this form for the benefit of the appellant, and to conform to a line of decisions by this court condemning instructions giving prominence to certain facts. The instruction appears to us to be not only unobjectionable in point of law, but to be more favorable to the appellant than the law required.

Third. As to instruction No. 8: Section 241 of the Criminal Code of Practice provides: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed, and the circumstances thereof." Following the words of the statute, the trial court gave instruction No. 8, which is as follows: "The jury cannot convict the defendant upon the testimony of an accomplice, unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." It is maintained that the instruction is misleading, as there were several accomplices who testified on the trial, and under it the jury may have understood they were warranted in convicting on the testimony of one accomplice when supported by another, and that thus appellant might be convicted on the testimony of accomplices without other corroborating evidence. The statute clearly does not allow this; for this would be but a conviction "upon the testimony of an accomplice." The words, "unless corroborated by other evidence," clearly refer to other evidence than the testimony of an accomplice. The instruction is in the words of the statute, and conveys the same meaning, although the sense might have been made plainer by adding an "s" to the word "accomplice," and omitting the word "an," so as to make the clause read: "The jury cannot convict the defendant upon the testimony of accomplices, unless," etc.

The testimony of the accomplices as to the vital facts was corroborated by other evidence, and by circumstances established beyond question. It is clearly shown that 53 L. R. A.

appellant was not only a party to, but a leading spirit in, the conspiracy to bring to Frankfort and keep here the band of men, supplied with arms and ammunition. Such things are not done vainly or without a purpose. No jury of intelligence could believe that such an armament could be organized and brought to the seat of government but for the purpose of intimidation. Whether they might not also infer, from the fact that so many of the state militia were brought along dressed in citizens' clothes, that the purpose was to use this militia as state troops to protect them from arrest, or to hold their own against the civil authorities, we need not determine. In any view of the facts, the enterprise was a felony, producing a condition of anarchy at the state government, and the peace and good name of the state require that the majesty of the law should be upheld in such a manner that it will not be repeated. It, of necessity, contemplated such a state of things that violence, if not bloodshed, would follow in its wake, and, where a homicide was committed in furtherance of it, appellant, who was its director, was clearly guilty of murder.

To reverse the judgment of conviction on the facts which are either admitted, or so clearly established as to be beyond controversy, is not only to delay justice, but to give no force to the statute providing that such judgments may only be reversed when, on the whole record, the court is satisfied the substantial rights of the accused have been prejudiced. We therefore dissent from the opinion of the court.

**Paynter, Ch. J., and Hobson, J., concur in this dissent.**

A petition for modification having been filed, **Du Relle, J.**, on June 22, 1901, handed down the following response:

The court is of opinion that the defense should have been permitted to contradict the witness Sinclair's denial of a conversation asked for on cross-examination which tended, if true, to show that his testimony had been purchased. The majority are also of opinion that a witness may be permitted to explain what he meant by spoken words, but not what he meant by written words, unless ambiguity exists as to their meaning, and, further, that the rulings of the trial court as to the admissibility of explanations of written words were correct. To the extent indicated, the opinion is extended, and the petition is overruled.

Annie O. FITE, Appt.,

v.

W. E. FITE.

(.....Ky.....)

**A discharge in bankruptcy includes liability under a judgment for future**

NOTE.—For alimony as debt provable under state insolvency law, see the earlier case in this series of *Noyes v. Hubbard* (Vt.) 15 L. R. A. 394.

instalments of alimony, where the state law makes the husband an ordinary debtor under such judgment for a fixed sum of money that his estate is liable for in the same manner that it would be for a debt due upon any contract.

(February 28, 1901.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Bracken County discharging a rule against defendant to show cause why he should not be punished for contempt for failing to comply with the provisions of a judgment against him for alimony. *Affirmed.*

The facts are stated in the opinion.

*Messrs. George Doniphan and A. E. Willson* for appellant.

*Mr. F. T. Fox*, for appellee:

This debt, not being found or mentioned in any one of the four exceptions found in the bankruptcy act, is a provable debt, and consequently the bankrupt is released from it. In any event it is either a provable debt because not specified in the exceptions, or he is released by his discharge because this debt is not excepted by the law.

*Re Chambers*, 98 Fed. 865, 2 N. B. N. Rep. 864; *Tyler v. Tyler*, 99 Ky. 32, 34 S. W. 808; *Re Nowell*, 99 Fed. 931; *Re Van Orden*, 96 Fed. 86, 1 N. B. N. 475.

The judgment establishes the indebtedness, and becomes the evidence of the debt it creates.

*Black v. McClelland*, 12 Nat. Bankr. Reg. 481, Fed. Cas. No. 1,462; *Zimmer v. Schlee-hauf*, 115 Mass. 52; *Crouch v. Gridley*, 6 Hill, 250; *Nichols v. Dissler*, 31 N. J. L. 473, 86 Am. Dec. 219.

*Guffy, J.*, delivered the opinion of the court:

At the July term, 1898, of the Bracken circuit court, the appellant obtained a divorce from the appellee and was given the care and custody of their two infant children. It is further adjudged that the defendant pay the cost of the suit, including an attorney's fee of \$50 for plaintiff's attorney. The following also appears in the said judgment: "It is ordered and adjudged that from this date the defendant pay to the plaintiff, as and for alimony, the sum of twenty-five dollars per month, payable on the 7th day of each month henceforth, which may be collected by execution, or by other process or orders of this court." At the March term, 1900, of the said circuit court, the appellant, then plaintiff, moved the court to redocket the aforesaid case of Annie O. Fite against William E. Fite; and plaintiff claimed that the defendant has failed to pay any instalment of the alimony since the — day of —, 1899, and asked the court to enforce its order, and to issue a writ returnable forthwith against the defendant to show cause why he has so failed, and why he should not be punished for contempt. The plaintiff also moved the court to require the defendant to pay a monthly stipend for the support of the children awarded to her. The court proceeded to redocket the suit aforesaid, and issued the

rule prayed for, returnable to the March term, 1900, of the said court. The response of the defendant showed that since February 10, 1900, he was adjudged a bankrupt by the district court of the United States for the district of Kentucky, and filed his discharge in bankruptcy, and prayed that an order be entered enjoining the plaintiff and George Doniphan from further proceeding to collect said sums of money, or from enforcing said judgment against the defendant. The discharge referred to is as follows:

It is therefore ordered by this court that William E. Fite be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 24th day of November, A. D. 1898, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness: The Hon. Walter Evans, Judge of said District Court, and the seal thereof, this 15th day of June, A. D. 1900.

Thomas Speed, Clerk.

The reply of plaintiff traverses the factor claim that the discharge relied on by defendant is any bar to the collection of her claim. At the October term, 1900, of the said Bracken circuit court, the court, after reciting the matters and things in controversy, rendered the following judgment: "Upon proof heard and argument of counsel, the court finds, further, that the defendant is in arrears in the payment of the instalments of alimony to October 7, 1900, in the sum of \$417.41, and of that sum \$117.41 was due at the time of the filing of the petition in bankruptcy by defendant, and \$300 has since accrued; also that from and after the 7th day of October, 1900, the alimony instalments, at the rate of \$25 per month, are accruing and will accrue under the herein-after set out judgment; that alimony accrued and to accrue under the aforesaid judgment is a provable claim in bankruptcy, and the discharge of the defendant in bankruptcy operated as a discharge of all moneys due, or to become due, as and for alimony. It is therefore ordered and adjudged that the plaintiff's motion herein be, and it is, overruled. The rules issued against the defendant are discharged. The response by the defendant, filed July 15, 1900, herein, is adjudged sufficient, and in accordance with the prayer of said response the plaintiff herein, Annie O. Fite, is perpetually enjoined and restrained from collecting, or attempting to collect, from the defendant the sums aforesaid, or any other sums accruing under said judgment." Plaintiff's motion to vacate or modify the foregoing judgment was overruled; hence this appeal.

The question presented for decision is whether appellee's discharge in bankruptcy is a bar to the prosecution or collection of the alimony theretofore adjudged to appellant. By § 1 of the bankruptcy act of July 1, 1898 [30 U. S. Stat. at L. 544,

chap. 541], it is said that "debt" shall include any debt, demand, or claim provable in bankruptcy; "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." By § 63 of said act, the debts which may be proved are stated thus: "Debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. . . ." By § 17 it is provided: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the persons or property of another; have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." The district court of Kentucky, in *Re Houston*, 94 Fed. 119, had under consideration the precise question involved in the case at bar. It appears from the opinion in the case *supra* that the circuit court of Campbell county had committed to jail the petitioner for the reason that he had failed and refused to pay a judgment against him for alimony in weekly instalments of \$5 each, notwithstanding his discharge in bankruptcy. The petitioner appealed to said district court to be released under a writ of habeas corpus. The district court, among other things, said: "Among those benefits was that of claiming a discharge from all liabilities of every character which, by the terms of the bankrupt law, were provable debts against his estate, with certain exceptions specified in the act." The court then refers to § 1 of said act, heretofore quoted, and then said: "Whether wisely or unwisely, Congress did not in fact, in § 63, distinguish between judgments for alimony and other judgments, when including them in the list of provable debts; nor did it, in § 17, include judgments of that class among those not to be affected by a discharge in bankruptcy. The bankrupt court in this case had so decided on the motion for a stay of proceedings, and had directly passed upon the question in holding that a stay should be ordered. While, in making the order for a stay of proceedings, the court only looked at the question from the standpoint of the past-due instalments of alimony, it is strongly inclined to the opinion that the peculiar form of judgment by which alimony

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is usually allowed may be properly classed among certain of the unliquidated demands of the bankrupt, to be liquidated and made certain in amount pursuant to § 63 of the act, and, if the state law gave it priority, such judgments could be allowed a preference of payment out of the assets. And it should not be overlooked that the court of appeals of Kentucky in the case of *Tyler v. Tyler*, 99 Ky. at page 34, 34 S. W. 899, in speaking of a judgment against the husband for alimony, said that it "makes him an ordinary debtor to the wife for a fixed sum of money, that his estate is liable for in the same manner that it would be for a debt due upon any contract." But whether the judgment be a fixed liability or a contingent one is immaterial in this case, because all these questions must be settled and disposed of in the bankruptcy court alone, and, while the judgment of the court thereon may be erroneous, it is not void, nor, so long as it remains unreversed, is it to be disregarded by the state court. . . ." It will be seen from the judgment of the Bracken circuit court that the court heard proof, which, however, is not certified to us; and it must be presumed that, so far as testimony affects the judgment, the same was amply sufficient to authorize the judgment rendered. It may be conceded that some state courts have reached a different conclusion. But it is also true that the law in some of the states in regard to alimony differs materially from the law of this state as declared in *Tyler v. Tyler*, 99 Ky. 34, 34 S. W. 899. It may be in order to remark, further, that the honorable judge of the district court of Kentucky was a member of Congress when the bankrupt law under consideration was enacted, and taking that, together with the well-known legal ability of the judge, into consideration, his opinion in respect to said law is entitled to very great consideration. This court has nothing to do with the question of sentiment that may be supposed to enter into the question under consideration, nor can the moral duty, if such there be, resting upon the appellee to pay the alimony in question, be considered in determining the law governing the case. This court must respect and obey the law as it exists.

*Judgment affirmed.*

Claude W. BECKER, by Next Friend, *Appt.*,  
v.  
LOUISVILLE & NASHVILLE RAILROAD  
COMPANY.

(.....Ky.....)

**1. In case a young girl whom a boy is escorting across a railroad bridge**

NOTE.—For other authorities in this series as to voluntarily incurring danger to save life of another person as contributory negligence, see *Corbin v. Philadelphia* (Pa.) 40 L. R. A. 715, and *note*; and *West Chicago Street R. Co. v. Linderman* (Ill.) 52 L. R. A. 855.

For duty of railroad company to trespassers on track, see *Toomey v. Southern P. R. Co.*

falls in attempting to escape from an approaching train, he is not guilty of contributory negligence in remaining on the bridge and attempting to rescue her.

2. Whether or not those in charge of an engine approaching a bridge saw children on the bridge in time to stop the train before striking them is for the jury, where the evidence shows that the engineer could have seen the whole length of the bridge for more than 1,000 feet before reaching it, and that the train was running up grade, in view of the risk that would result to the train by running onto the bridge without looking to see if it was in good condition.
3. A trespasser on a railroad bridge, when discovered by those in charge of an approaching train, must be given a reasonable chance to escape from the bridge in safety, by checking the speed of the train.

(April 12, 1901.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Lincoln County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

**Messrs. Robert Harding, John W. Rawlings, and Emmet V. Puryear** for appellant.

**Messrs. J. W. Alcorn, Edward W. Hines, and Charles B. McDowell**, with **Mr. B. D. Warfield**, for appellee in support of petition for rehearing:

If the fireman on the engine owes no duty of lookout when a train is running rapidly along a principal street of a populous town like Newport (*Louisville & N. R. Co. v. Creighton*, 20 Ky. L. Rep. 1691, 50 S. W. 227), with how much greater reason must the court hold that there is no presumption that the fireman has actually discovered the peril of a person on the track in front of an engine at a point where no lookout is due, either by the engineer or fireman, or anyone else?

The fallacy of the court's argument lies in this: It concedes that there was no primary duty to discover appellant's peril, but holds that the duty arose incidentally, because we might have discovered his peril, which we were not bound to do, while we were looking out for something else which we were bound to see. Such a ruling puts persons to whom the duty of lookout is due exactly on the same footing as persons to whom no duty is due, and ignores the settled principle of law that no person can complain of the failure to perform a duty except the one to whom the duty is due.

*Newport News & M. Valley R. Co. v. Deuser*, 97 Ky. 95, 29 S. W. 973.

It was not the duty of the engineer to see that the bridge was safe before crossing it.

*Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545.

The testimony as to the distance at which the engineer could have seen the bridge, and as to the distance at which the train could have been stopped, is wholly irrelevant and incompetent. Not one of the persons who testified on this point had ever ridden on an engine over this part of the road, or had ever handled an engine at all.

*Louisville & N. R. Co. v. Foard*, 20 Ky. L. Rep. 646, 47 S. W. 342; *Flynn v. Louisville R. Co.* 23 Ky. L. Rep. 57, 62 S. W. 490.

There is no obligation on the part of a railroad company to be on the lookout for trespassers, or to incidentally discover them when keeping a lookout for other purposes, or to take any steps for their safety unless and until their peril is actually discovered.

*Louisville & N. R. Co. v. Howard*, 82 Ky. 212; *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119; *Schackelford v. Louisville & N. R. Co.* 84 Ky. 43; *Vertrees v. Newport News & M. Valley R. Co.* 95 Ky. 314, 25 S. W. 1; *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639; *Shittenhelm v. Louisville & N. R. Co.* 5 Ky. L. Rep. 325; *Louisville & N. R. Co. v. Green*, 5 Ky. L. Rep. 694; *Louisville & N. R. Co. v. Cooper*, 7 Ky. L. Rep. 102; *Louisville & N. R. Co. v. Cox*, 8 Ky. L. Rep. 961; *Nichols v. Louisville & N. R. Co.* 9 Ky. L. Rep. 702, 6 S. W. 339; *John v. Louisville & N. R. Co.* 10 Ky. L. Rep. 757, 10 S. W. 417; *Louisville & N. R. Co. v. Hunt*, 11 Ky. L. Rep. 825, 13 S. W. 275; *Louisville & N. R. Co. v. Dolph*, 13 Ky. L. Rep. 432; *Louisville & N. R. Co. v. Thompson*, 14 Ky. L. Rep. 815; *Oatts v. Cincinnati, N. O. & T. P. R. Co.* 15 Ky. L. Rep. 87, 22 S. W. 330; *France v. Louisville & N. R. Co.* 15 Ky. L. Rep. 244, 22 S. W. 851; *Robinson v. Louisville & N. R. Co.* 15 Ky. L. Rep. 626, 24 S. W. 625; *Hoskins v. Louisville & N. R. Co.* 17 Ky. L. Rep. 78, 30 S. W. 643; *Gherkins v. Louisville & N. R. Co.* 17 Ky. L. Rep. 201, 30 S. W. 651; *Eastern Kentucky R. Co. v. Powell*, 17 Ky. L. Rep. 1051, 33 S. W. 629; *Embry v. Louisville & N. R. Co.* 18 Ky. L. Rep. 434, 36 S. W. 1123; *Louisville & N. R. Co. v. Wade*, 18 Ky. L. Rep. 549, 36 S. W. 1125; *Chesapeake & O. R. Co. v. Perkins*, 20 Ky. L. Rep. 608, 47 S. W. 259; *Lyons v. Illinois C. R. Co.* 22 Ky. L. Rep. 1032, 59 S. W. 507.

Even where the peril of a trespasser is discovered, this court has uniformly held that the duty of stopping the train does not immediately arise unless the circumstances are such that the engineer sees at once that the man will not get to a place of safety before the train reaches him.

*Ward v. Illinois C. R. Co.* 22 Ky. L. Rep. 191, 56 S. W. 807; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 98, 39 C. C. A. 568, 99 Fed. 309.

(Cal.) 10 L. R. A. 139, and note; *Spicer v. Chesapeake & O. R. Co.* (W. Va.) 11 L. R. A. 385; *Patton v. East Tennessee, V. & G. R. Co.* (Tenn.) 12 L. R. A. 184; *Clark v. Wilmington & W. R. Co.* (N. C.) 14 L. R. A. 749; *Parker v. Pennsylvania Co.* (Ind.) 23 L. R. A. 552; *Ward v. Southern P. Co.* (Or.) 23 L. R. A. 715; *Raines v. Chesapeake & O. R. Co.* (W. Va.) 24 L. R. A. 53 L. R. A.

226; *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257; *Cleveland, C. C. & St. L. R. Co. v. Tartt* (C. C. App. 7th C.) 49 L. R. A. 98; and some cases in notes to Cincinnati, I. St. L. & C. R. Co. v. Cooper (Ind.) 6 L. R. A. 243; and Daniels v. New York & N. E. R. Co. (Mass.) 13 L. R. A. 248.



Guffy, J., delivered the opinion of the court:

It is substantially alleged in the petition that one Mary Vanarsdale, an infant between twelve and fourteen years of age, was upon the railroad bridge of the defendant at said time and place, and in front of said approaching train, and in great danger and peril of being run over by said train, and was placed in said danger and peril as alleged by the gross negligence of defendant in failing to slacken said speed of said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in failing to stop said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in the operation of said train after it became aware of her presence thereon, and that defendant became aware of her presence on said bridge in ample time to slacken the speed of said train to avoid running over and upon her and relieve her of said danger and peril. It is further alleged that plaintiff, Becker, undertook to rescue the said Vanarsdale from her peril and danger, and to enable her to escape from being killed by said train by the gross negligence of defendant, and in his efforts to rescue said Vanarsdale, and while he was endeavoring to do so, the train ran over him, knocking him from said bridge, and permanently injuring him, to the damage of \$5,000, for which he prayed judgment. The answer denies that on the occasion mentioned it could have slackened the speed of its train any more than it did after it became aware of the presence of said Vanarsdale and plaintiff, or that after it became aware of their presence on the bridge it could have avoided running over them. Denies any negligence at all. The answer may also be treated as pleading contributory negligence upon the part of the plaintiff. It is also pleaded that neither plaintiff nor Vanarsdale had any right to be upon the bridge in question. The affirmative averments of the answer were properly denied by reply. After the pleadings were made up, and various motions disposed of, which we deem it unnecessary to notice, the trial was entered into; and at the conclusion of plaintiff's testimony the court, upon motion of defendant, instructed the jury peremptorily to find for the defendant, which was accordingly done. And, plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

The sole question presented for decision is whether the plaintiff was entitled to have the case submitted to the jury, or, in other words, was there sufficient evidence from which the jury might find a verdict for the plaintiff? It appears from the evidence in this case that five children, to wit, Ed. Hunn, Katie Hood, Lillie Owens, Mary Vanarsdale, and plaintiff, the ages of whom are about as follows: Lillie Owens, between eight and nine; Ed. Hunn, in his fourteenth year; Katie Hood, about fifteen; Mary Vanarsdale, between twelve and thirteen; and the plaintiff, in his fourteenth year,—had gone to the creek for the purpose of fishing,

and, not being satisfied with the first point they reached, decided to go to another place, and, to reach it, decided to cross the creek on the railroad bridge, and while crossing it they heard or by some means became aware of the approaching freight train, and at once made an effort to get out of the way of the train, by continuing to cross the bridge to the other side of the creek. Three of the party escaped, but Miss Vanarsdale, it seems, fell through between the ties or bars of the bridge; and the plaintiff, who seems to have been her escort, sought to rescue her, and perhaps pulled her up once out of the opening in which she had fallen, but she again fell into another, and as the result of this delay she was killed, and the plaintiff suffered the injuries sued for in this action.

It is the contention of appellee that plaintiff had no right to be on the bridge, and that it owed him no duty until after it discovered his peril, which it claims it did not do in time to avoid the injury; also that he was guilty of such contributory negligence as to bar his right to recover. It is evident that it was the legal right as well as the moral duty of the plaintiff to remain with and seek to rescue his companion, and, so far as that question is concerned, the law seems to be well settled that he was not guilty of any contributory negligence for remaining on the said bridge for the purpose of saving the life of his companion.

It is the contention of appellant that the defendant or its agents discovered those parties upon the bridge in ample time to have slackened the speed of the train so as to enable the plaintiff to have avoided the danger. The evidence conduces to show that the engineer could see the whole bridge from a distance of 900 feet, and one standing on the track at the bluff can see the whole length of the bridge for 320 yards; that a man in the cab could see the train 120 feet further back. The proof also conduces to show that a man in the cab could see the bridge 120 feet further back than if on the ground. It is also evident from the proof that for a considerable distance from the bridge it is up grade in reaching the bridge in question. There is also some proof tending to show that someone on the engine was seen to put his head out, as if looking towards the bridge, at some distance from it. It seems to us, from the evidence, that the jury were authorized to believe and to have found that the defendant's agents and servants saw those children upon the bridge in ample time to have so slackened the speed of the train as to enable them to have escaped the danger. There is hardly room to doubt this, from the map and evidence filed in this action. It is not at all reasonable to suppose that the defendant, if it had a right to do so, was indifferent as to the condition of the bridge it had to cross. It can hardly be presumed that the defendant would not feel enough of interest in its own train and those aboard to risk running on the bridge without looking to see whether the bridge was in a condition to be crossed in safety to the crew, and if the defendant

was on the lookout it must have seen those children in time to have slackened the speed of the train and thus have prevented the injury. The reasonable conclusion is that the children were seen, but the defendant supposed that they had ample time to complete the crossing of the bridge and thus escape injury, which the proof evidently shows they would have done but for the misfortune of Miss Vanarsdale in falling between the ties or bars of the bridge. If it be conceded that the plaintiff was a trespasser, and that defendant owed him no duty except to protect him after discovering his peril, it is clear that when discovered upon the bridge the defendant should have given him ample time to have escaped. If he had simply been on the railroad track in the open country, it might be said that defendant had a right to presume that he would step off the track and get out of the way of the train; but if a party, having started to cross a bridge of as much length as the one under consideration, had no means of escape except to reach the termination of the bridge, common humanity demands that, even if a trespasser, he should not be wantonly run over, but should have a reasonable chance to cross the bridge in safety. A few minutes' delay of the train would have saved plaintiff the great personal injury which he suffered in the vain attempt to save the life of the little girl with him. It is said in 2 Shearm. & Redf. Neg. § 483. "The rule stated in § 99, that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger, failed to use ordinary care to avoid injuring him, has been enforced in many railroad cases. . . . Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury before it becomes imminent, and the utmost care and diligence of which he is personally capable after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train, and will step off the track in ample 53 L. R. A.

time to avoid all danger without any diminution of the speed of the train. These rules apply to all cases, even of the most outrageous negligence on the part of a person on the track,—as, for example, where a person attempts to cross in the very front of a train, or where children or drunkards have actually fallen asleep, lying across the rails. If the engineer becomes aware of anything lying upon or dangerously near the track, which may possibly be a human being or a valuable animal, he is bound to check the speed of his train so as to enable him to stop in time to avoid injury; and, if injury ensues from his neglect to do this, his sincere belief that the object was worthless is of no defense. In general, an engineer has the right to assume that a person walking upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence; but, when the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary. So, where he sees a little child upon the track, he has no right to assume that the child will use the same discretion for its own protection as an older person would; and he must bring the speed of the train under control as quickly as possible, so as to be able to stop it altogether if the child does not appreciate its danger." In § 484, Id., it is said: "The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible, not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'wilful,' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously stated it."

After a careful consideration of the evidence in this case, as well as the law applicable thereto, we are clearly of the opinion that the court erred in giving the peremptory instruction. The evidence made a prima facie case which would entitle plaintiff to recover.

*The judgment appealed from is therefore reversed, and the cause remanded, with directions to award plaintiff a new trial, and for proceedings consistent herewith.*

Rehearing denied June 20, 1901.

## MICHIGAN SUPREME COURT.

Elizabeth TRUDELL, Admx., etc., of William Trudell, Deceased,  
v.

GRAND TRUNK RAILWAY COMPANY  
OF CANADA, Plff. in Err.

(.....Mich.....)

1. A boy a little over seven years old, who knows and appreciates the danger of being on a railroad track in front of a moving train, is guilty of negligence as matter of law in standing on a track on which a train is approaching, which will preclude a recovery in case he is killed by the train, although he does not realize that a train is approaching on the track on which he is standing.
2. A railroad company is liable for the killing of a boy by its train only in case of gross negligence, where he was trespassing on a track remote from a public highway, at a place where those in charge of the engine had no reason to expect him to be.
3. One in charge of a locomotive is justified in believing that a good-sized boy on the track in front of the train will step off in time to avoid being struck, and is not required to check the speed of the train until he sees that the boy does not appreciate the danger.

(February 27, 1901.)

**E**RROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

**Mr. E. W. Meddaugh**, with *Messrs. Geer & Williams*, for plaintiff in error: When the undisputed evidence shows that the decedent fully appreciated the danger, then the court should say, as a matter of law, that he was guilty of contributory negligence, irrespective of his age.

*Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 74 N. W. 525.

Although the age of the child may be important in determining the question of contributory negligence, or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees, not invited or enticed by it, than it is to keep them safe for adults.

*Elliott, Railroads*, § 1259; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Wright v. Boston & A. R. Co.* 142 Mass. 296, 7 N. E. 866; *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 569, 39 N. E. 22, 40 N. E. 822; *Woodruff v. Northern P. R. Co.* 47 Fed. 689; *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380, 124 N. Y. 519, 26 N. E. 1103; *Masser v.*

*Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Mitchell v. Philadelphia, W. & B. R. Co.* 132 Pa. 226, 19 Atl. 28; *McDermott v. Kentucky C. R. Co.* 93 Ky. 408, 20 S. W. 380; *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957; *Givens v. Kentucky O. R. Co.* 12 Ky. L. Rep. 950, 15 S. W. 1057; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106; *Hargreaves v. Deacon*, 25 Mich. 1; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 41 Am. Rep. 177, 9 N. W. 830; *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196, 31 N. W. 180; *Rabidon v. Chicago & W. M. R. Co.* 115 Mich. 390, 39 L. R. A. 405, 73 N. W. 386; *Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 74 N. W. 525; *Brague v. Northern C. R. Co.* 192 Pa. 242, 43 Atl. 987; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013; *Wolfe v. Peirce*, 24 Ind. App. 680, 57 N. E. 555.

*Messrs. William Stacey and Frank C. Cook* for defendant in error.

**Long, J.**, delivered the opinion of the court:

This action is brought by the plaintiff, as administratrix of the estate of William Trudell, deceased, to recover damages for injuries resulting in the death of the latter, a boy seven years and four months old at the time of the injury. He was killed about 3 o'clock on Sunday afternoon, upon defendant's track, about half way between Mack avenue and Hale street, in the city of Detroit. At the place where the injury occurred there were two main tracks and a side track, and at the time there was a Lake Shore train coming towards him from the south, on the east main track. He was standing, as plaintiff claims, in the center of the west main track, on which the Grand Trunk train which struck him was approaching from the north. The testimony is somewhat contradictory as to whether the boy was standing on this track when he was struck or was attempting to cross it. Herman Eckert, a boy about fourteen years of age, testified that deceased had then been on that track about two minutes. He says he called the boy's attention to the fact that the Grand Trunk train was coming, and that young Trudell said, "That train is on the other track; it can't strike me;" that it was the Lake Shore train he said could not strike him; that the witness then said to him, "Look out, Willie, here it comes;" and then the boy turned round, and started to run, when he was struck. Anthony Karsnick, who saw the accident, was the only other witness examined by the plaintiff. He testified that Eckert called to the boy, and told him the train would strike him, and he said the train was on the other track; that Eckert called to him again to

**NOTE.**—As to care required of railroad company to prevent injuring small children on track, see *Bottoms v. Seaboard & R. R. Co.* (N. C.) 25 L. R. A. 784, and note; also other authorities in this series as follows: *Both v. Union Depot* 53 L. R. A.

*Co. (Wash.)* 31 L. R. A. 855; and *Gunn v. Ohio River R. Co.* (W. Va.) 36 L. R. A. 575.

As to duty to trespassers on track generally, see *Becker v. Louisville & N. R. Co.* (Ky.) ante, 267, and footnote thereto.

get off the track, and then he looked around, and started to run off. Both these boys testified substantially that the deceased knew enough to get out of the way of the train or he would be injured. Young Eckert testified that he was a good sized boy for his age; that he went to school, and understood perfectly well that if a team or a car came along, and he stood in front of it, if he did not get out of the way he would be hurt. The testimony showed that these boys were standing on the siding, throwing stones and playing tag, and that just before the train came along deceased went upon the track of the defendant company, and stood there watching the Lake Shore train, or else he attempted to cross the defendant's track just before the train came along. There was some conflict in the evidence on this point. The engineer on the train testified: "As near as I can recollect, after I passed Mack avenue this little boy ran right out from behind some cars in front of my engine. He could not have been more than 15 feet from my engine when I first discovered him. I was keeping a close lookout, and at no time before or after I reached Mack avenue did I see him on the track." The fireman testified to substantially the same thing. The plaintiff introduced some evidence tending to show that the defendant's train at the time was running at a rate of from 30 to 35 miles an hour. It appeared that the track was straight, and that an object as large as this boy could have been seen a long distance from the cab of the engine. The court below submitted to the jury, not only the question of the negligence of the deceased, but also the question of the defendant's negligence. The jury returned a verdict for the plaintiff for \$500. Defendant brings error.

The court charged the jury on the question of the defendant's negligence as follows: "It is incumbent, obviously, upon the plaintiff in this case, . . . to satisfy you, gentlemen of the jury, that the defendant has been negligent, and that the negligence of the defendant is the proximate cause of the injury, because no damages may be honestly rendered unless the injury of which the plaintiff in a case like this complains of comes directly from the negligence of the defendant. Now, you have heard the testimony in this case, and if you shall find in this case that, at a point sufficient for the engineer to have come to a stop,—to have controlled his engine,—it became, or should have become, apparent to him that the child was not going to leave the track, then, and under those circumstances, I say, gentlemen of the jury, it became his duty to stop his engine. But, unless you find that to be the fact, then a verdict must be rendered for the defendant. It is for you to say, from all the evidence in the case. You have heard the testimony. You have heard the testimony of the boy, who stood, I think, upon the flat car, or in the immediate vicinity, who was one of the companions, who stated that the boy stood in the center of the track; that he called his attention to the fact that the Grand

Trunk train was coming in, and he said, 'Oh, no; it is the Lake Shore train.' It is for you to say whether you believe that, from the evidence which has been submitted on that point, it was possible for the engineer of that train to have seen the boy at a sufficient distance to have stopped the train, and that a man exercising reasonable caution in his position would, under those circumstances, have stopped the train. If that is so, then I think that if he could have seen him at a sufficient distance to have stopped or controlled the train, and if he failed to observe that degree of care which other men under like circumstances would have observed, then, and under those circumstances, the company is guilty of negligence, but not otherwise. Now, you have heard the testimony, on the other hand, of the engineer. The engineer says that when he was coming along, at the rate which you may find that he was coming, the boy suddenly, at a short distance in front of the train, went upon the track. If that is so, that is obviously an end of the case, because, under those circumstances, no negligence could be predicated of those who were in the conduct of the engine. But I think, gentlemen of the jury, it becomes a question for you to determine, under the circumstances of the case, whether the defendant is or is not guilty of negligence. There is one further thing that I must say to you upon the subject, because, as I have already said to you, not only, in a case like this, must you find that the defendant has been guilty of negligence, but the plaintiff must not be guilty of contributory negligence. As I said before, if this were the case of an adult, it would be a different case. Under those circumstances, not only would there be no duty, in the sense in which I have used it, on the part of the company to stop, but beyond that there would be contributory negligence upon the part of the adult. Was the little boy, under those circumstances, guilty of contributory negligence? Now, obviously, as has been said, we cannot attribute that degree of knowledge and that degree of care to an infant that we can to an adult; and it is for you to say, under the circumstances, how much negligence should be imputed to the boy. If you believe that he was of sufficient maturity,—had sufficient appreciation of the danger that he was in in going upon a railroad track,—and if you believe, under the circumstances of the case, that he had sufficient maturity to keep that appreciation in mind, then, and under those circumstances, you may properly find him guilty of contributory negligence, but not otherwise. If he failed in that, obviously contributory negligence could not be attributed to him. It is you, gentlemen of the jury, I think, that must deal with this question, rather than the court. Now, I think I have said all that is necessary for me to say upon that subject."

We think the court was in error in submitting either the proposition of defendant's negligence or the negligence of the boy to the jury. The verdict, under the circum-

stances, should have been directed in favor of the defendant. The testimony conclusively shows that this boy, while only a little over seven years of age, knew and appreciated the danger there was in being on this track. He knew that if he remained on the track on which the train was passing he would be injured. There is no dispute in the case but that his companion, Eckert, called to him that the train was coming, and that he heard the call, and appreciated the danger; but he called back that the train was on the other track, and that as soon as he apprehended that the train was on the track where he stood he attempted to get off. There is no reason in this case for saying that he did not apprehend the danger, nor that he was of immature years, and must therefore be excused from exercising any care. Age is not the true test in such case. It is the intelligence of the boy, not his age, that must control. In *Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 74 N. W. 525, it appeared that the boy who was injured was about eight years old. It was said: "The plaintiff himself testified that this boy had intelligence enough to appreciate the danger. He placed the boy on the stand, and he so testified. The evidence clearly shows that there was nothing except this wagon and the east-bound car to obstruct the vision. Witnesses for the plaintiff state that, if the boy had looked in the direction of the car, he could have seen it. It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury would have occurred from collision with an ordinary wagon just as surely as from running into this car, and from the testimony of the lad himself he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?" That same inquiry might as well be made in the present case as in that. There is no conflict in the testimony whatever but that the deceased knew of the danger in being on this railroad track. He apparently fully appreciated it; for when his attention was called to the fact, and he saw for himself the situation, he hurriedly attempted to get off the track.

But, aside from this, the court should have directed the verdict for defendant, because it was not shown to have been guilty of any negligence. The boys were playing upon the defendant's right of way half way between two streets which crossed the defendant's tracks. They were in a place where the engineer had no reason to expect to see them. They were not upon a public highway crossing, but were trespassers upon the defendant's premises; and we think there is no conflict of authority that in such case the defendant can be held liable only when its agents have been guilty of gross negligence. There is no evidence in the case which would warrant the submission of that question to the jury. If the testimony of the plaintiff's witnesses be taken as true, that the boy was on the track two minutes before he was struck by the engine, it would

not warrant the conclusion that the engineer was guilty of gross negligence. This boy was of good size for his age, and the engineer would be justified in believing that he would step off the track in time to avoid being struck, and the engineer would not be required to check the speed of his engine until he saw the boy did not appreciate the danger.

The learned court below seemed to think that, because the boy was of tender years, the question of the defendant's negligence was for the jury, and the claim of plaintiff's counsel and the ruling of the court was that the boy was too young to be a trespasser. It was therefore left to the jury to say whether or not he was a trespasser. It has been repeatedly held that much younger children than this boy were trespassers under such circumstances. Elliott on Railroads, at § 1259, lays down the rule that "although the age of the child may be important in determining the question of contributory negligence, or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers, or bare licensees, not invited or enticed by it, than it is to keep them safe for adults;" and again it is said, at § 1260, by the same author: "So it has been held that a railroad company is not obliged to keep a lookout for trespassing children upon its tracks under ordinary circumstances or move its cars with reference to them, until their presence in danger is discovered." In *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776, it appeared that the boy was eleven years old. It was claimed that he should have been sooner discovered. The court said: "It seems not improbable that he might have been discovered a little sooner, but no locomotive engineer is bound to watch out for trespassers upon the track. The company does not owe trespassers that kind of care. This has been settled by repeated adjudications." Counsel for plaintiff cites *Battishill v. Humphreys*, 64 Mich. 514, 38 N. W. 581, and several other cases in this state, to sustain the proposition that a railroad company is bound to use reasonable care to avoid injuring a trespasser after seeing his danger, or after his danger could have been seen by an ordinarily prudent person. It is undoubtedly the rule that the defendant's servants would have had no right to recklessly run their engine over this boy if they had seen the danger he was in. If, however, the engineer or fireman had seen the boy on the track, they had the right to believe, from his size, that he would step off. It is not like the cases cited by counsel for plaintiff. In those cases (*Baker v. Flint & P. M. R. Co.* 68 Mich. 90, 35 N. W. 836; *Starbard v. Detroit, G. H. & M. R. Co.* 122 Mich. 23, 80 N. W. 878) the injury occurred upon street crossings, where the defendants were required to give some warning of the approach of their trains. In the present case the engineer had no reason to expect anyone to be on the track, and, if anyone was seen of the size of this boy, he

would be justified in believing he would step off in time to avoid injury.

The judgment must be reversed, and no new trial will be granted.

The other Justices concur.

Hazen S. PINGREE

v.

MICHIGAN CENTRAL RAILROAD COMPANY, Plaintiff in Certiorari.

(118 Mich. 814.)

1. The legislature has the power to fix the rate which railroad companies may charge within certain limits.
2. The legislature may confer upon a railroad company the exclusive power to fix its rates for the transportation of passengers and freight within a certain maximum, and a subsequent attempt by the legislature to fix such rates is invalid as the impairment of the obligation of a contract.
3. An exclusive power to fix passenger and freight rates within the maximum limit, which could not be impaired by subsequent legislation attempting to fix such rates, was conferred upon the Michigan Central Railroad Company by § 15 of its charter, providing that it shall be lawful for the company to fix the tolls and charges for the transportation of property and persons, subject only to a limitation as to passengers of 3 cents a mile; and such power is not limited by §§ 11, 30, authorizing the company to charge such tolls as shall be lawfully established by by-laws, and to pass such by-laws as shall be necessary to carry into execution the powers vested in it, provided they are not contrary to the laws or Constitution of the United States.
4. The exclusive right to fix freight and passenger rates within a maximum conferred upon the Michigan Central Railroad Company by § 15 of its charter has not been lost or surrendered by the company's acceptance of additional privileges, under acts professed or impliedly amendatory of its charter, and under the general railroad law, or by its absorption of the property and franchises of other railroad corporations.
5. Pub. Acts 1891, No. 90, providing for the issuance of family mileage tickets, cannot be deemed an exercise of the power of amendment reserved in the charter to the Michigan Central Railroad Company, as it does not purport to be an amendment for the charter, and contains no provision for compensating the company for the loss of its exclusive right under the charter to fix its fares.

(October 3, 1898.)

CERTIORARI to the Circuit Court for Wayne County to review a judgment

NOTE.—As to legislative power to regulate rates of carriers generally, see *note* to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 83 L. R. A. 177; also *Louisville & N. R. Co. v. Com.* (Ky.) 83 L. R. A. 209; and *Indianapolis v. Navin* (Ind.) 41 L. R. A. 837.

For validity of statutes requiring the issuance of mileage books, see earlier cases in this series as follows: *Atty. Gen. v. Old Colony R. Co.* (Mass.) 22 L. R. A. 112; and *Purdy v. Erie R. Co.* (N. Y.) 48 L. R. A. 669.

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granting a mandamus to compel respondent to issue to relator a thousand-mile ticket at the rate established by statute. *Reversed.*

The facts are stated in the opinion.

Mr. Benton Hanchett, with Messrs. Ashley Pond and Henry Russel, for plaintiff in certiorari:

That the legislature can, by contract, the obligation of which is protected from legislative impairment by the Constitution of the United States, limit or restrict the exercise of its police power, except with reference to life, health, and morals, is settled by the court of last resort upon that question, to wit, the Supreme Court of the United States.

*New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 147; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *The Binghamton Bridge*, 3 Wall. 51, sub nom. *Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535; *Pontchartrain R. Co. v. Orleans Nav. Co.* 15 La. 404.

No case can be found in the books, which rules that the exercise of the power to regulate rates for the transportation of persons and property by railroad companies cannot be restricted or limited by contract, while several cases directly affirm and many recognize that it can be so restricted.

*Stone v. Yazoo & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 593, 41 L. ed. 565, 17 Sup. Ct. Rep. 198; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Railroad Commission Cases*, 116 U. S. 307, sub nom. *Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; *Stone v. New Orleans & N. E. R. Co.* 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391.

An amendment to a charter, simply enlarging the powers of the corporation, does not create a new corporation.

*Atty. Gen. v. Joy*, 55 Mich. 84, 20 N. W. 806.

A corporation cannot, by its own act merely, surrender its charter. Such surrender, to become effective, must be accepted by the state.

2 Morawetz, Priv. Corp. § 1011; *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530.

And no corporation can come into existence except in some manner provided by statute.

1 Morawetz, Priv. Corp. § 8.

The intent of respondent's charter with reference to amendment is: (1) That any proposed amendment should be specific; that is, it should be an act which in terms should express the intent to amend said charter; (2) that an amendment should be by an act by which the legislature should take into consideration the terms of the charter, and,

in order to make the amendment, two thirds of each branch of the legislature should vote to make the same. That is to say, the vote should be a vote upon the charter itself, to amend it; (3) that the legislature should take into account what damages would arise to the respondent by such amendment. This is an element which would necessarily be considered in determining the advisability of amending the charter as proposed.

*Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606, 33 N. W. 749.

The charter of the Michigan Central is a special law, and act No. 90 of 1891 is a general law, and it is well settled that a general law cannot be construed to alter or amend a prior special law by implication, even though inconsistent.

*Hewitt v. Gage*, 71 Mich. 292, 39 N. W. 56; *People v. Hanrahan*, 75 Mich. 611, 4 L. R. A. 751, 42 N. W. 1124; *Sutherland*, Stat. Constr. § 157.

The said act No. 90, if held or construed to apply to this respondent, is repugnant to and in violation of paragraph 1 of article 14 of the Amendments to the Constitution of the United States in this, to wit, that it deprives this respondent of liberty and property without due process of law.

*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

Messrs. **Fred A. Maynard**, Attorney General, and **John Atkinson**, for defendant in certiorari:

Where the power to alter or repeal is reserved in a special charter, a subsequent general statute applicable to all corporations of the kind will operate as an amendment of the special charter of the particular corporation.

1 *Thomp. Corp.* § 94; *Durand v. New Haven & N. Co.* 42 Conn. 211.

The legislature of 1846 had no power to make such a contract as claimed by respondent.

*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 102, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Railroad Commission Cases*, 116 U. S. 325, sub nom. *Stone v. Farmers' Loan & T. Co.* 29 L. ed. 642, 6 Sup. Ct. Rep. 337, 388, 1191; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495.

The legislature cannot take away the liberty of contracting.

*Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.

The legislature is equally incompetent to

make one person pay an unreasonable price for services rendered by another.

The company has no right to fix its charges except by by-laws, and some meaning must be given to the provision that the by-laws shall not be "contrary to the Constitution or laws of the United States or of this state."

No by-law can be established by the directors that does not conform to the laws of the state, and this whether the laws were in force when the amended charter was granted, or came into operation afterwards.

*Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832.

Such provisions do not constitute contracts.

*Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

The presumption against a contract is much stronger where a monopoly is granted, because in such cases it becomes much more important that the state should retain its power to protect the people against extortion.

*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota ex rel. Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 760, 14 Sup. Ct. Rep. 857.

The amendments to the charter of the Michigan Central have so entirely changed the scope of the corporation as to operate as a repeal of the special franchises conferred, and to bring it under the general law.

*State v. Maine C. R. Co.* 66 Me. 488.

Act No. 90 of the Laws of 1891 is itself a repeal of § 15 of the charter, if at the time this act was passed the charter had any vitality left as to the question of fixing rates.

The power of a state to regulate the charges of railroad companies has always been sustained.

*Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, sub nom. *Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Railroad Commission Cases*, 116 U. S. 307, sub nom. *Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Minneapolis Eastern R. Co. v. Minnesota*, 134 U. S. 473, 33 L. ed. 988, 3 Inters. Com. Rep. 224, 10 Sup. Ct. Rep. 473; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25,

24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 575, 28 L. ed. 1085, 5 Sup. Ct. Rep. 681; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Brass v. North Dakota ex rel. Stoeser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627.

The right to regulate fares has been firmly established in this state.

*Wellman v. Chicago & G. T. R. Co.* 83 Mich. 592, 47 N. W. 489; *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328; *Stimson v. Muskegon Booming Co.* 100 Mich. 347, 59 N. W. 142.

The right to regulate the business of railroads to some extent has always been conceded.

*Chicago & A. R. Co. v. People ex rel. Koerner*, 67 Ill. 11, 16 Am. Rep. 599; *Com. v. Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710.

**Hooker, J.**, delivered the opinion of the court:

The circuit court for the county of Wayne granted a mandamus to compel the respondent to issue to relator a ticket, popularly known as a "family mileage ticket," described in act No. 90 of the Public Acts of 1891. This act has been considered in the case of *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328, and held applicable to that company, which, like the respondent, was one of the railroad companies chartered by the legislature, previous to the adoption of the Constitution of 1850, which reserves the power of amendment and repeal as to all corporations thereafter created. Many of the questions raised in that case are before us upon this record, but such as are covered by the decision mentioned need not be discussed here. It is the claim of the railroad company that its original charter constituted a contract between itself and the state, whereby it was given the right to fix the rate to be charged for the transportation of passengers, within the limit of the maximum rate therein prescribed, of 3 cents a mile, and to regulate the manner of collecting the same; and that these privileges cannot be revoked or altered except upon compliance with the reservation of power to be found in the charter, viz., by compensating the company therefor. The relator contends: (1) That the legislature has the general power to fix rates of transportation by railroads: (2) that it cannot part with this authority, by contract or otherwise, so as to bind succeeding legislatures; (3) that, if such a thing were possible, the charter of 53 L. R. A.

the respondent should not be so construed; (4) that, even if the charter had the effect contended for, it has been surrendered, or so altered by its consent, that the respondent is subject to the provisions of the general railroad law and the Constitution of 1850; (5) that, if not lost by surrender, it is lost by virtue of act No. 90, hereinbefore mentioned, which must be treated as an amendment under the charter, taking away the right to fix tolls, but subject to the right of the company to recover damages from the state in a proper proceeding.

Relator's first proposition, viz., that the legislature has power to fix rates, within certain limits, is not an open question. It has been so held in the cases of *Wellman v. Chicago & G. T. R. Co.* 83 Mich. 592, 47 N. W. 489, and *Smith v. Lake Shore & M. S. R. Co.* 114 Mich. 460, 72 N. W. 328, where the authorities are cited. To the assertion that the right to regulate tolls belongs to the police power, and cannot be bartered away, we reply that the almost uniform current of judicial authority is to the effect that such power may be given to corporations, and that, where the intent to do so is clear, a subsequent attempt by the legislature to fix tolls is the violation of a contract, under the provisions of the Federal Constitution. We will allude to some of the cases which the industry of counsel has collected. In the case of *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 510, 6 Sup. Ct. Rep. 252, it appeared that the legislature had, in 1875, granted to the gas company the exclusive right for fifty years to supply gas to the city of New Orleans through pipes laid in the public streets. Subsequently, by a new Constitution, adopted in 1879, it was provided that the "monopoly features" in the charters of all existing corporations save railroads should be abolished, and in 1881 the light company was authorized to use the streets of New Orleans for the purpose of supplying gas to the public. A bill filed to restrain this project was dismissed by the local court, and the United States Supreme Court reversed the decree. The unanimous opinion of the court, delivered through Mr. Justice Harlan, recognized the right of the state, in the exercise of the police power, to carry on the business of furnishing gas itself, or select one of several agents to do so, but held that "the police power, according to its largest definition, is restricted in its exercise by the national Constitution;" that "this is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts, the obligations of which are fully protected against impairment by state enactments." As supporting the proposition, the distinguished jurist cites *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 110, 17 L. ed. 571; *The Binghamton Bridge*, 3 Wall. 51, sub nom. *Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *West River Bridge Co. v. Dia*, 6 How. 507, 531,



12 L. ed. 535. He approved the language of Chief Justice Martin in *Pontchartrain R. Co. v. Orleans Nav. Co.* 15 La. 404, 413, where he says: "In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprises for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious." Allusion was also made to cases in which it is held that an exemption from taxation for a valuable consideration, at the time advanced, constitutes a contract within the meaning of the Constitution. In the case of *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571, Mr. Justice Miller, in discussing a grant of an exclusive right to erect and maintain a bridge, said that, "without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises on the one side, and the other are wanting in no element necessary to constitute a contract." The case of *The Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137, involved the question whether a charter to a company, authorizing it to build and maintain a bridge for the accommodation of the public, for which it was given the right to take certain tolls, and providing that it should be unlawful for any one to build a bridge within 2 miles, constituted a contract within the meaning of the Constitution. The question arose by reason of the erection of another bridge. It was held to be a contract, in the following vigorous language of Mr. Justice Davis: "If anything was settled by an unbroken course of decisions in the Federal and state courts, it was that an act of incorporation was a contract between the state and the stockholders," and "a departure from it now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. . . . The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked, unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The leg-

islature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations; and justice and good policy alike require that the protection of the law should be assured to it." Recurring to the case of *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, where the foregoing authorities are commented upon, we find a distinction clearly drawn between cases where the grants have been claimed to confer privileges injurious to public morals or public health and those where they compensated persons for performing a public service, and the case elaborates still further the proposition that a state cannot justify the repudiation of its solemn engagements by the claim that the police power cannot be diminished.

The existence of this power on the part of the legislature to bind the state, by a grant of a right to take tolls, is one thing, and the question whether it has been exercised is quite another. We shall find numerous cases where it has been held that the state has not parted with this power, and, we may add, many of these seem to admit that such a contract may be made by apt and clear language showing such intent. The case of *Stone v. Yasco & M. Valley R. Co.* 62 Miss. 607, 52 Am. Rep. 193, is a case in point.

The railroad company was incorporated by an act of the legislature of the state of Mississippi approved February 17, 1882, which contained the following, among other sections:

"Sec. 6. That said company shall have and possess the power of fixing, from time to time, by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches: Provided, said last-mentioned rates shall not exceed 4 cents per mile for each passenger, nor exceed the following rates of freight: . . . but in no case shall the railroad company be limited to a less charge than 25 cents for the transportation of any passenger, parcel, package, or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company, not exceeding the maximum rates for railroad business as above set out, may be charged and collected by said company."

Subsequently the legislature provided a commission with power to reduce rates. The court of last resort disposed of the case in a forceful opinion, which fully recognizes

the rule that a grant of a right to fix tolls may be a valid contract. It is as follows: "Section 6 of the charter of the appellee confers on the company power to fix, from time to time, by its board of directors, the rates at which it will transport persons or property over its railroads, provided they shall not exceed a maximum specified in the act. The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and a favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld. . . . A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable,—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance. That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear. That this was a valid contract by the state, obligatory and inviolable by it, we regard as settled authoritatively by Federal and state decisions too numerous for citation. If anything is, or ever can be, settled in American constitutional law, the sanctity and inviolability of a contract between a state and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded. The appellee has the unquestionable right, from time to time, by its board of directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested, and the enterprise set on foot. It is not allowable now for one of the contracting parties to interfere with the exercise by the other of its

plainly granted rights. They are secured beyond the reach of legislation, and cannot be impaired. The state cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and, where they are not a part of the machinery of government, the franchise cannot be resumed by the legislature, or its benefits be essentially impaired, without the consent of the grantee. To hold otherwise would be revolutionary, and disturb the foundations of society as molded by the judicial utterances of half a century of constitutional government in America." We think there is no force in the suggestion that this decision might have been different had the legislature itself fixed the reduced rate, instead of attempting to delegate the authority to a commissioner. See also *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47, where Mr. Justice Field said: "It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained." In the case of *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, Mr. Justice Brewer said: "If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or property, it would not be doubted that that express stipulation formed a part of the obligation of the state, which it could not repudiate." In the case of *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94, Chief Justice Waite used similar language. He said: "It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter, and, if it was refused, to abstain from building the road, and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference; but it was not, and the company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation." Again, in *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97, he said: "In *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94, we decided that the state may limit the amount of charges by railroad companies for fares and freights,

unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions." The same power is recognized in the case of *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832. The case of *State v. Maine C. R. Co.* 66 Me. 488, supports the doctrine that a valid contract may be made, though restrictive upon the subsequent exercise of the police power,—citing numerous authorities,—and we may conclude the discussion of this subject as we commenced it, by saying that, as we understand the authorities, they are practically uniform upon the main proposition.

Having reached the conclusion that the state had power to make a valid contract with the respondent, whereby it was authorized to fix rates, we will next examine the charter to ascertain whether its language should be so construed. The history of this charter is familiar. The state had entered upon a policy of internal improvement, which, at the time this charter was granted, had been found impolitic and disastrous, and the Constitution adopted soon after reflected public sentiment by prohibiting the state from engaging in any work of internal improvement except by grant of property. It had commenced to build lines of railroad across the state. The public documents of the day, such as gubernatorial messages and legislative papers, clearly indicate that negotiations were had for the sale of the Michigan Central road, in which the price to be paid and the privileges to be accorded were carefully weighed. In his message to the legislature Gov. Felch said: "Much complaint has existed of the high charges for freight on these roads, yet even at these rates it is very doubtful whether anything has been received from this branch of their business above the expenses of transportation and the actual injury to the roads and their stock and fixtures. It would seem that true policy requires that the Central road should be speedily rebuilt with T or H rail." "No direct proposition for the purchase of these works, or either of them, has yet been made, but it is understood that there are those who are ready to negotiate for the purchase, if it can be made on terms sufficiently favorable. The granting of an act of incorporation to the purchasers seems to be deemed indispensable. The reluctance of many of our citizens to see these important works fall into the hands of corporate bodies has occasioned some opposition to the proposed sale, and it must be admitted that this objection is not without weight. If the legislature should entertain the proposition favorably, it will, of course, be in their power to annex to the corporation such guards and restrictions as shall best secure the public interests. A maximum rate of tolls may be established in the charter. The company may be required to finish the road in the best possible manner, and in such time as the legislature may des-

ignate, and to keep it in the best possible repair, and in constant operation. The right of repurchase after a certain period and on certain conditions may, if deemed advisable, be retained by the state, and a simple method in case of a forfeiture of the chartered privileges may be adopted for annulling the charter, and vesting the property in the state. But, while every requisite guard should be thrown around such chartered rights, it should be remembered that the facilities granted in such charter will be regarded as of the utmost importance by those proposing to purchase, and the character of the provisions may very possibly determine the question of whether or not a sale can be effected. The utmost discretion is therefore necessary in so framing the provisions of such charter as to protect as fully as possible the public weal on the one hand, and not to defeat the possibility of a sale by unusual restrictions and impracticable requirements on the other." Joint Documents 1846, Introduction, pp. 27, 28. The legislative records show the following: "The select committee, to whom was referred so much of the message of the governor as relates to the sale of the works of internal improvement, and to whom have been also referred great numbers of petitions very numerously signed, and coming from almost every portion of the state, praying for the sale of the public works, beg leave to report," etc. "It is without precedent that any company has brought to the West such an amount of money to be invested in any enterprise. In looking through the length of the land your committee find but one district of country in which capital to that amount can be well spared for investment at a distance, and but one class of men in that district whose vigilant and far-seeing eye would be likely to engage them in such an adventure. The men named in the bill presented are of that class. Of their ability to take and complete the road no doubt is entertained, and your committee have strong grounds to believe that they will purchase the road on the terms proposed if the bill shall become a law in its present shape, but in case any material alteration is made they cannot anticipate with confidence any such result.

. . . To protect the people against unreasonable charges for freight and passengers, the maximum for passengers within the state is 3 cents per mile, and upon the great staple of produce and consumption, flour, grain, lime, plaster, salt," etc., "the tolls are limited to the average of tolls on the best New England roads upon the same articles; these rates to be reviewed and adjusted once in ten years if the state desire it." House Documents 1846, Doc. No. 2. "That the central and southern roads present sufficient inducements to capitalists to make a purchase desirable seems to be generally conceded, but the sum of money they will bring cannot, of course, be ascertained until terms of sale are proposed, and an offer made. . . . Again, the amount of money which the company would be willing

to pay would be increased or diminished by the extent of the privileges and corporate powers which the legislature might see fit to grant. Unusual restrictions or reservations would either prevent a sale altogether, or lessen very materially the price which the purchaser might otherwise be willing to give. The policy of the legislature in this respect should be, in the opinion of your committee, to grant a charter delegating liberal powers and privileges, but so defined and guarded as to keep the companies in proper check, and prevent abuse. On such terms a sale could probably be effected, while it might be impracticable to sell should greater restrictions be imposed. Capitalists will not invest their money where the rights to be acquired are ill defined, or where they can be interfered with, or taken away, at the option of the legislature." Senate Documents 1846 (Doc. No. 9) p. 15. It would seem obvious that the granting of a right to fix tolls within a limit prescribed was intended. The first section of the act (act No. 42, Laws 1846) created the corporation. The second provided for the purchase of the road and property pertaining thereto for the sum of \$2,000,000. Section 3 provided for a forfeiture and dispossession in case of a failure to meet the payments as agreed upon. Section 12 provided: "The said company . . . shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on said railroad, as well as the manner of collecting all tolls and dues on account of transportation, carriage, and storage." Section 15 provided that it should be lawful for said company from time to time to fix, regulate, and receive the tolls and charges taken for the transportation of property and persons on said railroad subject only to a limitation as to passengers of 3 cents a mile and 10 cents in addition on distances not exceeding 30 miles. The following provisions of §§ 36 and 39 may be mentioned in this connection:

1. The state reserves the right, at any time after January 1, 1867, to purchase said railroad, and all the property, effects, and assets of the company upon terms named based upon the market value of the property at the time of such purchase.

2. The rights and franchises vested or which may vest in the company under or by virtue of said act "shall not in any manner be prejudiced or affected save as herein provided or by judicial proceedings or by a repurchase of said railroad to be made by the state" as in said section 36 provided.

"3. The state reserves the right, at any time after thirty years from the passage of this act, by a vote of two thirds of each branch of the legislature, to alter, amend, or repeal the same, provided that said company shall be compensated by the state for all damages sustained by reason of such alteration, amendment or repeal."

Section 15 makes it lawful for the company to use its own judgment in fixing tolls, and provides that it shall not receive more

than 3 cents per mile for the transportation of passengers, and imposes a penalty for charging more. In the case of *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47, a charter containing the following provision was before the court: "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right, provided, that the charge of transportation or conveyance shall not exceed 50 cents per 100 pounds, on heavy articles, and 10 cents per cubic foot, on articles of measurement, for every 100 miles; and 5 cents per mile for every passenger." At first blush this might seem to authorize the fixing of rates within the limit of 5 cents a mile. But the court held otherwise. It will be noticed that the provision there construed gave to the railroad an exclusive use of the road, which theretofore was supposed to be open to use by others, upon the proviso that the charge for transportation should not exceed 5 cents. So long as this price was not exceeded, the right would continue exclusive, but it did not follow that a contract right to fix tolls up to 5 cents was conferred. The section contained no express grant of power, and none is necessarily implied. Such was the construction of the court, but it was careful to say: "If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained."

Again, there is a class of cases where charter provisions give the right to fix rates in general terms. That is no more than the common carrier would have by implication were the charter silent upon the subject of compensation. In *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, the charter under consideration granted to the company the right, "from time to time, to fix tolls and charges." It prescribed no limit. The court held that, in the absence of words of positive grant, or their equivalent, in the law, the power of the state to regulate would not be cut off, and that reasonable doubts should be resolved in favor of the state, citing the words of Mr. Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 560, 7 L. ed. 955, that "its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." Also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Delaware Railroad Taa*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Bailey v. Magwire*, 22 Wall. 215, 22 L. ed. 850; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 660, 24 L. ed. 1036; *Newton v. Mahoning County*

*Comrs.* 100 U. S. 548, 25 L. ed. 710. Referring to the provision of the charter, the court said: We "find, first the authority given to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be." In short, the provision that it might, from time to time, fix tolls was a grant of nothing that it would not have had the right to do had it not been inserted, and did not have the effect of enlarging its rights, as no intention to do so was apparent. In *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348, 388, 1191, the charter granted power to establish such rates for transportation as they may deem proper, and to alter and change them at pleasure; and it was held that it did not show an intent on the part of the legislature to part with the power to regulate. The provision was substantially the same as that in *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191. The other railroad commission case—*Stone v. New Orleans & N. E. R. Co.* 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391—needs no discussion further than to say that the charter there discussed expressly reserved to the legislature the power to regulate rates. The charter of the respondent contains a direct grant of power to fix, regulate, and receive tolls. It also fixes what it evidently considered a reasonable rate as to passengers, *viz.*, 3 cents per mile. It clinches the matter by providing that the respondent's right to fix tolls should be limited by this rate of 3 cents, and by that only. It was not, then, a general grant of power, and therefore limited to fixing rates the reasonableness of which should be determined by the usual methods, and consequently the same power as any individual or corporation would have without it, but was intended to confer a contract right to fix tolls, within the limit of 3 cents a mile, as plainly as though it had provided that said road should have the right to charge 3 cents a mile, or less, in its discretion, for transportation of passengers. It will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix tolls to that amount been denied. This case is even stronger than such, inasmuch as the charter expressly fixes the limitation, and unqualifiedly states that such shall be the only limitation of the company's power. But our attention is called to the provisions of §§ 11 and 30, which are said to limit the power conferred by § 15. Section 11 contains the provision that "the said company shall have power to charge for tolls and

transportation such sums as shall be lawfully established by the by-laws of said company." Section 30 confers upon the board of directors the power to do many acts, and concludes as follows: "And shall have power to pass all by-laws which may be necessary for the carrying into execution all the powers vested in the company hereby incorporated: provided, such by-laws shall not be contrary to the Constitution or laws of the United States or of this state." It is contended that these provisions negative any contract right to the exclusion of regulation of rates by the legislature that otherwise might be conferred by § 15, and we are cited to *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832, in support of the contention. The charter provisions in that case conferred only a general power to fix rates, and we have already shown that such provisions do not confer a right to do more than fix reasonable rates within the limits that the legislature may, from time to time, prescribe. The provision was as follows: "Shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business and interest of the company: provided, that the same be not repugnant to the Constitution and laws of the United States, or of this state, or repugnant to this act." The court, after quoting the above provision, which was a part of an amending section (§ 6), proceeds as follows: By § 5 all the powers of the company were vested in and could be exercised by the directors. Clearly, under this authority no by-law can be established by the directors that does not conform to the laws of the state, and this whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the state. The corporate power was a continuing one, and intended for the ordering of the affairs of the company as circumstances might, from time to time, require. The reserved control by the state was also continuing in its nature, and manifestly intended for the protection of the public whenever, in the judgment of the legislative department of the government, the necessity should arise. Then follows the special provision on which the claim of a contract is predicated. It is as follows: "The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the company." On commenting upon this the court said: "Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and, unless an exemption is clearly established, the legislature is free to act on

all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in *Proprietors Charles River Bridge v. Proprietors Warren Bridge*, 11 Pet. 547, 9 L. ed. 824: 'It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle. In *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 176, 24 L. ed. 98, and *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99, it was determined that a state may limit the amount of charges by railroad companies for fares and freights unless restrained by some contract in the charter.' The right to a reversal of the present judgment rests on the question whether this company has any such restraining contract, and that depends on the effect to be given the amending § 6. The company, by its original charter, was authorized to transport passengers and property, and to receive compensation therefor. This, if there had been nothing more, would, under the rule stated in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and the several railroad cases decided at the same time, require the company to carry at reasonable rates, and leave the legislature at liberty to fix the maximum of what would be reasonable. So that, laying aside the limitations of the old charter, the question here is whether the amending section relied on has the effect of taking away from the state this power of legislative regulation. . . . This is the form in which the power to charge and collect compensation for the carriage of persons and property was granted by the amended charter. The rates must be fixed by by-laws, and no by-law can be made that is at all repugnant to the laws of the state. The first paragraph of the section, with its proviso, prescribes generally what is necessary to the validity of a by-law, and the second allows the directors to fix rates by by-laws. It is undoubtedly true that the first paragraph neither adds to nor takes from the inherent power of a corporation to make by-laws for the regulation of its affairs, and that the proviso is nothing more than a legislative declaration of the principle of the common law that all by-laws must be reasonable, and not in conflict with the laws of the state. But the very fact that such a provision would have been implied adds to the significance of its incorporation in express terms into the charter, and manifests a determination not to leave room for doubt as to the right of the state to use its legislative power, if necessary for the regulation of the affairs of the corporation, at least by the enactment of general laws applicable to all corporations of a like character, and engaged in a like business. There is nothing which even in the remotest degree indicates that a by-law fixing rates is to be of a different character from those regulating the other business of the company. When, therefore, in a section of the 53 L. R. A.

charter which expressly declares that no by-law shall be made that is in conflict with the laws of the state, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the state. This implies that in the absence of direct legislation on the subject the power of the directors over the rates is subject only to the common-law limitation of reasonableness, for, in the absence of a statute or other appropriate indication of the legislative will, the common law forms part of the laws of the state to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that when a maximum is so established the rates fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws." It is noticeable that in the present case we do not "find the section granting the power to fix rates by by-law in the same section that declares that by-laws shall not be in conflict with the laws of the state," nor do we find a mere general authority to fix rates, nor a mere mention of a maximum rate. In construing this charter we must, as in any other case, endeavor to ascertain the intent of the legislature, and we are of the opinion that §§ 11 and 30 should not be held to qualify the unambiguous grant contained in § 15.

We have yet to consider the question whether the right which is claimed under § 15 has been lost by surrender. Counsel assert that it has been lost by reason of respondent's acceptance of additional privileges under acts professedly or impliedly amendatory of its charter, and under the general railroad law; and, secondly, by reason of its consolidation with, or absorption of, the property and franchises of other railroad corporations of the state. It is said that in 1846 the Michigan Central Railroad Company became a corporation with the right of perpetual succession, and the right to complete the half-finished railroad, within the borders of this state, and to have a capital of \$8,000,000; that at the present time the respondent has a continuous line through the states of Michigan, Indiana, and Illinois, and that it operates some and owns other railroads in this state, all of which it operates in conjunction with its own, the corporations owning which are said to have practically ceased to exist, and the roads are known to the public only as parts of the Michigan Central Railroad, and the companies which built them can only be reached through the Michigan Central; and that in some instances it owns the entire stock of such roads. We do not discover that it is asserted that the respondent's relations with these roads are unauthorized, and, if they were, we are not advised that the claim is made that the charter has been

declared forfeited thereby. Our understanding of the claim is that by drawing to itself these privileges and railroads it has surrendered its rights under the original charter, and through a consolidation has become a new corporation, which, having come into existence since 1850, is subject to the powers reserved by the present Constitution. In 1848, by act No. 197, entitled "An Act to Amend an Act Entitled," etc. (describing the respondent's charter), the legislature extended the powers of the corporation theretofore formed, and authorized it to build and operate a railroad from the southern line of this state to Chicago. The charter, by § 36, reserved to the state the right to purchase the property of this company upon terms therein stated. Counsel say that the act of 1848 contained no saving clause as to the old charter, and that it destroyed the option of the state to purchase under § 36, because it destroyed the basis of fixing the price. We think a sufficient answer to this is the question "whether the repeal of § 36, thereby depriving the state of the right to purchase, would have dissolved the corporation." It must be manifest that it would not, and we know of no authority to support the proposition that an enlargement of the powers of a corporation puts an end to its life, and at the same time creates another. To follow this suggestion to its logical consequence under the Constitution of 1850, it might be contended that an effort on the part of the legislature to increase the powers of a corporation would result in diminishing them by operation of law. We think the amendatory acts had no such effect as to dissolve the corporation, whether they were enacted before or after the adoption of our present Constitution, and that the act of 1855 (act No. 139), authorizing the Michigan Central to build a double track, and to sell bonds therefor, and to make business contracts and arrangements with other railroads organized or to be organized for operation thereof by the Michigan Central Company, had no such effect. It is urged that the necessary effect of that amendment was to amend the general railroad law, inasmuch as it necessarily gave the other companies powers of dealing that they did not have under the general railroad law; and that while, under the general railroad law, they could not only consolidate under this act, they could make business contracts and arrangements which amounted to consolidation, though not technically called such, and that the act, if treated as enlarging the charter, was void. We need not concern ourselves, at this juncture, with the question of the validity of this legislation. The only question we are concerned about is whether the then existing Michigan Central corporation was dissolved by it, and whether a new one arose, Phoenix-like, from its ashes. One thing would seem obvious: If the amendatory act was void, as suggested, it could hardly dissolve one corporation or create another; if valid, we know of no authority which indicates that it must have the effect suggested. All of the acts pur-

porting to amend the charter contain language indicating the right of the company to accept or reject such amendments, and they were accepted or rejected, as provided by the charter, and they all show an absence of the understanding by anyone that they should destroy the existing or create a new corporation. This question was passed upon in the case of *Atty. Gen. v. Joy*, 55 Mich. 107, 20 N. W. 806, where it was held that an act authorizing the Detroit & Pontiac Railroad to take a new name, and under that new name to extend its road from Pontiac to Lake Michigan, did not create a new corporation. The general railroad law authorizes consolidation by all companies organized under it. We do not find it necessary to inquire whether the respondent could lawfully avail itself of those provisions if it were disposed. But, assuming that it might, has it done so by compliance with such provisions, or by a course of dealings which should be held to have had that effect? The law providing for consolidation clearly implies that the result of the statutory consolidation is a new corporation. See 1 How. Stat. § 3343. This is in accord with the majority of such statutes throughout the country, as will be seen by a comparison. 1 Thomp. Corp. § 305. But this statute does not necessarily imply that the only arrangement for an extension of lines must come through a statutory consolidation, and other statutes permit arrangements of a different character to be made. We have already cited one which was added to this charter by amendment. Pub. Acts 1855, No. 139. Undoubtedly, if a law points out a method by which railroads may consolidate, and provides that upon compliance with such law the consolidated companies shall constitute a new corporation, such new company could not deny the effect of its acts. It is not so clear that anything less than full or substantial compliance would enable it to claim new corporate rights. It is not to be presumed that consolidation is favored. On the contrary, it is usual for legislatures to hedge the privilege about with conditions that tend to the preservation and encouragement of competition and prevent the sacrifice of public interests through monopolies. In *Elliott on Railroads* (§ 323) it is said: "These enabling statutes are construed to authorize a consolidation only in cases where the companies seeking to combine come fairly within the terms of the statute;" and again (§ 323): "Where the statute provides for the mode of consolidation, that mode must be substantially, if not strictly, pursued." See *Rodgers v. Wells*, 44 Mich. 411, 6 N. W. 860; *Mansfield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 124; *Peninsular R. Co. v. Tharp*, 28 Mich. 506. The intention to consolidate may be an important consideration where the act is ambiguous or uncertain, and in *Elliott on Railroads*, § 324, it is said that "a clear intention to consolidate, together with the performance of acts reasonably appropriate to that end, must be shown, in order to establish a consolidation," where

the act is consistent with a different intent. Thus the union of name, officers, business, and property does not, it has been held, change their distinctive character as separate corporations. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004. The mere purchase by one railroad corporation of the franchise and property of another does not make the purchaser the successor, by consolidation, of the purchased road. Thus, in the case before us, the numerous arrangements by which the respondent manages, owns, or is otherwise interested in its several branch lines, and which are not shown in the record, may not amount to a consolidation in a general sense, or, if they do so, not in the sense of the statute. Where the statute is silent in regard to the effect of consolidation, a new corporation is not always the necessary consequence. "Succession is not necessarily consolidation, and a corporation may have authority to become the successor of another, without having any authority to consolidate." Elliott, Railroads, § 324. "If the merger is complete, it is evidence that the one corporation is extinguished, unless kept alive for certain purposes; while it is equally clear that the other, in which it is merged, is not dissolved." Id. § 335. See also 1 Thomp. Corp. § 396, where it is said that the existence of a new corporation as the result of consolidation depends upon the legislative intent manifested in the statute under which the consolidation takes place. *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757. If there is no statute authorizing consolidation, the attempt is *ultra vires*. Elliott, Railroads, § 322; 1 Thomp. Corp. § 315, and cases cited. This case is unlike that of *Smith v. Lake Shore & M. S. R. Co.* In that case the answer of the company to the order to show cause alleged that it had taken the steps prescribed by statute for the purpose of effecting a consolidation. In the present case there appears to be no such admission, and the record does not show that the Michigan Central has ever intentionally proceeded to effect a statutory consolidation. As said in Elliott on Railroads, § 335: "The term 'consolidation' is an elastic one, and may include a union of two or more corporations into a new one, with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter."

We have seen that the legislature has, by an amendment to the Michigan Central charter, authorized it to make business arrangements with other companies owning railroads. If so, it may enforce them. It may operate other roads, possibly buy their property or their stock; but if it be conceded that they cannot lawfully do these things and therefore that their acts were *ultra vires*, are they not acts that subject them to a forfeiture of all rights through quo warranto, rather than a new grant of power, 53 L. R. A.

under consolidation acts, which they have neither attempted to act under nor complied with in making business arrangements with other roads? In the list of charges against this respondent are to be found the extension of lines by building, the operation of other roads, the acquisition of all of the stock of some or the owning of other roads, the leasing of others for long terms, the increase of capital. If these things are *ultra vires*, it does not follow that a consolidation has been effected, or, if so, that it is a statutory consolidation, which has created a new corporation. If, on the other hand, these are valid arrangements, and lack the substantial requisites of the consolidation provided by statute, the stockholders of the Michigan Central Railroad Company are not thereby deprived of their charter rights. They have never assented to a consolidation. The company could not, as a new corporation, enforce collection of stock subscriptions, and could not compel the state to recognize it as a new corporation. The further claim is made that, granting all of the foregoing, Pub. Acts 1891, act No. 90, is to be treated as an exercise of the power of amendment reserved in the charter, and must be accepted and acted upon, subject to the right of the respondent to collect its damages from the state. We think this cannot be. The act does not purport to be an amendment of the charter, and no provision for compensating the respondent is contained in it. There is no provision of law for the payment of such claim, and the respondent would be powerless to enforce it. We therefore reach the conclusion that the respondent had a vested right to fix its own tolls, and that to hold the act of 1891 applicable to it would be to impair the obligation of the contract made between the state and the company. To bring this company under the power of the state in the matter of the regulation of tolls, if desirable, must be done by the method pointed out in the charter. It would doubtless be a convenience to the public to enjoy the privilege of travel upon this line at a 2-cent rate, either under this act or the act discussed; but it cannot be accomplished, under this act, as to the line constructed under the original charter. The language of Mr. Justice Harlan in *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 673, 29 L. ed. 525, 6 Sup. Ct. Rep. 252, is suggestive in this connection: "If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result with respect to corporations whose contracts with the state are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the



company, under the state's power of eminent domain. [Citing cases.] In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed."

*The order of the Circuit Court for the County of Wayne is reversed, with costs of both courts.*

The other Justices concur.

Writ of error dismissed by the Supreme Court of United States March 23, 1900.

## PEERLESS MANUFACTURING COMPANY

v.

John N. BAGLEY *et al.*, *Plffs. in Err.*

(.....Mich.....)

**A landlord who agrees with his tenant to put an automatic fire extinguisher in the leased building cannot relieve himself from liability for injuries to the tenant's property caused by negligence in using apparatus the vents of which open at too low a temperature, by employing a competent independent contractor to do the work.**

(April 2, 1901.)

**ERROR** to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's property by water from an automatic fire extinguisher which had been installed therein by the owners of a building leased by plaintiff. *Affirmed.*

### Statement by Grant, J.:

The facts in this case are undisputed. Plaintiff was engaged in the manufacture of clothing, and was tenant of a building owned by defendants. Throughout the building had been placed a number of water pipes, constituting an automatic sprinkler system, intended for extinguishing fire. On an extremely hot Sunday—July 4, 1897,—in the afternoon, a sprinkler head in a pipe in this automatic sprinkler system opened, and the water flooded the building, damaging plaintiff's goods. The sprinkler head was beneath a skylight in the roof of the building. The skylight had glazed sloping sides and vertical ends standing above the roof. A vertical section of the skylight formed substantially an inverted V. Across the bottom, and about in the line of the roof, was a sash containing panes of glass. Beneath

this glass, curtains, which could be moved, ran on wires. Two or three panes of glass had been taken out of the bottom sash, through one of which the water pipe ran up. It then turned, and ran horizontally lengthwise of the skylight somewhat below the point where the sloping sides of the skylight united. Upon the top of this pipe were set the sprinkler heads, from one of which the water was discharged. The skylight was nearly 20 feet long by about 12 inches wide, and it was 4 feet 3 inches vertically from the bottom sash to the top of the skylight. The head itself was so made that at about a given temperature an alloy in it would fuse, and release a cap, and thus afford release for the water in the pipe by gravity pressure from a tank on the roof. It was intended that the alloy in these heads in question should stand a temperature of about 155° Fahrenheit before fusing, and they were stamped "155" to indicate that fact. On July 10, 1897, after this accident, the head, which up to that time remained intact, fused when the temperature in the skylight was 146°. The heads used in the skylight were of the same kind as those used elsewhere throughout the building. Near the top of each end of the skylight was an opening leading to a short pipe which opened into the air. Beneath each opening was a swinging window for ventilation. These ventilating windows, in hot weather, were usually kept open. They were closed Saturday, July 3d, at 1 P. M., and remained closed till after the accident.

The following facts are established by the testimony: (1) That the relation of landlord and tenant, and no other, existed between the parties. (2) That there was no written lease, whether or not there was an agreement for one. (3) That there was no covenant forming part of the oral agreement for leasing that the premises were free from defects and fit for use, or that the landlord would keep them in repair and fit for use; that that oral agreement was simply that the plaintiff should occupy the premises for a certain period at a certain rental. (4) That an agreement, which, if plaintiff's testimony is believed, was, in effect, a part of the agreement as to tenancy, was made by defendants at the instance and for the benefit, at least in large part, of plaintiff, that there should be installed upon the demised premises a sprinkler system like that about to be installed in Burnham, Stoepel, & Co.'s premises, and that this agreement was, without damage to plaintiff, performed as early as the September following the May or June which was the date of plaintiff's entry upon the premises demised to it. (5) That from September, 1896, to July, 1897, the sprinkler

NOTE.—For exceptions to rule that an employer is not liable for acts of independent contractor, see, in this series, *Hawver v. Whalen* (Ohio) 14 L. R. A. 828, and *note*; *Carrico v. West Virginia C. & P. R. Co.* (W. Va.) 24 L. R. A. 50; *Larson v. Metropolitan Street R. Co.* (Mo.) 16 L. R. A. 330; *Ketcham v. Newman* (N. Y.) 24 L. R. A. 102; *Negus v. Becker* (N. Y.) 25 L. R. A. 667; *Colgrove v. Smith* (Cal.) 27 L. R. A. 560; *Smith v. Milwaukee Builder's* & 53 L. R. A.

*T. Exchange* (Wis.) 30 L. R. A. 504; *Wertheimer v. Saunders* (Wis.) 37 L. R. A. 146; *Cabot v. Kingman* (Mass.) 33 L. R. A. 45; *Richmond & M. R. Co. v. Moore* (Va.) 37 L. R. A. 258; *Thompson v. Lowell, L. & H. Street R. Co.* (Mass.) 40 L. R. A. 345; *Bonaparte v. Wiseman* (Md.) 44 L. R. A. 482; *Moran v. Corliss Steam-Engine Co.* (R. I.) 45 L. R. A. 267; *Sebeck v. Plattdeutsche Volksfest Verein* (N. J. L.) 50 L. R. A. 199; and *Boomer v. Willbur* (Mass.) ante, 172.

head had been part of the demised premises which were in the actual occupancy of the plaintiff. (6) That defendants had no notice of any defect in the sprinkler head up to the time of the accident. (7) That the defendants did not plan, or by their servants install, the sprinkler system, but that they committed the whole work of installation, including planning, labor, and material, to the General Fire Extinguisher Company under a clear and distinct contract; that that company is an experienced, competent, and reputable concern in its line of business; that defendants did not interfere with, or exercise supervision over, the work of installing, but left the work wholly in the hands of the extinguisher company. (8) That the work was inspected by an experienced insurance inspector before reduced insurance rates on the building and stock were procured. (9) That it is proper practice to put sprinkler heads in skylights. (10) That the extraordinary heat of the sun on July 4, 1897, caused a head in the skylight to open, which, under ordinary circumstances, remained closed. (11) That if such opening is due to the fault of anyone it is to the fault of the General Fire Extinguisher Company.

The declaration charges neglect against the defendants, plaintiff's landlord, in negligently constructing an automatic sprinkler system. The court instructed the jury that the fact that the defendants "had used all ordinary precaution in employing suitable people to put this system in, and letting the contract to a reputable concern to put it in, was of itself no defense against the action in this case." In other words, the defendants were held responsible for the negligence, if any, of the party who put in the sprinkler system. The jury found that the apparatus was negligently constructed, and rendered a verdict for the plaintiff.

**Messrs. Wells, Angell, Boynton, & McMillan**, for plaintiffs in error:

Defendants are guilty of the breach of no duty arising by implication from the relation of the parties. The relation negatives the existence of such duty.

Wood, Land. & T. § 382; *Petz v. Voight Brewery Co.* 116 Mich. 422, 74 N. W. 651; *Jaffe v. Hartcau*, 56 N. Y. 398, 15 Am. Rep. 438; *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Loupe v. Wood*, 51 Cal. 586; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Doyle v. Union P. R. Co.* 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333; *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169, 13 N. E. 465; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279.

Even where the landlord is bound to repair defects arising after the beginning of the term, knowledge of the improper condition, or culpable ignorance amounting to constructive notice, must be shown.

*Henkel v. Murr*, 31 Hun, 28; *Idel v. Mitchell*, 158 N. Y. 134, 52 N. E. 740; *Simons v. Secard*, 22 Jones & S. 406; *Hines v. Willcox*, 96 Tenn. 148, 34 L. R. A. 824, 33 S. W. 914; *Case v. Chicago, R. I. & P. R. Co.* 64 Iowa, 762, 21 N. W. 30; *Wood, Land. & T.* 53 L. R. A.

§ 377; *Kenny v. Barns*, 67 Mich. 336, 34 N. W. 587.

If any duty to plaintiff rested on defendants with reference to the sprinkler system, they were guilty of no breach of it, since they procured under the contract in evidence the planning and installation thereof by a competent, reputable concern engaged in such business.

*Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Blake v. Woolf* [1398] 2 Q. B. 426; *King v. New York C. & H. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Reedie v. London & N. W. R. Co.* 4 Exch. 244; *Laugher v. Pointor*, 5 Barn. & C. 547; 2 Thomp. Neg. p. 902.

The proper performance of the contract did not involve any intrinsic or necessary danger.

No injurious consequence would have arisen if the extinguisher company had not been guilty of what now appears an error in judgment, which defendants had no reason to anticipate.

*Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490.

The harm came from doing the work wrong, not from doing it at all. Hence it was not a nuisance in such a sense as to bring the case within the exception to the rule.

*Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052; *McCafferty v. Spuyten Duyvil M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Peachey v. Rowland*, 13 C. B. 182; *Butler v. Hunter*, 7 Hurlst. & N. 826; *Miller v. New York, L. & W. R. Co.* 125 N. Y. 118, 26 N. E. 35.

A vendor is not liable for latent defects in an article bought by him and sold with or without his own labor on it.

*McKinnon Mfg. Co. v. Alpena Fish Co.* 102 Mich. 221, 60 N. W. 472; *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102; *Hoe v. Sanborn*, 21 N. Y. 566, 78 Am. Dec. 163.

A railroad company is not liable to a passenger for the breaking of an axle from a latent defect, when it was bought from a reputable manufacturer.

*Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

Nor to any employee for a defect in a boiler.

*Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837.

A vessel is not liable for a collision caused by the breaking of a wheel chain purchased from a reputable manufacturer.

*The Olympia*, 52 Fed. 985, 9 C. C. A. 393, 22 U. S. App. 69, 61 Fed. 127. See also *Walden v. Finch*, 70 Pa. 480; *Hoffman v. Tuolumme County Water Co.* 10 Cal. 413; *Shreusbury v. Smith*, 12 Cush. 177; *Pittsburgh, Ft. W. & C. R. Co. v. Brigham*, 29 Ohio St. 374.

**Messrs. Maybury & Lucking**, for defendant in error:

The landlord who, himself or by his servants, makes repairs or improvements to demised premises, is liable to the tenant for all damages resulting from negligence in so doing.

Smith, Neg. p. 48; Wharton, Neg. § 792; *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850; *Kimmell v. Burfeind*, 2 Daly, 155.

This is so whether he is under covenant to make repairs or not. If he voluntarily, or by request of tenant, actually proceeds with the work, he is liable for negligent injury.

Wharton, Neg. § 792; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108; *Wertheimer v. Saunders*, 95 Wis. 573, 37 L. R. A. 146, 70 N. W. 824; *Willcox v. Hines*, 100 Tenn. 538, 41 L. R. A. 278, 46 S. W. 297.

Landlords are liable to the tenants under the facts in this case, and it is no excuse that they employed a reputable independent contractor.

*Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490; *Worthington v. Parker*, 11 Daly, 557; *Wertheimer v. Saunders*, 95 Wis. 573, 37 L. R. A. 146, 70 N. W. 824; *Cleghorn v. Taylor*, 18 Sess. Cas. 2d Series, 64, No. 126; *Quarman v. Burnett*, 8 Mees. & W. 499; *Sturges v. Society for Promotion of Theological Education*, 130 Mass. 414, 39 Am. Rep. 463; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Sulzbacher v. Dickie*, 51 How. Pr. 500; *Lasker Real-Estate Assn. v. Hatcher* (Tex. Civ. App.) 28 S. W. 404; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77.

An owner has no right to erect a nuisance on his own land to the injury of his neighbors.

*Bensen v. Suarez*, 28 How. Pr. 511, 19 Abb. Pr. 61.

The landlords are not liable for casual acts of negligence on the part of the contractor or his servants in the progress of the work, but for the proper completion of the work itself,—especially when taken off the hands of the contractors,—the owner of the building is liable; and if it is left in an unsafe condition, whereby injury results to the tenant, the landlord is liable.

*Sturges v. Society for Promotion of Theological Education*, 130 Mass. 414, 39 Am. Rep. 463; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Hole v. Sittingbourne & S. R. Co.* 6 Hurlst. & N. 488; *Robbins v. Chicago*, 4 Wall. 679, 18 L. ed. 432.

When the defendants undertook with the plaintiff to install a sprinkler system, a duty rested upon them, which they could not devolve upon, or delegate to, contractors.

*Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 418, 41 N. W. 490; *Wood, Mast. & S. §§ 318, 321*; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. ed. 485; *Worthington v. Parker*, 11 Daly. 559.

Grant, J., delivered the opinion of the court:

It appears conceded that there was evidence of negligence on the part of the General Fire Extinguisher Company in putting in the sprinkler heads in the skylight arranged to fuse at 155 degrees. That tempera-

ture proved too low. They should have been arranged to fuse at a higher temperature. The sprinkler plant was installed in September. In the following July, with a temperature outside at 94°, one of the sprinkler heads fused. A few days afterwards the remaining sprinkler head, when the temperature outside was about the same, fused when the temperature in the skylight had reached 146°. It was undoubtedly assumed, on the part of the agents of the extinguisher company, that the temperature within the skylight would not reach that degree; but it made no effort to determine the degree of temperature of the skylight in hot weather. If they relied upon experiences elsewhere, it is not shown upon this record. An experienced witness for the defendants testified that "they should be set with a leeway of about 30°, and that he would not locate a 155° sprinkler head at a place where he knew the temperature would reach over 135°." We must, therefore, enter upon a determination of the defendants' liability with the fact established that their contractor, the extinguisher company, was guilty of negligence. It is also established that the defendants had no experience with, or knowledge of, the construction of the sprinkler apparatus; that they employed a standard company of long experience and of good reputation, and that the system was one in common use. They had, therefore, exercised that prudence which the law requires in choosing independent contractors, and no negligence is directly attributable to defendants. It was to the interest of the defendants, as well as that of the plaintiff, to have a proper apparatus supplied. In case of flooding, both would be damaged.

Did the employment of such a contractor relieve the defendants from liability to plaintiff? They insist that it did; that the case is within the rule that, when one employs a competent, experienced, and independent contractor to do a lawful work, he is not liable, either for defects in the system or in the apparatus or machinery. The learned counsel cite *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052; *McCafferty v. Spuyten Duyvil M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Miller v. New York, L. & W. R. Co.* 125 N. Y. 118, 26 N. E. 35. None of those cases involve the relation of landlord and tenant. They are cases coming clearly within the rule as to nonliability for the negligence of independent contractors. There is, however, another rule, and which may be called an exception to that above stated, viz., that, where one owes an absolute duty to another, he cannot acquit himself of liability by delegating that duty to an independent contractor. To apply the rule to the present case, it may be thus stated: Where a landlord undertakes to make repairs or improvements for his tenant, he cannot relieve himself of the consequences of neglect in the performance of his agreement by employing an independent contractor. Thus, where a landlord un-

dertook to put a new roof on the building of his tenant, and he let the contract to an independent contractor to perform the work, and the goods were damaged by rain through the negligence of the contractor, the landlord was held liable. *Wertheimer v. Saunders*, 95 Wis. 573, 37 L. R. A. 146, 70 N. W. 824. Where the landlord made repairs, and a joint of pipe was improperly constructed, whereby the water flowed from the roof through onto the plaintiff's goods, the landlord was held liable. *Worthington v. Parker*, 11 Daly, 545. Where a drain had been constructed by an independent contractor, and after its acceptance the water flowed through it into an adjoining cellar, through the negligence of the contractor, the owner of the building was held liable. *Sturges v. Society for Promotion of Theological Education*, 130 Mass. 414, 39 Am. Rep. 463. A landlord assuming to make repairs, though not required to do so by his lease, is responsible for his lack of skill in making them. *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108. Plaintiff had agreed with defendants that they should put in a sprinkler system. They could adopt whatever system they chose, and could make whatever contract they chose for putting it in. There was no contractual relation between plaintiff and the General Fire Extinguisher Company. We think that in reason, as well as authority, the rule of law is that the plaintiff can

hold defendants for the negligence resulting in damage to it, and that the defendants have their remedy against the extinguisher company.

Counsel likens the case to that of one buying an appliance of a reputable dealer, which, through its negligent construction or make, works damage to a third person; and invokes the rule that a vendor or purchaser is not liable for latent defects in machinery, citing *McKinnon Mfg. Co. v. Alpena Fish Co.* 102 Mich. 221, 60 N. W. 472; *Walden v. Finch*, 70 Pa. 460, and other cases. We think this is not a case for the application of that doctrine. There was no defect here in the system or in the apparatus. The former was good, and the latter properly constructed. There was no latent defect. The sole difficulty was that the extinguisher company erred in not determining the temperature at which the sprinkler head should be set. *Walden v. Finch* was a case between bailor and bailee. The bailor had deposited his property in the warehouse of the bailee. The building fell through improper construction. It was held that the bailee, having done all in his power to erect a safe structure, was not liable for its occult defects. *McKinnon Mfg. Co. v. Alpena Fish Co.* involved the shaft of an engine, which broke from hidden and unknown defects.

*Judgment affirmed.*

The other Justices concur.

## NEW YORK COURT OF APPEALS.

UNITED PRESS, Appt.,

v.

NEW YORK PRESS COMPANY, Limited,  
Resp't.

(164 N. Y. 408.)

1. A contract to take press reports for a term of years at not more than \$300 per week, without making any other provision as to price, is too indefinite to permit a recovery

of anything more than nominal damages for its breach.

2. An extra allowance as part of the costs of the action may be made under Code Civ. Proc. § 3253, in the discretion of the court, to a defendant against whom nominal damages only are recovered.

(*Landon, J., dissents.*)

(November 16, 1900.)

NOTE.—Effect on contract of leaving price indefinite.

- I. Introductory.
- II. Total absence of price.
- III. Option between different amounts.
- IV. Price dependent on contingency.
  - a. Market price or value.
  - b. Appraisal or award.
  - c. Action of, or with, other parties.
- V. When price definite or certain.
  - a. To be fixed by subsequent agreement.
  - b. By happening of subsequent event.
  - c. By reference to former relations.
  - d. By action of other parties.
  - e. Misunderstanding of parties.
  - f. Vague general statements.
  - g. Promise by decedent to pay for services.
- VI. Executed contract; value instead of price.

### I. Introductory.

The general rule that price is an essential ingredient of every contract for the transfer of property or rights therein, or the furnishing

and rendering of service, may be said to be axiomatic.

It is also necessary in general, in order to the enforcement of an executory contract, that the price must be certain and capable of being ascertained from the contract itself. By this is not meant that the exact amount in figures must be stated in the contract; but when that is not the case, the price must, by the terms of the contract, be capable of being definitely ascertained,—by computation; by the exercise of an option by a party entitled to do so; by the happening of a contingency; or by some of the several circumstances mentioned in *infra*, V. a, b, c, and d.

What is said herein, of course, has no reference to contracts completely executed.

Where, however, a contract has been partially executed by the receipt and acceptance of the property, right, service, or benefit, and the contract is indefinite as to price, the party so receiving and accepting becomes liable, upon an implied agreement, to pay its reasonable value, but not by force of the inchoate contract to sell or furnish. VI. *infra*.

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County in its favor for nominal damages only and for costs in favor of defendant in an action brought to recover for breach of a contract to take and pay for the plaintiff's news service. *Affirmed.*

The facts are stated in the opinion.

**Mr. William C. Davis**, for appellant:

Notwithstanding the language of the contract bound the defendant to pay a sum "not exceeding \$300 per week," the defendant had, by paying that sum for so long a period, without objection and with uniform regularity, bound itself by a practical construction of the contract to pay that sum during the life of the contract.

*Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782.

## II. Total absence of price.

There was a verbal contract of sale made between the plaintiff and defendant, by which the plaintiff had agreed to sell to the defendant a horse, warranted five years old, for the sum of 200 guineas. In order to take the case out of the statute of frauds, the plaintiff gave in evidence the following letter, written by the defendant five days after the making of the verbal contract: "Mr. Kingscote begs to inform Mr. Elmore that if a horse can be proved to be five years old on the 13th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved Mr. K. will most decidedly have nothing to do with him." The Lord Chief Justice was of opinion that this was not a sufficient note or memorandum in writing of the bargain within the statute of frauds, and directed the plaintiff to be nonsuited, but reserved liberty to him to move to enter a verdict. On such motion being made the court held that there must be a note or memorandum in writing of the bargain. The price agreed to be paid constitutes a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent; and the rule was refused. *Elmore v. Kingscote*, 5 Barn. & C. 583, 8 Dowl. & R. 343.

The defendant made an order and delivered it to the plaintiff as follows: "Sir Archibald M'Laine orders Mr. Hoadly to build a new, fashionable, and handsome landaulet, with the following appointments [here followed details of what was required], the whole to be ready by the 1st of March, 1833. The carriage was completed by the time agreed on; and in April the defendant wrote to the plaintiff desiring that he send his bill for the carriage, and announced the defendant's intention to have it out immediately. The bill, however, amounting to £480, the defendant refused to pay it, or to accept the carriage. It was held that a contract for the sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth; and that in this case the memorandum of the contract was sufficient without naming the price. *Hoadly v. M'Laine*, 10 Bing. 482, 4 Moore & S. 340.

A contract whereby the defendants agreed to furnish the plaintiff, a smelting company, with ores from the defendants' mine, to be handled and treated by the plaintiff company upon such terms as would realize to the mine owner the

The plaintiff's proof as offered tended to show the reasonable value of the contract at the time of the breach, and was improperly excluded.

*Goetz v. Van Au*, 12 N. Y. Civ. Proc. Rep. 104; *Taylor v. Pinckney*, 12 N. Y. Civ. Proc. Rep. 107, note.

In the absence of other evidence, cost is competent as tending to show value.

*Ellsworth v. Aetna Ins. Co.* 105 N. Y. 624, 11 N. E. 355; *Aetna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810.

The right of action for damages accrued immediately upon the breach of the contract by the defendant.

*Todd v. Gamble*, 67 Hun, 38, 21 N. Y. Supp. 739; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Dingley v. Oler*, 11 Fed. 372.

The measure of damages is the contract price, less the cost of performance.

metal value contained therein after compensating the plaintiff for its labor and expense in extracting such values and reducing them to a marketable condition, is not a contract for the sale of the ore in that, among other things, it fixes no stipulated price per ton to be paid therefor. And where the defendants refuse to continue to deliver the ore under such alleged contract nominal damages only can be awarded for a breach thereof. *Patrick v. Colorado Smelting Co.* 20 Colo. 268, 38 Pac. 236.

In an action for the price of a boat laden with coal, it appeared that there had been no actual delivery, or possession taken by the alleged vendee, and there was no specification of price. It was held that there was no sale. *Bigley v. Risher*, 63 Pa. 152.

The question arising in a case whether a deed made between parties was an absolute sale of the property or a trust or an equitable mortgage, the court, in deciding the question, said: "There is an intrinsic difficulty in treating this transaction as a conditional sale, in whatever manner the circumstances are viewed. It seems to be of the very essence of a sale, that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense. . . . Now, here is not the slightest proof, in this case, of any sum being agreed on as the price of the purchase. No money was in fact paid; . . . none was contracted to be paid; and even the encumbrances were not to be discharged. The money, which was to be repaid on the reconveyance, was only what had been, in the intermediate time, actually paid to discharge the encumbrances, and expended in improvements. If none had been so paid, none was to be repaid. So that not only was there no fixed price, but the premises stood as a mere security for future advances. *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847.

The agent of a railroad company wrote to a person: "I have to say that if you are the first settler upon the northeast quarter of section 5, . . . and if you continue to reside upon and improve said land until it shall be offered for sale, the same being strictly agricultural in character, you will be entitled to the first privilege of purchase at the appraised valuation. . . ." It was held that, treating improvement as a condition to be performed, the letter was totally silent as to what the improvement should be. It might be much and it might be little, and yet, the party making it would be entitled to have his conveyance. But the absence of two absolutely necessary items of such a contract from this letter, *viz.*, the price and

*Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Nichols v. Scranton Steel Co.* 137 N. Y. 471, 33 N. E. 561; *Baker Transfer Co. v. Merchants' Refrigerator & Ice Mfg. Co.* 12 App. Div. 260, 42 N. Y. Supp. 76; *Heroy v. Fin de Siecle Co.* 16 App. Div. 171, 44 N. Y. Supp. 611; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Todd v. Gamble*, 67 Hun, 38, 21 N. Y. Supp. 739.

Where parties to a contract have themselves given a practical construction to it, the court will take into account such construction and give effect to it.

*Reading v. Gray*, 5 Jones & S. 79; *Stokes v. Recknagel*, 6 Jones & S. 368; *Van Buskirk v. Stour*, 42 Barb. 10; *Moses v. Bierling*, 31 N. Y. 462; *Hilleary v. Skookum Root Hair Grower Co.* 4 Misc. 127, 23 N. Y. Supp. 1016.

**Messrs. John W. Boothby and De Lancey Nicoll** for respondent:

The agreement was so indefinite and un-

the terms, would render it void under all circumstances. *Lombard Investment Co. v. Carter*, 7 Wash. 4, 34 Pac. 209.

Plaintiff wrote defendant: "I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company upon the following terms, viz., first, a salary of £300 per annum, commencing at the present date, if the company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labor you may think me deserving of and your means can afford." In answer to this the defendant wrote, after accepting the terms: "It is distinctly agreed and understood that if the company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labor done in the event of the company not being carried out." The plaintiff rendered some service, but the company was never formed. A verdict having been entered for the plaintiff with leave reserved to the defendant to move to enter a nonsuit, a rule nisi was obtained accordingly, and, on consideration by the entire court, made absolute. *Roberts v. Smith*, 4 Hurlst. & N. 315, 28 L. J. Exch. N. S. 164, 32 L. T. N. S. 320; *Pourtales Gorgier v. Morris*, 7 C. B. N. S. 588, 29 L. J. C. P. N. S. 208, 6 Jur. N. S. 705.

A bankrupt, of which the plaintiffs were assignees, had performed work for the defendants, who composed a committee for the management of the sale of lottery tickets. The claim to compensation was founded on a resolution of the committee as follows: Resolved, that any services to be rendered by Walsh (the bankrupt) shall, after the third lottery, be taken into consideration, and such remuneration be made as shall be deemed right. The case was tried before Ellenborough, Ch. J., who nonsuited the plaintiffs. In a motion to set aside the nonsuit the King's bench held that it was an engagement accepted by the bankrupt on no definite terms, and that the action could not be maintained. *Taylor v. Brewer*, 1 Maule & S. 290.

Upon a covenant to an attorney to pay him a reasonable fee for defending the defendant on a criminal charge, nothing more can be recovered than nominal damages, where he did not actually defend, and no special damage was shown. *Wilson v. Barnes*, 13 B. Mon. 330.

The defendants, a building committee of a congregation, had entered into a contract, under

certain that no action for a breach of it will lie.

*Buckmaster v. Consumers' Ice Co.* 5 Daly, 313; *Campbell v. Jimenes*, 7 Misc. 77, 27 N. Y. Supp. 351; *Harper v. Hassard*, 113 Mass. 187; *Peacock v. Cummings*, 46 Pa. 434; *Coffin v. Landis*, 46 Pa. 426; *Van Slyke v. Broadway Ins. Co.* 115 Cal. 644, 47 Pac. 689; *Gates v. Gamble*, 53 Mich. 181, 18 N. W. 631; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796; *Dayton v. Stone*, 111 Mich. 196, 69 N. W. 515.

There was no ambiguity in the terms of the contract, and therefore no testimony as to how the parties acted under it, or of other extrinsic facts, is admissible as bearing upon the real meaning and construction of the contract.

*Campbell v. Jimenes*, 7 Misc. 77, 27 N. Y. Supp. 351; *Van Slyke v. Broadway Ins. Co.* 115 Cal. 644, 47 Pac. 689.

The words used denote an indefinite and

seal, with the plaintiff, for the erection of a church edifice, according to a designated plan and a fixed price. The contract contained the following stipulation: "At any time during the progress of the building, the committee reserves the right to direct any alteration or variation from the original plan, so as not to vary therefrom in any very essential manner, so as to cause any material extra expense to the building; but any alteration suggested by them shall be made, and the expense, if any, shall be agreed upon at the time; but no extras shall be allowed, under any pretext whatever." The plaintiff made various alterations in the plan by which the cost of the building was increased. The defendants knew of the alterations, and made no objections, and some of them at least approved the acts of the plaintiff. This was an action by the plaintiff to recover the value of this extra work. The court held that the action could only be maintained by clear and satisfactory evidence of a new, distinct, and independent contract by the parties authorizing the alterations in the original plan, and expressly agreeing to pay for them a certain fixed price, or what they might be reasonably worth. *Miller v. McCaffrey*, 9 Pa. 245.

A verbal contract between a school trustee and a teacher, in which the latter undertook to teach school for the term to be held in a certain school year, and the trustee in said contract promised to pay her good wages, is so void for uncertainty as to compensation as not to bind the school township and make it liable for a breach. *Fairplay School Twp. v. O'Neal*, 127 Ind. 95, 26 N. E. 686.

The agent of the defendant promised a workman that he should have a place in the works the ensuing season, and, it appearing that there were different places for workmen in the factory, and that some were more valuable than others, and that it was customary for the company, before each season, to fix the prices to be paid their employees,—it was held that there was no contract completed, as neither the price of the labor, nor the place to be given the plaintiff, was agreed upon. *Shaw v. Woodbury Glass Works*, 52 N. J. L. 7, 18 Atl. 696.

Defendant was a body corporate—a shooting club. The plaintiff testified that he was requested by the club to build a barn on his own premises, and the club agreed to furnish part of the money for its erection; that it was to be used by the club and its members, that he commenced the erection of the barn, and that a person (presumably a member or officer of the club) came down and went in and showed him

uncertain amount. In such case, no extrinsic evidence of acts of the parties, or anything else, is competent to vary the express terms of the contract, and give them a meaning which they do not express.

*Abbott, Trial Ev. pp. 484, 509; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. ed. 948.*

The plaintiff could in no event recover more than nominal damages.

*Todd v. Gamble, 148 N. Y. 382, 52 L. R. A. 225, 42 N. E. 982.*

**Gray, J.**, delivered the opinion of the court:

This action was brought to recover damages for the breach of a contract in writing entered into between the parties, wherein the plaintiff agreed to deliver to the defendant the night news report of the former for publication every morning in the city of New York, and the defendant agreed

to receive the said news report, "and to pay to the first party [the plaintiff] therefor a sum not exceeding \$300 during each and every week that said news report is received by the second party [the defendant] until the 1st day of January in the year 1900, it being understood and agreed that said news report continue to be fully equal in quality and quantity to its present average standard." It was also further provided that the defendant "shall have the right to receive the said news report without interruption from and after the 1st day of January, in the year 1900, and the first party [the plaintiff] shall continue to deliver the same, if required by the second party, at a price which shall be fair and equitable to both of the parties hereto; provided, that such price shall not be more than any other daily morning newspaper in the city of New York shall be required to pay to the first party for the same news

how he wanted it arranged, but afterwards sent for plaintiff and said he had decided to build a barn himself on the club lot. Plaintiff had a verdict for \$65, which, on appeal, was reversed, the court holding that the motion to dismiss the action as upon judgment of nonsuit should have been allowed, for the reason that the contract as testified to by the plaintiff was indefinite as to how much money the defendant agreed to furnish, and that the damages which arose from the failure of the defendant to furnish an unknown and uncertain amount of money could not be estimated. Two of the five judges dissented, holding that under the contract as stated by the plaintiff, while he was not entitled to include any speculative or prospective profits, he was yet entitled to recover for the actual amount expended by him, and for which he received back no remuneration. *Thomas v. Thomasville Shooting Club, 123 N. C. 286, 31 S. E. 654.*

A party being in embarrassed circumstances, and about to take refuge in bankruptcy, the defendant bank offered to carry him through if he would place in their hands all his collaterals. This he agreed to, and the bank from time to time disposed of the collateral and applied the proceeds to the payment of his indebtedness. Among others he placed certificates of stock in the name of an employee of the bank as trustee. No understanding was had between the parties at what value or price the stock was to be accounted for. In an action against the bank under the stockholders' liability act to render it liable for the debts of the corporation it was held that the transaction could not be regarded as a sale of the stock to the bank; that there was nothing said by either party in reference to buying or selling the same; nor was the value of the stock agreed upon or even discussed; nor any price fixed at which the owner would part with it or the bank accept it. Quoting from *Story on Sales, § 217*, the court held that the price required in a contract of sale must be: (1) Money or its negotiable representative; (2) certain and definite, or capable of being rendered definite; (3) an actual price, seriously intended to be exacted. That it was not necessary, however, that the price for which property is sold should be money only, or that it should be actually delivered at the time of the transaction. The term as here used is equivalent to compensation. *Hudson Iron Co. v. Alger, 54 N. Y. 177.* But as values are expressed in money units, a sale implies a reciprocal transfer of this compensation, past, present, or future, whose value in money is agreed upon between

the parties. It is, however, the agreement to pay a price, rather than the actual payment of the price, which is the essential element of a sale, but the price itself must be definite, or the agreement must contain such elements that the price can be ascertained therefrom. *Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. 737.*

Plaintiff having been charged by defendant's testator with looking after land titles, clearing them up, and obtaining possession of certain lands belonging to testator, wrote to the testator that he should have as payment therefor one half the land provided he (the plaintiff) paid the expenses, or one third provided the owner paid the expenses. After some correspondence testator wrote plaintiff: "Don't get restless. Go ahead and get all your lands clear, and, after all entanglements are removed, satisfactory settlement will be made. Perhaps your ideas are not too high." It was held that no contract was entered into between the parties, because defendant's testator did not agree to either one of the two propositions made to him by plaintiff. *Bowen v. Hart, 101 Fed. 376.*

A deed of marriage settlement contained the following provision: "And the said Hulin G. Barnhill for the above consideration covenants and agrees to and with the said Samuel Anders and Catherine A. Anders that he will within four years from the consummation of the aforesaid marriage purchase, or cause to be conveyed to the said trustee, Samuel Anders, a negro woman to be worth not less than \$900, to be held in trust for the said Catherine A. under the same restrictions as the negroes hereinbefore conveyed." The action was brought by the executor of the wife against the administrator of the husband to recover for a breach of this covenant in the failure of the intestate to purchase or procure such slave during the period mentioned and afterwards during his life, and the plaintiff claimed judgment for the sum of \$900. Upon the trial the plaintiff introduced the marriage settlement and read it to the jury. Both parties offered testimony, but none was made on the question of damages other than what was contained in the deed. The court decided that, in the absence of evidence to ascertain the damages, the jury should be instructed to give nominal damages only. On appeal it was held that the judgment was correct. That the words "to be worth not less than \$900" were used as descriptive of the female slave to be purchased, and not of the sum to be laid out in the purchase. *Anders v. Ellis, 87 N. C. 207.*

After a carrying away by a flood of a bridge,

report." This contract was made in July, 1892, and the parties proceeded under it until January 1, 1894; the plaintiff furnishing its news report to the defendant, and the defendant paying therefor the sum of \$300 in each week. A few days before January 1, 1894, the defendant, through its manager, notified the plaintiff in a letter to cease sending the news report on the 1st of January, and that after that date it would not pay for the same. The letter in which this notice was conveyed contained the statement that it had become necessary to make a reduction in the cost of the defendant's news service, and that the plaintiff had declined to make any concessions. In a brief correspondence, which ensued during the next few weeks, the subject of a concession in price was discussed between the parties, but nothing came of it. Thereupon the plaintiff brought this action, and demanded judgment for damages in the sum of up-

wards of \$93,000, upon the basis of its right to \$300 a week from January 1, 1894, to January 1, 1900. The trial court denied a motion to dismiss the complaint, and at the close of the plaintiff's case, the defendant offering no evidence, a verdict was directed for the plaintiff in the sum of 6 cents, upon the ground that there was a technical breach of the contract, for which only nominal damages might be awarded. The judgment entered thereupon was affirmed by the appellate division in the first department, and the plaintiff's appeal to this court presents this as the main question for our consideration: whether the contract was so indefinite, by reason of its failure to state the price to be paid by the defendant, as to preclude a recovery of substantial damages for its breach.

The appellant claims that, inasmuch as the language of the contract bound the defendant to pay a sum "not exceeding \$300 a

plaintiff made application to one of the assignees of his lessor, and informed him that since the bridge had gone he was not able to pay so much rent, and that he would immediately leave possession of the premises if they did not make the rent lower. The assignee requested him to remain, acknowledged that his request was reasonable, and promised that it should be complied with, and the rent should be reduced, and in consequence of this assurance plaintiff did remain in possession of the premises. The defendant here, made cognizance of the taking of certain property of the plaintiff as a distress for rent, as bailiff of the assignees of the lessor, and the plaintiff brought replevin. It was held that the agreement on the part of the assignee to reduce the rent was so uncertain that equity could not give relief. *Smith v. Ankrum*, 13 Serg. & R. 89.

### III. Option between different amounts.

Defendant agreed that if the plaintiff would find him a purchaser for a certain tract of land, he would pay him \$50 or \$60. In an action to recover for the services performed under the contract it was contended on the part of the defendant that an offer to give \$50 or \$60 is so vague and uncertain as to amount to no definite promise, and hence a court cannot determine which of the two sums was the consideration. Plaintiff had a verdict for \$50, which on error was affirmed on the ground that either \$50 or \$60 was a valid and sufficient consideration for the services to be performed. That the defendant made the proposition in the alternative; and had a right at any time before default to elect which of the two alternatives he would perform. That if the services were performed by plaintiff, and defendant failed to perform either alternative, then plaintiff had a right to elect whether he would sue for the \$50 or \$60. There was not such uncertainty as would render the proposition void. *Kramer v. Ewing* (Okla.) 61 Pac. 1064.

The defendant inquired of the plaintiffs the cost of repairs to his carriage, and terms of payment, to which the plaintiffs answered that it would cost him not less than \$125, nor more than \$150; and that the usual terms were cash, upon the completion of the work; but, if he could give his note, he could have twelve months' credit. It was held that this did not constitute a special contract. *Prince v. Thomas*, 15 Ark. 873.

Defendant, who had at various times during several years purchased of plaintiff land scrip 53 L. R. A.

and soldiers' additional homesteads (plaintiff being engaged in business as a dealer in the same), wrote to plaintiff a letter to which he added this postscript: "What is Cole's scrip worth, and soldiers' additional homesteads, now?" Three days after the plaintiff wrote the defendant: "Have to advise that I can furnish today Cole's scrip at \$5 and additional eighties at \$3 per acre. Shall be pleased to hear from you at any time you may desire the paper." The defendant received this letter three days after it was written, and on the morning of the next day he sent plaintiff this telegram: "Send me two soldiers' additional eighties (80's) to-day." This telegram was received by plaintiff the day it was sent, and on the same day he sent by express to defendant four 80-acre pieces of soldiers' additional, and inclosed in the express package his letter as follows: "Per the request of your telegram of this date stating 'Send two eighties additional to-day,' I send you the following described soldiers' additional homestead scrip, collection on you, at \$3 per acre for the two heir claims, and \$3.25 for the others. I send you these so that you may take your choice of them." The defendant received the package two days afterward and retained and used the two pieces, the price of which was named at \$3.25, and returned the other two pieces, together with \$480, to pay for the two pieces retained. This action was brought to recover of the defendant \$40 difference between \$3 and \$3.25 per acre. It was held that prior to the telegram there had been no proposition to buy nor an offer to sell, but merely an inquiry as to the value on a particular day, and a statement as to its value on such day, and a judgment in favor of the plaintiff for the difference was affirmed. *Talbot v. Pettigrew*, 3 Dak. 141, 13 N. W. 576.

A shipper of freight claimed to have made an agreement with the defendant railroad company's agent to ship a mixed car load of watermelons, cantaloupes, and grapes from a point in Texas to Denver, Colorado, at a certain price, which was lower than the price for shipping melons alone. The agent of the defendant misunderstood the plaintiff, and agreed to ship the car at a certain price, and in the bill of lading made what plaintiff claimed was a fraudulent omission by leaving out the grapes, and billed a car as one car of melons. The plaintiff was thereby compelled to pay an additional sum before he could secure the delivery of the same. The court held that under these circumstances the facts did not show that the minds of the parties met upon a contract for a mixed car of



week," by paying that sum for a period of time it had bound itself through a practical construction of the instrument; and it is also argued that the contract should be construed as one "to recover the reasonable value of the news service for the unexpired term of the contract, less the cost of performance." If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to explain them by evidence of their acts, and thus to show a practical construction; but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements,—in the absence of a statement of the price to be paid. That was a defect which was radical in its nature, and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, cannot be ascertained from the instrument, neither the court nor the jury will be allowed to

make an agreement for them upon the subject. It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to. 1 Comyn, Contr. 3; 1 Chitty, Contr. 92; *Elmore v. Kingscote*, 5 Barn. & C. 583; *Blagden v. Bradbear*, 12 Ves. Jr. 468; *Williams v. Morris*, 95 U. S. 456, 24 L. ed. 302; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Stone v. Browning*, 68 N. Y. 598-604. The latter case is not parallel in its facts, but a question arose whether there was a sufficient memorandum of the contract for the sale of the goods to satisfy the requirements of the statute of frauds, and a letter of the defendant was relied upon for the purpose. Judge Rapallo observed that it

melons and grapes, but that the parties misunderstood each other, and no contract was therefore agreed upon between them. *Gulf, C. & S. F. R. Co. v. Dawson* (Tex. Civ. App.) 24 S. W. 586.

#### IV. Price dependent on contingency

##### a. Market price or value.

The complaint in an action alleged that the defendant made his two promissory notes, or bills, or instruments in writing, of which the following are copies: "Bath, January 13th, 1851. Pay Abram Lent for 68 25-11 bushels wheat in store at three cents below first quality wheat. (Signed) L. D. H. for L. D. Hodgman." "Bath, January 23rd, 1851. Pay Abram Lent for 33 46-11 bushels wheat. (Signed) S. M. C. for L. D. Hodgman." The plaintiff had a verdict for \$101.42. Upon a motion for a new trial the same was denied by the general term of the supreme court, the court holding that the instruments in question were not bills of exchange, or promissory notes, but that they were valid special agreements. That as to the sums to be paid, it was sufficient to the validity of the instruments, as agreements, that the sums can be ascertained by reference to the market price of wheat, which must control, except so far as the parties have provided a different standard. That here were the promisor, the promisee, the sum payable, and the consideration therefor; and there was no want of reasonable certainty. The defendant had offered evidence which would have tended to prove that the writings were not contracts. The court held that there was no such ambiguity as warranted the introduction of that evidence. *Lent v. Hodgman*, 15 Barb. 274.

In *Acebal v. Levy*, 10 Bing. 376, 4 Moore & S. 217, the court said: "Whether in all cases of an executory contract of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to price, by inferring that the parties must have intended to sell and to buy at a reasonable price, may be a question of some difficulty. Undoubtedly the law makes that inference where the contract is executed by the acceptance of the goods by the defendants, in order to prevent the injustice of the defendant taking the goods without paying for them. . . . But it may be questionable whether the same reason applies to a case where the contract is executory only, and where the goods are still in the possession, or under the control, of the

seller. . . . The present case, however, does not rest here. It was proved at the trial by parol evidence, that the actual bargain made was for a sale at the current price at the shipping port. This case, therefore, falls within the principle laid down by the judges in *Cooper v. Smith*, 15 East, 103. . . . namely, that where it is shown by parol evidence there has been an agreement for sale at a specified price, the plaintiff cannot, on producing a note in writing, which is altogether silent as to price, recover on a count upon a sale on a *quantum valebat*."

A receipt executed by the plaintiff, after reciting the receipt of certain moneys for timber previously delivered, further stated: "Also, B. Muir has advanced to J. James \$2,077.42 C. c., (two thousand no hundred and seventy-seven dollars forty-two cents, C. c.) on 428 pieces of timber now lying in town of Arbelia, Michigan, measured and marked M., which said timber J. James agrees to deliver at Bay City, Michigan, in spring of 1873, as early as the ice and weather will permit, free of all encumbrances, to B. Muir. Interest at the rate of 10 per cent from 1st of April, year 1872, till the timber is delivered at Bay City. J. James agrees to pay and account to B. Muir in the spring of 1873 for the within-mentioned \$2,077.42 C. c., with interest, advanced on said timber to be delivered in spring of 1873 at Bay City, interest at the rate of 10 per cent, C. c., from 1st April, 1872, till the timber is delivered at Bay City in the year 1873. [Signed] J. James." Plaintiff claimed that the agreement contained in the receipt which had been received by the defendant on which he sought to recover was in itself a complete and binding bargain containing every essential of a contract of sale, except the price, which it is claimed appeared by implication. The court held, following *Acebal v. Levy*, 10 Bing. 376, 4 Moore & S. 217, that where a contract is executory, and not executed, unless the price is fixed distinctly according to some standard, either of amount or of market, or of reasonableness, or some other method of ascertainment, the contract is incomplete and the purchaser is not bound. That, as was held in *Acebal v. Levy*, 10 Bing. 376, 4 Moore & S. 217, where a contract was silent as to price, and there was evidence of a parol agreement as to price, there could be no recovery on a *quantum valebat*, and that a contract in writing was as necessary for a reasonable price as any other; that in the present case there was no implication of a promise to pay at what might happen to be the market

did not "state the price, or any of the terms of the contract. These deficiencies cannot be supplied by oral evidence. All the essential parts of the contract must be evidenced by the writing. This objection, without reference to others, is conclusive." The rules of evidence exclude oral testimony with reference to the understanding of the parties or to supply omissions, and permit it only when to do so is necessary to explain the meaning of some technical or ambiguous language used. It will not permit it to vary the terms of the contract itself by inserting in the writing what is not there. 1 Greenl. Ev. §§ 275-277, 282; *Drake v. Scaman*, 97 N. Y. 230-236. In *Drake v. Scaman*, 97 N. Y. 230-236, where the question arose as to the sufficiency of the memorandum of the parties' contract, in an action for its breach Judge Finch cites the language above given from Judge Rapallo's opinion in *Stone v. Browning* in sup-

port, which might not always, as held in *Acebal v. Levy*, be a reasonable one. *James v. Muir*, 83 Mich. 228.

#### b. Appraisement or award.

Plaintiff and defendants, being in possession of certain real estate, water privileges, machinery, fixtures, etc., entered into an indenture whereby the plaintiff agreed to sell and convey all his right, title, interest, etc., at such prices as should be agreed on and awarded by three men, one chosen by the plaintiff, one by the defendant, and the third by the two thus chosen, which award should be final and binding on the parties; and the defendant covenanted that he would receive and pay for the premises at the award of the appraisers, in cash, on the delivery of the deed; and each party severally bound themselves to the other, under the penalty of \$1,000 for the faithful performance of the agreement to be sued for and recovered according to the laws of Massachusetts. The referees chosen under the agreement made an appraisal of the property. The plaintiff tendered a deed and demanded the amount, which the defendant refused. In an action to recover the same or the \$1,000 damages, it was held that the referees had fixed the price, and, according to the authorities and the reason of the thing, the sale should be carried into effect, and that after the price had been fixed by the referees chosen pursuant to the indenture, it was too late for the defendant to object. *Brown v. Bellows*, 4 Pick. 189.

#### c. Action of, or with, other parties.

A lease provided for the right to the lessor to sell the demised premises any time after its date, and then provided: "But no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms and at the same price per acre as any other person or purchaser might have offered therefor." The lessor sold the land to another person during the time the lease was running. In an action by the lessee against the lessor and the purchaser for a specific performance of the contract, it was held that the lessor, while not bound to sell, but having determined to do so at a price and upon terms satisfactory to himself, offered by some other person or purchaser, covenanted that he would not sell to such other person or purchaser without first giving to the lessee the right to exercise his option to

purchase the land upon the same terms, and it cannot be presumed that the tenant would have taken the lease without this covenant, or that the landlord would have granted the concession, without each understanding that it entered into and formed a part of the consideration moving between them. It was held further, that the parties had, by their contract, prescribed a mode by which the price at which the lessee was to purchase was definitely ascertainable. *Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73.

In *Bromley v. Jefferies*, 2 Vern. 415, Prec. in Ch. 138, the owner of a manor had settled the same on trustees to be by them sold after his death and the money thereby arising to be disposed of as in the settlement mentioned, and as he by his last will and testament should appoint, with a power of revocation; and afterwards, on the marriage of the plaintiff with one of his daughters, covenanted that if the plaintiff survived him and had issue by his daughter, the plaintiff should have the manor £1,500 less than any other purchaser would give for the same. The owner of the manor afterwards by will revoked his settlement, and devised the manor to trustees. In an action by the plaintiff for a specific performance after the death of the owner the court upon the hearing refused to decree a specific execution of this agreement from the uncertainty of it, because if the estate was not to be sold, and the plaintiff was to have it, it was not practicable to know what a purchaser would give for it.

A covenant in a lease provided that, "if the premises are for sale at any time, the lessee shall have the refusal of them." The lessor afterwards released all his right, title, and interest by deed or quitclaim to other parties than the lessee. This was a bill in equity brought by the assignee of the lessee to have the deed declared void and enforce specific performance of the contract contained in the lease, and to compel the defendants to convey the premises to the plaintiff on the same terms that they had conveyed to the other parties. The court held that, considered in the light of a contract to sell, the provision of the lease did not satisfy the statute of frauds, and, apart from the statute, it was not such a contract as equity could specifically enforce; that the contract did not contemplate a sale to somebody else as a mode of ascertaining the price at which the lessor would sell to the lessee; citing and approving *Bromley v. Jefferies*, 2 Vern. 415, Prec. in Ch. 138. *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741.

This case and *Bromley v. Jefferies*, 2 Vern.

give for it. The agreement was held to be objectionable for want of mutuality and as not obligating the plaintiff to take the estate at any price. In *Browne* on the Statute of Frauds there is a discussion upon the subject of the applicability of the statute of frauds in the case of an executory contract, and the cases of *Accebal v. Levy*, 10 Bing. 376, and of *Hoadly v. M'Laine*, 10 Bing. 482, are referred to. Section 377. In *Accebal v. Levy* it was observed by Chief Justice Tindal that, "whether in all cases of an executory contract of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to price by inferring that the parties must have intended to sell and to buy at a reasonable price, may be a question of some difficulty. Undoubtedly the law makes that inference where the contract is executed by the acceptance of the goods by the defendant, in order to prevent the in-

justice of the defendant taking the goods without paying for them. . . . But it may be questionable whether the same reason applies to a case where the contract is executory only, and where the goods are still in the possession or under the control of the seller." I do not think that the force of the doubt which the chief justice expressed in *Accebal v. Levy* was affected by his opinion shortly after expressed in *Hoadly v. M'Laine*. The facts of that case were such as naturally to take it out of the statute. That was an action against the defendant for not accepting and paying for a carriage made under his written order by the plaintiff. The question was whether, as the price was left uncertain, the statute applied to such an executory contract. It was observed by Chief Justice Tindal that a contract for a sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to

415, Prec. in Ch. 138, are the two cases cited and distinguished in *Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73. It was there held that those two cases inferentially decided that while a contract would not be enforced which simply gave the lessee a first chance to make the contract; or where the plaintiff was to have the property for a certain sum less than any other purchaser would give for the same,—that, had there been a mode of ascertainment provided for, the holding in both of these cases would have been otherwise.

There had been a previous decision in *Hayes v. O'Brien* (Ill.) 26 N. E. 601, in which the same court had unanimously decided in favor of the defendants: *Craig, J.* (who dissented from the decision on the rehearing—149 Ill. 403, 23 L. R. A. 555, 37 N. E. 73), writing the opinion and citing in support of it *Bromley v. Jefferies*, 2 Vern. 415, Prec. in Ch. 138, and *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741.

#### V. When price definite or certain.

##### a. To be fixed by subsequent agreement.

A trustee of a colliery with full control of its business, and the mining, transporting, and selling of its coal until June 14, 1901, on June 25, 1880, entered into a written agreement with a firm in New York, engaging to consign and deliver to the firm, its successor, successors, or assigns, the entire output of the colliery until June 1, 1901, at a price to be agreed upon from month to month, on or about the first of each month, by the trustee, or the colliery, and the said firm, its successor or successors or assigns. The firm in 1882 was succeeded by another composed of the defendants and the plaintiff. The latter firm continued in the business until January 10, 1885, and during the whole period of its existence continued in the performance of said contract with the trustee and the colliery. On that date the latter firm was dissolved and succeeded by another composed of the defendant and a third person, to which the said contract and all rights and causes of action thereunder were duly assigned. This last firm continued in business until September 2, 1885, when it was dissolved, and all its property transferred to plaintiff. The last-named firm continued in the due performance of the contract until about the month of March, 1885, when the trustee, as such, and the colliery, ceased and refused, and thereafter refused, to consign and deliver to the firm any of the output thereof. This was an action by the plaintiff against his partners in the second firm upon a guaranty (presumably

of the performance of this contract). The circuit court directed a verdict for plaintiff for six cents damages. On appeal the circuit court of appeals held that the plaintiff was not entitled to recover any but nominal damages. That the agreement bound the trustee and the colliery only to sell the firm coal at a price to be agreed upon between the parties from month to month. That as the price to be paid the colliery was left wholly unsettled by the contract, and could be made certain only by further agreement of the parties from time to time, there was nothing in the absence of such further agreement with which to compare the market price at which coal, if shipped, could have been sold by the firm, and thus determine the profits which might have been lost by refusal to sell at all. That not only was the contract uncertain as to the price to be paid by the firm, but it was not by its terms capable of being made certain; and that there was not sufficient in the evidence to warrant a finding that the parties had practically so interpreted it as to dispense with the successive agreements as to price for which it provided. *Watts v. Weston*, 10 C. C. A. 302, 26 U. S. App. 121, 62 Fed. 186.

Plaintiff sold defendant her entire stock of goods and fixtures, and by the contract of sale the undamaged goods were to be inventoried and taken at cost prices, and the damaged goods at prices agreed upon. In an action for a breach of the contract it was held that the words of the contract meant that the inventory was to be taken of the damaged goods with the others, and that then or thereafter the prices of the damaged goods were to be fixed and determined; and that this interpretation left the contract uncertain and incomplete, and not one which could be enforced against the defendant. *Dayton v. Stone*, 111 Mich. 196, 69 N. W. 515.

A sale is a transfer of the absolute and general property in a thing for a price in money. The price must be certain; and there can be no executed sale, so as to pass the property, when the price is to be fixed by agreement between the parties afterwards, and they do not agree. *Wittkowsky v. Wasson*, 71 N. C. 451.

The only agreement entered into by the defendant was to purchase at a price to be ascertained in a specified mode. No price was ever fixed either by the mode specified or by agreement of the parties. It was held that there was no such agreement as could be carried into execution, as price is of the essence of a contract of sale. *Milnes v. Gery*, 14 Ves. Jr. 408, 9 Revised Rep. 307.

be reasonably worth; and he held, applying that principle to the case at bar, that, as it appeared that the defendant had written to the plaintiff, desiring that he would send his bill for the carriage, and announcing his intention to have it out immediately, the facts showed that he knew he was to pay a reasonable charge when the article was made up, and that, "taking the whole together, there can be no doubt that here is a sufficient note or memorandum of the bargain." It is evident from his opinion, as it is from the other opinions, that the facts in the subsequent writings and conduct of the defendant were regarded as evidencing his undertaking to pay for the carriage *quantum valebat*. See also *Goodman v. Griffiths*, 1 Hurlst. & N. 574.

I have referred to these authorities as

possibly throwing some side light upon the discussion, and not as exactly applicable; for the question before us is whether the contract of the parties was of that legally complete character as would bind either to continue under it. For what had been furnished and accepted, the defendant had paid. It merely takes the position that it was no longer obligated to receive and pay for the reports when the price could not be agreed upon. I entertain no doubt that, where work has been done, or articles have been furnished, a recovery may be based upon *quantum meruit* or *quantum valebant*; but where a contract is of an executory character, and requires performance over a future period of time, as here, and it is silent as to the price which is to be paid to the plaintiff during its term, I do not think

*b. By happening of subsequent event.*

In an action for damages for conversion of a quantity of iron ore, which the plaintiff claimed to have bought from the defendant and taken possession of, it was claimed by both parties that the undivided half of the net proceeds, added to the amount the ore was worth to the defendant for filling, was the amount the defendant was to receive on sales made by the plaintiff of the ore. The amount the defendant was to receive for the ore depended, therefore, entirely upon the price at which it could be sold, and the amount that might be collected on the sales made, and both in turn depended upon the ability of the plaintiff to make a sale of the ore at all. It was held that when it is intended to pass the title to the property by the contract there are elements of certainty required in the terms to give it any validity. The price to be paid by the purchaser should be fixed, and, if the sale is not to be for cash, the terms of payment must be stated, and the time given within which the price fixed must be paid. *Williamson v. Berry*, 8 How. 544, 12 L. ed. 1191. Unless this is done, the title to the property will not pass, without a clause in the contract whereby they are waived. Under the agreement in this case both the time of payment and the price to be paid are left entirely uncertain, and upon these depended the change of title. A verdict for the plaintiff was reversed. *Foster v. Lumbermen's Mining Co.* 68 Mich. 188, 36 N. W. 171.

Where there is a contract for the sale of goods, although the goods may have been put in possession of the vendee, yet if something still remains to be done by the vendor before the contract is completed, as to ascertain the price, quantity, or individuality of the goods, the constructive possession of the property still remains in the vendor. *Devane v. Fennell*, 24 N. C. (2 Ired. L.) 36.

An agreement for the purchase of ice, to be delivered in the future at a price which shall afford the party delivering it a net profit not to exceed \$100 per ton, is void for uncertainty. *Buckmaster v. Consumers Ice Co.* 5 Daly. 313.

Defendant bought a horse from plaintiff and promised that "if the horse was lucky to him he would give £5 more, or the buying of another horse." It was held that such a promise was too vague to be considered in a court of law. *Guthing v. Lynn*, 2 Barn. & Ad. 232.

Plaintiff sold and conveyed to the defendant certain land for an agreed price, and for one half of what the defendant could realize above that sum in case of the sale of the land by him for a larger amount. The defendant thereafter sold the land and received therefor, in advance of \$53 L. R. A.

the sum stated, \$425 and 25 shares of stock, which the jury found was worth \$625. It was held that the agreement entered into between the parties pertained merely to the purchase-price. It was to be a certain sum, and in a certain contingency more than that; the contingency having happened, that the plaintiff was entitled to recover of the defendant one-half of the money received above the stated price, and one half the value of the stock less such sum as the defendant had expended in improvements and taxes, and that the contract was not void for uncertainty. *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500.

*c. By reference to former relations.*

By a written contract defendants agreed to take plaintiff's entire output of lye cans, and he was to continue to furnish them, as heretofore, their entire wants for cans, which were to be not less than 10,000 cans per day. Previous to the making of this contract cans had been furnished by the plaintiff to the defendants under an agreement which did fix the price, and the cans were thereafter furnished and paid for without any new agreement as to price. It was held that the last agreement was not incomplete because it failed to fix the price to be paid. That the words "as heretofore" referred to the price theretofore paid. *Walsh v. Myers*, 92 Wis. 397, 66 N. W. 250.

The defendant was indebted in \$1,628.53 upon a promissory note payable to a third person and secured by a mortgage running to him. This debt was really due to the plaintiff, and the note and mortgage was held by the third person for his benefit. An arrangement was made by which the note was given up, the mortgage discharged, the third person being released from all liability to the plaintiff, and a new agreement made between the plaintiff and the defendant, to enforce which this action was brought. Defendant was indebted to four persons, besides the plaintiff, whom he called his "borrowed-money creditors," with whom he, being insolvent, had settled, paying one in full, and to the others different portions of their debts. The agreement provided that "said Raymond [plaintiff] is to receive from said Rhodes [defendant] *pro rata* per cent of all moneys said Rhodes may hereafter pay his 'borrowed-money creditors,' as he calls them, to the amount of 50 per cent on \$1,628.53—\$814.26." It was held that the parties evidently intended to provide for payments to the plaintiff upon the unpaid balance of his debt in some proportion to other payments which might be made. That "*pro rata* per cent" is equivalent to "rate per cent." All moneys said Rhodes may hereafter pay meant "all payments said Rhodes may here-

that it possesses binding force. As the parties had omitted to make the price a subject of covenant, in the nature of things it would have to be the subject of future agreement or stipulation, and, to use the language of the opinion in *Buckmaster v. Consumers' Ice Co.* 5 Daly, 313, if the price each week was to be by future agreement, the contract was not legally binding on either party, as neither could be compelled to agree with the other. In *Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782, which is cited by the appellant, the contract of the plaintiff to do certain work for the defendant was fully executed, and the plaintiff's action was to recover for the work which he had actually done. The contract was indefinite as to price, and provided that it should not exceed \$1,500; but, as the work

had been done upon the defendant's house, the court permitted the recovery of its reasonable value within the limit of the sum named. The case is not parallel. Here the defendant had declined to be bound by the contract, or to take any further reports from the plaintiff thereafter. The effect upon the instrument of its indefiniteness or uncertainty as to the price to be paid was to make it operative only so long as the parties chose and were able to agree upon the price per week; in other words, whether it should have contractual force would depend upon the subsequent agreement of the parties, and, manifestly, if anything remained to be done by them relating to the subject-matter of the contract, it was an incomplete and unenforceable instrument. The payment of \$300 each week in the past

after make;" that taking all the provisions of the writing, with the circumstances interpreting it, the meaning was that, when the defendant should pay to his "borrowed-money creditors" a portion of their debts remaining unpaid, he should pay to the plaintiff the same proportion of his debt remaining unpaid, and that the agreement was therefore not indefinite as to the amount to be paid. *Raymond v. Rhodes*, 135 Mass. 337.

An agreement of the directors to transfer a specified amount of the capital stock and a specified number of the bonds of a railroad company, convertible into stock at the stockholders' option, to a person upon his agreement to pay all land damages to be awarded against the company, construct the road, and pay the expenses of conducting its affairs until the road was completed, no part of the work having then been performed and its value being unknown, is valid. *Barnes v. Brown*, 11 Hun, 315.

#### d. By action of other parties.

A contract of employment with a teacher by a school district, containing a stipulation for the teacher's compensation that he shall receive the same salary for his services as was established at the date of the contract for like services by the board of directors of the school district within which a mentioned city is situated, is not void for uncertainty. *Caldwell v. Lake County School Dist.* 55 Fed. 372.

An agreement by a client to pay his attorneys as much for their services to be rendered in a given case as he paid either of two other attorneys, who were connected with them in the case, is not void for want of mutuality and uncertainty. *Lungerhausen v. Crittenden*, 103 Mich. 178, 61 N. W. 270.

Plaintiff contracted to sell defendant certain washing machines at the price of \$110 each, and the defendant agreed to purchase them at that price, and to take fifty machines per year. The contract further provided that the plaintiff should have the refusal or option of manufacturing other washing machines at such price as may be bid for them in open competition for equal quality of goods by any responsible manufacturers other than the plaintiff, and these prices shall constitute and be designated as the manufacturer's prices for these machines. On appeal to the United States court from a judgment in favor of the plaintiff the court held that the contract had two phases,—one for the manufacture and sale of the machine first mentioned; the other in reference to the manufacture and sale of other washing machines. Specific provisions as to the former, which was obviously the real subject-matter of the contract, 53 L. R. A.

were inserted, and the defendant agreed to take at least fifty of them each year. Other machines were subordinate, and the stipulations in respect to them were incidental rather than principal, and apparently more for supporting and giving force to the principal matter of the contract; hence, whatever of uncertainty attends those provisions. On breach of such a contract, the principal matter in respect to which provision was made is the one to be mainly regarded. If subordinate provisions are clear and definite, and damages for disregard thereof determinable by plain and obvious rules, of course such damages may be recovered; but if, because they are subordinate, the provisions in respect thereto are indefinite, then the court may not, with the idea of preventing injustice, attempt to substitute equivalents therefor. The court held further, that the court should have charged the jury that, in reference to the machines other than those first mentioned, there could be none other than a recovery of nominal damages; and, having failed to do so, for this error the judgment was reversed. *Troy Laundry Mach. Co. v. Dolph*, 138 U. S. 617, 34 L. ed. 1083, 11 Sup. Ct. Rep. 412.

#### e. Misunderstanding of parties.

Two of three partners united in a letter to the third member of the firm, and offered to sell him three undivided quarter interests at the price of \$5,500 each, or to pay him that sum for his quarter interest. He immediately answered their letter, declining to buy their interest and accepting at the price stated the offer to buy his interest. At the origin of the partnership one of the defendants was the owner of certain patents which the partnership proposed to make, and agreed to sell a two-thirds interest in them to complainant and the other defendant, for the sum of \$10,000, of which \$2,000 was to be paid in cash, \$2,000 in three months, and \$1,000 in four, and the balance of \$5,000 was "to be paid out of the proceeds of the business, [said payments] commencing with the business of the second year, and not less than 25 per cent [of the whole sum] to be paid yearly, until the said sum of \$5,000 was fully paid." After communicating with the defendants as stated the complainant called upon them and demanded payment of the said sum of \$5,000, and asked to have the partnership dissolved. The defendant, who had been as stated the owner of the patent rights, insisted that, according to the terms of the offer, the sum of \$2,500 (one half of the sum still due him for the patents) should be deducted from the price agreed to be paid to the complainant, and he therefore refused to pay him more than \$3,000 on the adjustment of the matter. And the complainant filed his bill.

for the news report furnished was not an acknowledgment of an obligation to pay that amount during the whole contemplated life of the contract, as Mr. Justice Patterson observed at the appellate division. It is evident that the parties recognized their contract to be uncertain or indefinite as to the price from their correspondence and the efforts to come to a mutual understanding and agreement upon the subject. The defendant committed a technical breach of its agreement to receive the news reports from the appellant, but, because of the indefiniteness of the obligation, only nominal damages were recoverable. There was no price fixed

by the contract, and the defect could not be supplied by parol. There was lacking, therefore, any basis for establishing any measure of damages.

At the close of the trial an exception was taken to the granting of the defendant's motion for an extra allowance, and it is now argued in behalf of the plaintiff that it was unauthorized by law. I think that no error was committed in this respect. The Code of Civil Procedure denies costs to the plaintiff unless he recovers the sum of \$50 or more (§ 3228), and provides (§ 3229) that "the defendant is entitled to costs, of course, . . . unless the plaintiff is en-

tion, and assisting him to get a start in business. Whether parties making such a contract would contemplate a cost of \$1,000 or of \$20,000, no one but themselves could say; for the one sum might in some cases be made to answer or the other be required. Courts cannot enforce such contracts; they must rest for their performance upon the honor and good faith of the parties making them." *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29.

By an agreement in writing the defendant insurance company bound itself to pay to the plaintiff, in addition to other compensation for his services, "a contingent commission of 5 per cent." It was held that, "the agreement being silent as to the basis upon which the contingency depends and as to the sum or sums upon which the '5 per cent' is to be calculated," it was for that reason so uncertain as not to be the basis of a cause of action; and that parol evidence was inadmissible for the purpose of altering the legal operation of the instrument by evidence of an intention to an effect which was not expressed in the instrument, and that the agreement as pleaded was void for uncertainty. *Van Slyke v. Broadway Ins. Co.* 115 Cal. 644, 47 Pac. 689.

*g. Promise by decedent to pay for services.*

The defendant in a possessory action which was tried as a petitory action offered in evidence a written agreement from the plaintiff's intestate, which, after reciting that the defendant had been a good and faithful servant, and that he had ten years before given her her freedom, but that she yet held fast, and watched and cared for him in a tender manner, and that he had sold her 50 acres of land in the rear of his plantation (and describing it)—further stated: Said land is sold to her as a recompense as a payment for her services to me, as I have paid her nothing for a number of years past. From a decision in favor of the defendant the plaintiff appealed, and the supreme court held, under article 1757 of the Louisiana C. C., which is as follows: "A price is essential to a contract of sale; if there be none, it is either no contract, or if the consideration be other property, it is an exchange,"—that the language used in the instrument referred to did not warrant the inference that the price was agreed upon and paid, or its equivalent given in exchange. That no price or value was given to the land or services, and that the act was evidence of no contract known to the law, and reversed the judgment. *Kleinpeter v. Harrigan*, 21 La. Ann. 196.

A decedent had promised that if the plaintiff would come and live with him till his death he would give her as much as any relation he had on earth. It was held that the promise was vague and uncertain, and wanting in the essential elements of a valid contract. The court said: "But, at all events, the contract, if any,

to compel them to pay the sum of \$5,500, and for a dissolution of the partnership. The complainant had a decree, which on appeal the court of errors and appeals reversed; the court saying: "The difficulty arises from the fact that the dissolution was agreed upon before the commencement of the second year of the partnership business, and both the offer and acceptance are silent as to the mode in which the sum of \$5,000 due to Edwards for the patents is to be adjusted. . . . It is manifest, therefore, that if Edwards's offer is construed as a proposition to give the complainant the same sum for his quarter interest that Edwards would take for a like interest, including his interest in the debt due him, it was not an offer to give or take an equal sum, but was an offer to give the complainant \$2,500 more for his quarter interest than Edwards would have received for a quarter interest if the complainant had elected to purchase. It is true that Edwards, in his proposition, did not say that the \$2,500 due him from the complainant, out of future proceeds, was to be deducted, and the complainant might therefore well have been led to think that he was to receive the full sum of \$5,500; but it is also apparent that Edwards understood it otherwise. It is a case in which the whole subject-matter about which the parties dealt was not embraced in the offer and acceptance." *Braeutigam v. Edwards*, 38 N. J. Eq. 542.

#### *f. Vague general statements.*

A promise by a defendant upon valuable consideration to give his daughter, who was plaintiff's wife, "a full share of his property" which then and there was worth \$25,000, is too indefinite and uncertain to support an action. *Adams v. Adams*, 28 Ala. 272.

Plaintiff, an eldest son, on arriving at majority, entered into an agreement with his father and mother, whereby he agreed to manage the farm, pay for the professional education of a younger brother, and furnish the necessary funds to open a law office, aid him pecuniarily in establishing himself in business, and support the family, on consideration of which it was mutually agreed that the plaintiff should have and be entitled to whatever real and personal estate he might thereafter acquire by means of his personal labor, industry, and management, over and above the real and personal estate then owned by the defendant (the father), whenever he should thereafter demand a conveyance and transfer of the same to him. Plaintiff claimed to have fully performed the agreement on his part, and sought by the bill to compel performance on the part of the defendants. The court, in dismissing the bill, said, among other things: "The contract itself, as set out, was in some particulars as vague as possible, and especially in all that relates to what was to be done for Myron in furnishing him with a legal education." 53 L. R. A.

tion, and assisting him to get a start in business. Whether parties making such a contract would contemplate a cost of \$1,000 or of \$20,000, no one but themselves could say; for the one sum might in some cases be made to answer or the other be required. Courts cannot enforce such contracts; they must rest for their performance upon the honor and good faith of the parties making them." *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29.

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titled to costs." The provision which authorizes the granting of an additional allowance in difficult cases is contained in the chapter on costs (§ 3253), and reads that "the court may also, in its discretion, award to any party a further sum . . . in an action . . . [where a defense has been interposed], a sum not exceeding 5 per centum upon the sum recovered or claimed, or the value of the subject-matter involved." There is no limitation in this language to the party in whose favor the verdict or the judgment runs. The additional allowance is treated as a part of the costs of the ac-

tion to which a party becomes entitled. The defendant here, by reason of the plaintiff's recovering less than \$50, was in fact the prevailing party, and became entitled to the costs of the action. See *Landon v. Van Etten*, 57 Hun, 122, 10 N. Y. Supp. 802; *Safety Steam Generator Co. v. Dickson Mfg. Co.* 61 Hun, 335, 16 N. Y. Supp. 32.

*The judgment should be affirmed, with costs.*

**Parker, Ch. J., and O'Brien, Haight, Cullen, and Werner, JJ., concur. Landon, J., dissents.**

is too uncertain to admit of enforcement. How much did decedent promise to give? The amount is uncertain, and, from the nature of the arrangement, is incapable of being rendered certain." *Graham v. Graham*, 34 Pa. 475.

Plaintiff went to live with defendant nine years before his death. He was then eighty-seven years old, and besides the feebleness of age had fallen and injured himself, and during the time plaintiff was with him he had had a paralytic stroke. Decedent's wife had died during the time she was with him, and before her death the plaintiff helped to do all the general housework, and afterwards took charge of the house "the same as anyone would be as a wife;" she attended to his money affairs, and transacted business with those who came to see him about it; by reason of his paralysis his speech was affected so that he could not be understood by those coming to see him, and she had to interpret. She also nursed him, put him to bed, and attended to him generally. Some of the duties performed in doing this were very offensive and laborious, taking what it took a man's strength to do. Decedent said that if she would stay with him he would reward her in the future, for she had been a very good girl, and he intended to provide for her after his death, so that she need not want. "I cannot spare her; if she is not able to do the work, but stays here and sees to my house, and if she is never able to work again, she will have plenty to live upon; I intend to provide abundantly for her, that she may have plenty to live on after my death, if she is not able to work." It was held that here was a measure by which the amount could be ascertained, and which brings the case within the rule of certainty to a common intent, and that the plaintiff was entitled to recover such sum as, under the supervisory power of the court, would provide her an annuity that would place her in such circumstances that she need not work. *Williams, J., dissented from the opinion of the majority, on the ground that the alleged contract was as indefinite and uncertain in its terms as the contract declared invalid in Graham v. Graham, 34 Pa. 475. Thompson v. Stevens, 71 Pa. 161.*

A promise by defendant's intestate in consideration that if the plaintiff would live with him till her marriage, or in consideration of her living with him and marrying a certain person, he would give her 100 acres of land, is void for uncertainty. *Sherman v. Kitsmiller, 17 Serg. & R. 45.*

#### VI. Escouted contract; value instead of price.

Where a contract to perform services is in-  
53 L. R. A.

definite as to price, but the services have been performed by one party and accepted by the other, the law will award a reasonable remuneration. *Levitt v. Miller, 64 Mo. App. 147.*

In holding that the delivery of certain lumber on board vessels for the purpose of being transported to the place of delivery was such a contract of a sale and delivery of the lumber to the purchaser as would enable him to maintain an action as owner against an officer for levying an attachment against the vendor upon the property, the court said: "A sale is the transfer of the absolute or general property in a thing for money, or anything of value. When the property purporting to be sold is so separated as to be fully identified and distinguished from other property of like kind, and the price is certain, or, by the terms of the agreement, can be ascertained, . . . the payment of any part of the price as earnest money, or by note in lieu of it, or the delivery of the property, postponing the settlement till the quantity can be definitely determined, makes the sale complete. *Waldo v. Belcher, 33 N. C. (11 Ired. L.) 609; Morgan v. Perkins, 46 N. C. (1 Jonea, L.) 171; Cohen v. Stewart, 98 N. C. 97, 3 S. E. 716; May v. Gentry, 20 N. C. (4 Dev. & B. L.) 127.* Where there is an actual delivery, but no distinct agreement as to the exact price of an article, and no means provided of making it certain, the title does not pass, and if the person consume the article so delivered to him, he becomes liable, upon an implied agreement, to pay its reasonable value, but not by force of the inchoate contract to sell." *Albemarle Lumber Co. v. Wilcox, 105 N. C. 34, 10 S. E. 871.*

Defendants ordered goods, nothing being said about price. They were invoiced and shipped, and received by defendants. As the goods were at the risk of the defendants, being put on board of ship at Liverpool, and the defendants had no agent there to accept, or refuse, or even examine, the goods and compare them with the invoice prices, and the defendants had given a general order for such goods, without any express agreement as to the price, the law will only raise an implied promise to pay as much as the goods were worth at the time and place of shipment. The defendants could not refuse to receive them, and oblige the plaintiff to take them back if they were such goods as the defendants ordered; and their receiving them is no evidence of an agreement to pay the invoice price of them. But the receipt of the goods and of the invoice is prima facie evidence that the invoice price was the value, unless the defendants objected to that price in a reasonable time. *Fenton v. Braden, M. & Co. 2 Cranch, C. C. 550, Fed. Cas. No. 4,730.*

P. H. V.

## MISSOURI SUPREME COURT (In Banc).

ST. LOUIS & MERAMEC RIVER RAILROAD COMPANY, *Resp't.*,

v.

City of KIRKWOOD, *Appt.*

(159 Mo. 239.)

1. A municipal corporation in whose streets a street railroad cannot be operated without its consent may, in granting the consent, limit the use of the railway to the carriage of passengers, and acceptance of the terms will be binding on the company, although it has charter power to carry freight also.
2. An ordinance making the running of street cars in city streets for any purpose not authorized by the company's franchise a misdemeanor, subjecting the offender and the officers causing the operation to fine of not less than \$95, or to imprisonment of not less than two months, is not in excess of the power of the city over its streets, and is not so unreasonable that the court will declare it void.

(December 18, 1900.)

**A**PPEAL by defendant from a judgment of the Circuit Court for St. Louis County in favor of plaintiff in a suit to enjoin defendant from harassing plaintiff by a multiplicity of prosecutions for the violation of a municipal ordinance. *Reversed.*

The facts are stated in the opinion.

*Mr. George L. Edwards* for appellant.

*Messrs. Dawson & Garvin*, for respondent:

If the acts prohibited by ordinance No. 31 were a proper subject-matter for a valid contract between Kirkwood and the railroad company, by the failure of Kirkwood to make timely objection it is estopped, after allowing the railroad company to provide mail and express facilities, to say that it has not waived its consent, if its consent was ever necessary.

*Pennsylvania & S. Valley R. Co. v. Philadelphia & R. R. Co.* 160 Pa. 277, 28 Atl. 784. Laches may be imputed to a commonwealth, as well as to an individual.

*Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co.* 153 Pa. 47, 25 Atl. 1105.

Ordinance No. 31 is void as an exercise of power derived from any valid agreement of the appellant city with the respondent railroad company.

Railroad corporations are required to make arrangements, and provide such facilities as will enable express companies to carry on and transact their express business.

*Rev. Stat. 1889, § 2660.*

A corporation cannot bind itself to exercise only part of the franchise committed to it by the state for public purposes, or make a valid contract not to exercise part of such franchise.

*St. Louis v. St. Louis Gaslight Co.* 5 Mo.

**NOTE.**—As to municipal power to impose conditions when giving assent to street railway in street, see also *note* to *Galveston & W. R. Co. v. Galveston (Tex.)* 36 L. R. A. 33. 53 L. R. A.

*App. 485, 70 Mo. 69; 1 Dill. Mun. Corp. 4th ed. § 443, note 1; Booth, Street Railways, 1892, § 29, p. 36; Wiggins Ferry Co. v. Chicago & A. R. Co.* 128 Mo. 246, 27 S. W. 568, 30 S. W. 430.

The legislature of the state represents the public at large, and has paramount authority over its public ways, including the streets in the cities, as well as country roads.

3 Elliott, Railroads, § 1076.

The best indications of public policy are to be found in the enactments of the legislature.

*State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471.

The doctrine of estoppel cannot be invoked by appellant to validate such a contract.

*Wheeler v. Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088; *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 34 L. R. A. 369, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132.

The power conferred upon the town of Kirkwood to give or withhold its consent to the construction of this railroad is exclusive only to the extent declared by the charter, where it does not conflict with the Constitution and the laws of the state.

*Union Depot R. Co. v. Southern R. Co.* 105 Mo. 570, 16 S. W. 920; *St. Louis v. Weber*, 44 Mo. 547; 3 Elliott, Railroads, § 1081, p. 1622.

The municipality cannot impose conditions inconsistent with the rights granted to the railroad company by the state.

*State v. Dayton Traction Co.* 18 Ohio C. C. 490; *Sims v. Brooklyn Street R. Co.* 37 Ohio St. 556; *Allen v. Jersey City*, 53 N. J. L. 522, 22 Atl. 257; *Re Kings County Elev. R. Co.* 105 N. Y. 97, 13 N. E. 18.

Prohibitive ordinances are authorized only when directed against acts, the necessary and direct consequences of which are to injure the right of an individual or the public. The real character of the act cannot be changed by an ordinance.

*Yorc v. Mueller Coal, Heavy Hauling & Transfer Co.* 147 Mo. 688, 49 S. W. 855; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 41 S. W. 1094, 46 S. W. 976.

Police regulations are reasonable only when calculated to prevent a real wrong.

*Neuborn v. McCann*, 105 Tenn. 159, 50 L. R. A. 476, 58 S. W. 114; *Skinker v. Heman*, 148 Mo. 356, 49 S. W. 1026; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Sinnott v. Chicago & N. W. R. Co.* 81 Wis. 95, 50 N. W. 1097.

The fundamental distinction between a commercial railway and a street railway is the distinction between their operation, whatever their motive power or burden.

*Montgomery v. Santa Ana Westminister R. Co.* 104 Cal. 186, 25 L. R. A. 654, 37 Pac. 786; *De Grauw v. Long Island Electric R. Co.* 43 App. Div. 502, 60 N. Y. Supp. 163.

New or extended uses of a street, resulting from a natural business demand, and



which are consistent with a reasonably free use of the street by the general public, are appurtenant to the grant of the right of way by the city.

*Ransom v. Citizens' R. Co.* 104 Mo. 375, 16 S. W. 416; *Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759; *Philadelphia v. River Front R. Co.* 133 Pa. 134, 19 Atl. 356.

It is not a reasonable regulation of street railways, under the general police power of a municipality to regulate the use of its streets, to prohibit the running of a single mail car twice in twenty-four hours over the tracks laid in the streets of such municipality.

*River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6; *St. Louis v. Edward Heitzberg Pkg. & Provision Co.* 141 Mo. 384, 39 L. R. A. 551, 42 S. W. 954; *State v. Dayton Traction Co.* 18 Ohio C. C. 490; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859.

A railroad and a street railway are two distinct and different things, but the distinction is not that one is for the transportation of both persons and freight and the other for the carrying of passengers only. There is no inherent distinction in this respect.

*Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588; *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 175; Dill. Mun. Corp. 4th ed. § 722; Cooley, Const. Lim. 5th ed. 676, 687; Booth, Street Railways, § 82; Elliott, Roads & Streets, 528, 558; Lewis, Em. Dom. § 124; *Cincinnati & N. G. Ave. Street R. Co. v. Cummins*, 14 Ohio St. 523; *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604, 47 Am. St. Rep. 264, and note; *Sells v. Columbus Street R. Co.* 28 Ohio L. J. 172; *Pelton v. East Cleveland R. Co.* 22 Ohio L. J. 67.

The distinction between two kinds of railways is in the manner of construction and in the mode of operation.

*Hudson River Teleph. Co. v. Waterliet Turp. & R. Co.* 135 N. Y. 393, 17 L. R. A. 674, 32 N. E. 148; *Easton, S. E. & W. E. Pass. R. Co. v. Easton*, 133 Pa. 505, 19 Atl. 486.

If the right to carry freight, in the absence of legislative restriction, is one of the corporate powers of a company organized under the general laws to operate a street railway, then it is manifest that a municipal corporation cannot require the surrender of this corporate power as a condition of its consent to the construction of the road in its streets, nor prevent its exercise by the regulations it adopts for the operation of the road.

*Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 36 L. R. A. 33, 39 S. W. 920.

Gantt, Ch. J., delivered the opinion of the court:

This is a suit by the plaintiff to enjoin the city of Kirkwood and its officers from harassing it by a multiplicity of prosecutions for the violation of an ordinance of said city 53 L. R. A.

known as "Ordinance No. 31," which prohibits any corporation from running or operating any street-railroad car or cars upon or over any route in the city of Kirkwood not authorized by the franchise granted to said corporation by the town or city of Kirkwood, and making a violation thereof a misdemeanor or punishable by a fine not less than \$95 nor more than \$100, or by imprisonment in the city prison for not less than two months nor more than three months, or by both such fine and imprisonment. The defendant city was duly served and answered, and upon trial in the circuit court of St. Louis county a perpetual injunction was granted, from which judgment the city has appealed to this court. The appeal is brought to this court because the constitutionality of the ordinance mentioned is challenged.

Plaintiff's petition charges that it is a railroad corporation duly organized and existing under and by virtue of the provisions of art. 2, chap. 42, of the Revised Statutes of Missouri of 1889, for the purpose of constructing, maintaining, and operating a railroad in the city and county of St. Louis for public use in the conveyance of persons and property from a point within the said city, thence in a general southwestwardly direction through or near the villages and towns of Old Orchard, Kirkwood, etc.; that it has constructed, and is now and for some time past has been operating, its said railroad; that a portion of its line of railroad lies within the limits of the city of Kirkwood; that it is authorized to convey persons and property over its said railroad, and to receive compensation therefor; that, before constructing its said railroad within limits of the said city of Kirkwood, it obtained the assent of said town to said construction, expressed by an ordinance of said town duly enacted May 21, 1897, and numbered 238, and thereafter amended by other ordinances of said city; that neither of said ordinances contains any provisions against the carrying of mails or express matter or light freights, or freights of any character; that plaintiff has never operated its said railroad within the city of Kirkwood for any purpose other or different from the purpose for which it has operated its entire line of railroad, and has never transported on its cars any other or different kind of property than that transported by it throughout the entire length of its said railroad; that its said railroad is a post route, and it is engaged in carrying the United States mails thereon, and for some time past has been, from the city of St. Louis, and to and from the town of Kirkwood; that its said railroad is a public highway, and plaintiff a common carrier; that, at the time of the enactment of the ordinances assenting to the construction of plaintiff's railroad, the town of Kirkwood was organized under special acts of the legislature of the state of Missouri, in the petition referred to; that subsequently, and in 1899, said town became incorporated under the general laws of Missouri as a city of the fourth class; that thereafter, and on, to wit, the 20th day of November, 1899, the said de-

defendant, arbitrarily and without any lawful authority so to do, and with the intent to harass and injure the plaintiff, and to interfere with the plaintiff in the lawful conduct of its business as a common carrier, and to deprive the plaintiff of the exercise and enjoyment of the franchises granted to it as aforesaid, passed a certain resolution, in said petition set out, requiring the plaintiff to cease running and operating over its road in the city of Kirkwood cars carrying freight, express, baggage, or mail, a copy of which said resolution was delivered to the plaintiff; that thereafter, for the purposes aforesaid, and on the 11th day of December, 1899, the said defendant enacted ordinance No. 31, in said petition set out, whereby it is provided that "no corporation, company, copartnership, person or persons shall run, operate, use, or drive, or cause to be run, operated, used, or driven, in the city of Kirkwood, Missouri, any street railroad car or cars, or other kind of railroad car or cars upon or over any route, or for any purpose or use whatever, not authorized by the franchise granted to said corporation, company, copartnership, person or persons by the town or city of Kirkwood, Missouri" (said ordinance provides a penalty for doing the prohibited acts), and that a copy of this ordinance was also delivered to defendant; that thereafter, and on the 19th and 22d days of December, 1899, the said defendant, still persevering in its said purposes aforesaid, caused to be filed with its police judge complaints against one Thomas M. Jenkins, the general manager of plaintiff, for violating said ordinance, upon which warrants were issued, and said Thomas M. Jenkins arrested and brought before the police judge of defendant to answer to said complaints, copies of which said complaints and warrants are set out in the petition; that, though requested, defendant refused to forego further prosecution of plaintiff's said general manager for violating said ordinance No. 31 until the validity of the same might be tested in the courts, but threatened to continue the same. Plaintiff's petition then proceeds to charge that, for a great number of reasons therein enumerated, said ordinance No. 31 is null and void and of no effect, and concludes as follows: "That if the defendant is permitted to continue the prosecutions already commenced against the plaintiff as aforesaid, and is permitted to carry out its threats to institute similar prosecutions against plaintiff from time to time and from day to day, and is permitted to prevent plaintiff from the performance of its public duties as a common carrier, and to prevent the plaintiff from the exercise and enjoyment of its franchises as aforesaid, it will occasion the plaintiff great and irreparable damage for which the plaintiff has no adequate remedy at law." Wherefore the plaintiff prays the court to decree said ordinance No. 31 "illegal, null, and void, as against the plaintiff," and in the meantime to enjoin the defendant, its officers and agents and servants, from further prosecuting the actions already commenced against plaintiff as aforesaid,

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and from instituting or causing to be instituted any further actions against plaintiff, its officers, agents, or servants, for alleged violations of said ordinance No. 31, or in any way interfering with the plaintiff in the discharge of its duties as a common carrier or in the exercise or enjoyment of its said franchise aforesaid, and for such further and other relief as to the court shall seem meet. In pursuance to the prayer of plaintiff's petition the judge of the circuit court of St. Louis county on the 26th day of December, 1899, in vacation of said court, and at chambers, issued a temporary injunction or restraining order against defendant, its officers, agents, and servants, prohibiting them from doing the acts complained of. The answer of defendant to plaintiff's petition is a general denial. After filing said answer, defendant filed a motion to dissolve said temporary injunction as aforesaid issued against it, assigning as reasons therefor that plaintiff's petition does not state facts sufficient to constitute a cause of action or which warrant any equitable or other relief, and because the facts stated in plaintiff's petition are untrue.

The facts developed by the evidence in this case are few, and in the main uncontradicted. They are substantially as follows:

On the 31st day of May, 1895, plaintiff was duly organized "under and by virtue of the provisions of art. 2, chap. 42, of the Revised Statutes of Missouri of 1889, for the purpose of constructing, maintaining, and operating a standard gauge railroad for public use in the conveyance of persons and property." On the 21st day of May, 1897, the defendant, by ordinance duly enacted, granted to the plaintiff, its successors and assigns, a franchise "to construct, maintain, and operate an electric railroad for the transportation of passengers, on, along, over, and upon certain streets of defendant; this franchise to continue in full force and effect for a period of fifty years. This ordinance was thereafter twice amended during the year 1897, but these amendments are not material to the questions here presented for decision. After obtaining this franchise the plaintiff constructed along, across, over, and upon the streets of defendants, by the franchise authorized, an electric railroad. For a period of some six months or more after the construction of its said railroad the plaintiff operated thereon only cars conveying passengers. Plaintiff then commenced to run and operate thereon a mail and freight car, which carries no passengers, but is wholly given up to a traffic in mail, express, baggage, and freight. This car is labeled "United States Mail Car," but is in fact engaged in the business aforesaid. The exclusive privilege of shipping freight, express, or baggage on this car is contracted to the Walton-Knost Express Company for a number of years, at a stipulated sum per annum. Plaintiff makes two trips per day with this car over its roads, stopping to load and unload the same at the corner of Adams and Clay avenues, within the limits of the defendant. The time consumed in loading and

unloading this car is from ten to forty minutes, and at times it stands on the track when not thus engaged. While so engaged in loading and unloading, or standing on the track, this car obstructs the cross walks on Adams and Clay avenues, and withdraws for the time the one half of these streets at this point from public use; and, when passenger cars pass it going east and south at this point, these streets are entirely withdrawn from public use by the cars of plaintiff. The defendant objected to this use of its streets and plaintiff's road, and on the 20th day of November, 1899, by resolution, called upon the plaintiff "to cease within ten days from the 22d day of November, A. D., 1899, the running and operating over its road, in this city, cars carrying freight, express, baggage, or mail." No heed was given this remonstrance of defendant by the plaintiff, and to prevent it or any other railroad from operating its road for a use or purpose not authorized by its franchise, and using the streets of defendant for a purpose not authorized by it, the defendant enacted ordinance No. 31, whereby it is provided:

"Sec. 1. No corporation, company, copartnership, person, or persons shall run, operate, use, or drive, cause to be run, operated, used, or driven in the city of Kirkwood, Missouri, any street railroad car or cars, or other kind of railroad car or cars, upon or over any route, or for any purpose or use whatever, not authorized by the franchise granted to said corporation, company, copartnership, person, or persons by the town of Kirkwood, Missouri. And violations of the provisions of this section shall be deemed a misdemeanor, and upon conviction, the offender shall be punished by a fine of not less than ninety-five (95) dollars, nor more than one hundred (100) dollars, or by imprisonment in the city prison for not less than two months nor more than three months or by both such fine and imprisonment.

"Sec. 2. Any officer of any street railroad company or other railroad company, or person managing or operating the same, who shall run or operate the same or cause the same to be run or operated in a manner or for any use or purpose whatever prohibited by section 1 of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ninety-five (95) dollars, nor more than one hundred (100) dollars, or by imprisonment in the city prison for not less than two months nor more than three months, or by both such fine and imprisonment."

On the 14th day of December, 1899, the defendant caused a copy of this ordinance to be delivered to the plaintiff. Its provisions were not minded by the plaintiff; and on the 19th and 22d days of December, 1899, to enforce obedience thereto, the defendant caused to be commenced against the general manager of the plaintiff suits numbered 7,601 and 7,602, the files in which cases were offered in evidence by plaintiff, and are copied into the record; whereupon, on the 26th day of December, 1899, plaintiff commenced this suit against defendant.

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A correct understanding of the issues involved necessitates a statement of certain provisions of the Constitution of Missouri and of our statutes in force when the plaintiff obtained permission to lay its tracks and operate its railroad in the streets of Kirkwood. Section 20 of art. 12 of the Constitution of Missouri of 1875 provides: "No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained." Section 2543 of the Revised Statutes of Missouri of 1889 (art. 2, chap. 42) provides: "Nothing herein contained shall be construed to authorize the erection of any bridge or other obstruction across or over any stream navigated by steamboats at the place where any bridge or other obstruction may be proposed to be placed so as to prevent the navigation of such stream, nor to authorize the construction of any railroad not already located in, upon, or across any street in a city or road of any county, without the assent of the corporate authorities of said city or the county court of such county." The plaintiff railroad company was organized under the provisions of Rev. Stat. 1889, art. 2, chap. 42, of which § 2543 constitutes a part. On the 21st of May, 1897, the plaintiff applied to the board of aldermen of Kirkwood to grant it a franchise to construct, maintain, and operate an electric railroad upon and across certain streets of said town. Kirkwood was organized as a town by special act of the legislature approved February 20, 1865. By said act it was empowered "to open, establish, widen, extend, contract, abolish, build, and repair streets, avenues, alleys, lanes, public squares, drains, and sewers, and keep the same clear and in order," and "to regulate, grade, pave, and improve the streets in said town," and "to pass all ordinances to carry into effect the object of said act and the powers therein granted." Said charter was amended by another special act, approved February 27, 1869, containing the above powers and some others, not necessary now to mention. In 1899 Kirkwood duly accepted the provisions of the act entitled "Cities of the Fourth Class," and was at the commencement of this suit a city of the fourth class, with the powers conferred by the laws of this state upon such cities. Sections 1 and 14 of the franchise granted plaintiff by the town of Kirkwood, through its board of aldermen, on the 21st of May, 1897, were as follows:

"Sec. 1. Authority is hereby given to the St. Louis and Meramec River Railroad Company, its successors and assigns, to construct, maintain, and operate an electric railroad for the transportation of passengers on, along, and upon the following route within the town of Kirkwood, to wit [naming the streets, etc.]."

"Sec. 14. It is expressly understood by the

acceptance of the provisions of this ordinance by the St. Louis & Meramec River Railroad Company, the railroad company agrees and binds itself, its successors and assigns, to conform to all general ordinances now existing or hereafter to be enacted by the town of Kirkwood respecting and governing street railroads."

The contention of the city of Kirkwood under the foregoing statement of facts is that under the Constitution and statute quoted the town (now city) of Kirkwood had the right to consent or refuse to permit the plaintiff to construct, maintain, and operate its railroad along the streets of said town, and, if it consented, it had the right to prescribe the terms and conditions upon which it would permit said railroad to occupy its streets, and, having permitted plaintiff to occupy its streets solely for the purpose of transporting passengers, plaintiff has no right to use its streets for the carriage of freight. Whereas plaintiff insists that while it is true that under our laws it had no right to construct and maintain its railroad in a city, town, or village without first acquiring the consent of the authorities of said city, the plaintiff railroad company could not bind itself to exercise only a part of the powers committed to it by the state, or make a valid contract not to exercise part of the franchise granted to it for the public use, and the city or town could not impose the condition that it shall exercise only a part of its powers, and such a contract would be in plain violation of the law by both the town and the railroad, and *ultra vires* their respective corporate powers, and opposed to public policy.

It would be difficult to conceive of a more positive and unequivocal veto than that conferred upon the cities, towns, and villages of this state by § 20 of art. 12 of the Constitution, and Rev. Stat. 1889, § 2543, to prevent the construction and operation of railroads upon their streets and highways without their consent. When such power is given to cities and towns it is not limited to a mere yes or no, but they may impose such conditions upon their consent as they see fit. *Grand Ave. R. Co. v. Lindell R. Co.* 148 Mo. 637, 50 S. W. 302; *Grand Ave. R. Co. v. Citizens' R. Co.* 148 Mo. 665, 50 S. W. 305; *Union Depot R. Co. v. Southern R. Co.* 105 Mo. 571, 16 S. W. 920. Judge Elliott, in his work on Railroads, vol. 3, § 1081, says: "When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, the authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railroad in its streets." Judge Dillon, in his work on Municipal Corporations, vol. 2, § 706, says: "Where, under the general statutes of a state, a railroad company was forbidden to construct and operate its road upon the streets of an incorporated city 'without the assent of the corporate authorities,' these are not limited to a simple granting or de-

nial of the right of way, but may prescribe conditions on which they will give their assent; and, if these are accepted by the railroad company, they are binding upon the parties." It does not admit of doubt, in our opinion, that the city of Kirkwood could have altogether denied plaintiff the right to operate its road in said city, and it would have been utterly powerless to have forced its way into said city without its consent. "But," says the plaintiff, "while we concede this, we insist that if it did give its consent, and attached to it the condition that the company should only use the street as a carrier of passengers, the consent must stand, and the condition be rejected because unreasonable, and by so doing it required the railroad company to waive the performance of a duty which its charter imposed upon it, *viz.*, to carry freight." As this city gave its consent solely on this condition, we think it very clear that, if this condition was illegal, then plaintiff is entirely without right in the streets of Kirkwood. As was said by the supreme court of Pennsylvania (*Allegheny City v. Millville, E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202): "The man who can give the whole can give part, or who can grant absolutely can grant with a reservation of rent or other condition. He who can consent or refuse without reason does not make his consent or his refusal either better or worse by a good or a bad reason." It is plain that the Constitution and the statute cited give the absolute power to the city, and it does not lie in the mouth of plaintiff, who obtained this consent, to urge that the condition limiting it to a carriage of passengers is unreasonable. If so unreasonable as to make it void, the consent obtained upon that consideration is also void. But we opine plaintiff does not desire this court to go to this extremity, nor is it necessary. While plaintiff's charter gives it power "to take and convey persons and property . . . and receive compensation therefor," there is no absolute rule of law which compels it to exercise all of its powers at all times and all places. It was entirely reasonable for the town authorities to grant plaintiff the privilege of occupying its streets as a street railway for passengers,—a system which would cause little or no inconvenience to the traveling public, but, on the contrary, contribute to the comfort and convenience of its inhabitants,—and at the same time refuse its consent to a railroad carrying freight, which might block its highways, and amount in many instances to a practical monopoly of the streets. But we are dealing with a question of power, and we need not seek for reasons to justify the city council in refusing its consent to plaintiff to run freight trains on its streets. It must be remembered that the state is not here complaining of nonuser of its chartered powers, but it is the plaintiff, which obtained this consent to use the streets by contracting to carry only passengers on its cars, and thus to deny it itself merely one of its powers. If plaintiff is correct,—that it now has the right to haul freight in the streets of Kirk-

wood without its consent,—then there is nothing to prevent its running freight trains of 10 or 20 cars, and stopping its trains where it pleases. We are clear that its acceptance of the condition imposed in the franchise granted it estops it from now grasping the benefits of that contract with one eager hand, while thrusting aside its burdens with the other. We think the facts in evidence constituted plaintiff, so far as the city of Kirkwood is concerned, a street railway, with the right to transport passengers only, and that in operating mail and express cars it exceeded the consent granted by the city, and thus made itself amenable to prosecution for violation of the ordinance punishing companies for operating cars in the streets for purposes not authorized by their franchises granted by the city. The ordinance was a valid exercise of the corporate authority of the city. Acts 1895, p. 84, § 85, and Id. p. 90, § 106, now Rev. Stat. 1899, §§ 5979, 6000.

Ordinance No. 31 of Kirkwood is not void, by reason of being so unreasonable that this court will declare it void. The exclusive control over its streets is given the city, and after notifying plaintiff that it was violating its franchise, and after plaintiff ignored its demand to conform to its privilege, the ordinance was justified. The city seeks not to oust plaintiff of its franchise, but requires it merely to conform to the conditions upon which it is permitted to use the streets. A street railroad laid in the streets without authority is a nuisance, and so is the operation of a railroad of any kind in a city without authority of law. *Com. v. Old Colony & F. River R. Co.* 14 Gray, 93; *Pittsburgh, V. & C. R. Co. v. Com.* 101 Pa. 192. As the ordinance only made that an offense which is everywhere regarded as a nuisance, it was in no sense in excess of the city's power. It may be well to add that, as the franchise granted by the town of Kirkwood to plaintiff was simply "for the transportation of passengers," the grant must be construed in favor of the public and against the railroad company, and this enumeration excluded the transportation of freight. *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884; *State ex rel. Lackde Gaslight Co. v. Murphy*, 130 Mo. 24, 31 L. R. A. 798, 31 S. W. 594.

It becomes unnecessary to discuss at length the various other propositions urged *arguendo* by the respective counsel.

The decree of the circuit court granting a perpetual injunction against the city of Kirkwood and its officers, restraining it from prosecuting plaintiff and its officers and servants for the violation of the ordinance of said city, was erroneous; and said judgment is reversed and the cause is remanded, with directions to dismiss the bill at the costs of plaintiff.

All concur, except Burgess, J., absent.

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Fannie CRAVENS, Appt.,  
v.  
NEW YORK LIFE INSURANCE COMPANY.

(148 Mo. 583.)

1. An insurance policy is governed by the law of the state in which it is actually delivered to the insured and the premium paid by him to the insurer's agent, although it is issued by a foreign corporation in another state, and expressly provides that it shall be construed according to the laws of that state, where it also provides that it shall not be in force until actual payment of the premium.
2. The limitation on the forfeiture of life insurance policies, made by Rev. Stat. 1879, § 5983, after two annual premiums have been paid, cannot be waived by provisions of the contract.
3. Life policies issued by foreign companies, which do not take effect until they are delivered to the insured and the premium collected from him in the state, are subject to Rev. Stat. 1879, §§ 5983, 5985, providing for extensions of the policy for the full sum for such time as three fourths of the net value will pay for in case of default after two full annual premiums have been paid, notwithstanding provisions for forfeiture in the policies.
4. The right to a paid-up life policy under Rev. Stat. 1879, § 5984, after two full annual premiums have been paid, is conditioned on a demand therefor within sixty days after the unpaid premium becomes due.
5. An unconditional commutation to nonforfeitable paid-up life insurance, which will, under Rev. Stat. 1879, § 5986, exempt a policy from the provisions of the three preceding sections providing for nonforfeitable and paid-up policies, is not provided for by a policy which provides for it only in case of a demand within six months after default in the payment of the premium.

(March 14, 1899.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Jackson County denying the full relief claimed by her in an action to recover the amount alleged to be due on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. William B. C. Brown, James H. Cravens, and Karnes, Holmes, & Krauthoff, for appellant:

The contract is a Missouri contract.

*Fletcher v. New York L. Ins. Co.* 13 Fed. 528, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Berry v. Knights Tem-*

NOTE.—For earlier cases in this series as to law governing contract of insurance by foreign company, see *Mutual Reserve Fund Life Asso. v. Hurst* (Md.) 20 L. R. A. 761; *State Mut. F. Ins. Co. v. Brinkley Stave & Heading Co.* (Ark.) 29 L. R. A. 712; *Daggs v. Orient Ins. Co.* (Mo.) 35 L. R. A. 227; *Union Cent. L. Ins. Co. v. Pollard* (Va.) 36 L. R. A. 271; *Roberts v. Winton* (Tenn.) 41 L. R. A. 275; *Mutual L. Ins. Co. v. Dingley* (C. App. 9th C.) 49 L. R. A. 132; and *Millard v. Brayton* (Mass.) 52 L. R. A. 117.

*plars' & Masons' Life Indemnity Co.* 46 Fed. 439, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511; *Mutual Ben. L. Ins. Co. v. Robison*, 54 Fed. 580; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281; *Hicks v. National L. Ins. Co.* 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690; *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. 541; *Paine v. Pacific Mut. L. Ins. Co.* 2 C. C. A. 459, 10 U. S. App. 256, 51 Fed. 639; *Weinfeld v. Mutual Reserve Fund Life Assn.* 53 Fed. 208; *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. 17, 5 Fed. 228; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 400; *Thwing v. Great Western Ins. Co.* 111 Mass. 109; *Hardie v. St. Louis Mut. L. Ins. Co.* 28 La. Ann. 242; *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450; *McCully v. Phoenix Mut. L. Ins. Co.* 18 W. Va. 782.

The provisions of the Missouri nonforfeiture law (§§ 5983, 5984, 5985, and 5986, Rev. Stat. 1879, now §§ 5856, 5857, 5858, 5859, Rev. Stat. 1889), in force at the taking effect of the policy in suit, entered into and became a part of said policy or contract of insurance, and are to be considered as written into it.

*White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545; *Hicks v. National L. Ins. Co.* 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690; *Havens v. Germania F. Ins. Co.* 123 Mo. 403, 26 L. R. A. 107, 27 S. W. 718.

The Missouri statutes control all policies upon which two full annual premiums have been paid, issued by life insurance companies authorized to do business in this state.

*Wall v. Equitable Life Assur. Soc.* 32 Fed. 273; *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281; *Keller v. Travelers' Ins. Co.* 58 Mo. App. 560.

Nor can said statutes be set aside by an agreement of the parties to the contract that the contract shall be withdrawn from the protection and control of the laws of Missouri, and that it shall be a New York contract, and shall be governed by the laws of New York. This is an attempt to accomplish by indirection that which the law forbids respondent to do directly.

*Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281; *Mutual Ben. L. Ins. Co. v. Robison*, 54 Fed. 580; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. 439.

The only provision, in the policy in suit, relating to a paid-up policy, requires the discharge of two conditions precedent, viz.: (1) The making of a demand for a paid-up policy within six months after lapse; (2) the surrender of the policy in suit before the company can be compelled to issue a paid-up policy.

These conditions precedent prevent the application of § 5986.

*Hunthorne v. Brooklyn L. Ins. Co.* 5 Mo. App. 73; *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427, 15 L. R. A. 449, 17 S. W. 796; *Hexter v. United States L. Ins. Co.* 91 Ky. 356, 15 S. W. 863; *Knapp v.* 53 L. R. A.

*Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Shearer v. Manhattan L. Ins. Co.* 20 Fed. 886.

The legislature of the state of Missouri acted within its constitutional authority in enacting the statute.

*Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *State v. Stone*, 118 Mo. 402, 25 L. R. A. 243, 24 S. W. 164; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5.

That respondent is a mutual life insurance company is immaterial. It is a foreign corporation doing business in Missouri, and its business and contracts, like those of every other foreign corporation, are subject to the regulation and control of the foregoing sections of the statute.

*Knights Templar & Masons' Life Indemnity Co. v. Berry*, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511.

The state may not only prescribe the conditions upon which foreign corporations may do business within her boundaries, but may regulate the business of such corporations therein, and may even exclude such corporations altogether from transacting any business therein.

*State v. Stone*, 118 Mo. 402, 25 L. R. A. 243, 24 S. W. 164; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *State ex rel. Beach v. Citizens' Ben. Asso.* 6 Mo. App. 163; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129.

Mr. F. N. Judson for respondent.

Burgess, J., delivered the opinion of the court:

This is a suit upon a policy of life insurance for \$10,000, issued by the defendant company upon the life of J. K. Cravens, deceased, in favor of the plaintiff, who was his wife. The case was tried by the court, a jury being waived. There was judgment in favor of plaintiff in the sum of \$2,670, from which, after an unsuccessful motion for a new trial, she appeals, claiming that she is entitled to recover the sum of \$8,749.21; that is, the face of the policy, \$10,000, less the two unpaid premiums which were due at the time of the death of the assured, together with interest thereon. The petition alleges that the policy was issued on the 11th day of May, 1887; the payment of all annual premiums until May, 1891; the death of the assured on November 2, 1892; that under the statute the insurance was extended, and was in force at the date of the death of the assured; and asks judgment for the amount of the policy, less the unpaid premiums. The answer of defendant alleges that it is a mutual insurance company duly incorpo-

rated under the laws of the state of New York, and doing business in this state; that by agreement of the parties the law of that state was made the law governing the contract set up; that the assured made default in May, 1891, after paying four annual premiums,—and tendered the sum of \$2,670, the amount of paid-up or commuted policy to which the original policy was entitled by its terms on such default, waiving failure to make demand therefor. It also alleges that other policy holders—that is, other members of the same tontine class—had by the terms of their respective policies acquired with plaintiff contingent and mutual interests in the profits and surplus to be derived from the premiums on all policies of such class, and that the company, on the faith of plaintiff's contract, had incurred obligations to the other members of the tontine class, and that plaintiff is now estopped from setting up any other or different claim under the policy. The answer further alleges that if the statute of Missouri relied on by plaintiff was construed so as to nullify the nonforfeiting agreement upon the faith of which the policy was issued, and without which it would not have been issued, and to create and enforce an obligation contrary to the expressed intent of the parties, then the statute so construed is repugnant to the Constitution of Missouri and to the Constitution of the United States.

The application for the policy is made part of the contract, and contains the following provisions: "(2) That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its right, unless such statements, representations, or information be reduced to writing and presented to the officers of the company at the home office in the application. . . . (4) That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company, or its authorized agent, during the lifetime and good health of the person on whose life insurance is applied for. . . . (6) That the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole, and in each of its parts and obligations, according to the laws of the state of New York, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York." The policy contains this further provision: "That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this

policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued, on demand made within six months after such lapse, with the surrender of this policy, under the same conditions as this policy, except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premiums shall be made; and all right, claim, or interest arising under statute, or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statutes of any state or not, is hereby expressly waived and relinquished."

The cause was tried upon an agreed statement of facts the material parts of which are as follows: "(1) That the defendant is a corporation organized and existing under the laws of the state of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was at the date of issuing the policy in question, and since has been, and now is, engaged in the business of insuring lives through branch offices situated in the different states and territories of this country and certain foreign countries. (2) That the defendant, for many years past, has maintained branch offices in the state of Missouri, and has employed agents to solicit applications for insurance from citizens of Missouri, and in the year 1887, as both prior and subsequent thereto, defendant had received from the superintendent of insurance a certificate of authority to transact business in said state. (3) That during the year 1886, and prior to the issuance of the policy sued upon, the amount of policies issued by defendant to citizens of Missouri was \$1,617,985, and the amount of insurance in force on the lives of citizens of Missouri on December 31, 1886, was \$3,886,542, and the total amount of policies issued by defendant in said year 1886 was \$85,178,294, and the total amount of policies in force on December 31, 1886, issued by defendant, was \$304,373,540. (4) That on the 2d day of May, 1887, and long prior thereto, John K. Cravens was a citizen of the state of Missouri and resident of the county of Jackson, in said state; that on the said date, and long prior thereto, said John K. Cravens was the husband of Fannie Cravens, the plaintiff herein, and thereafter continued to be the husband of said plaintiff, Fannie Cravens, until the time of his death. (5) That the defendant, in the transaction of its business, had adopted different forms of policies, embodying different and varying plans of insurance, all of them being on the mutual plan; the premiums paid, less the expense of management, being administered solely for the benefit of the policy holders, defendant having no capital stock. (6) That on the 2d day of May, 1887, the local agents of defendant solicited said John K. Cravens, at his residence in the county of Jackson and state

of Missouri, to insure his life in the defendant company, and submitted to him the different plans of insurance then in use by said defendant, and said John K. Cravens selected the plan known as the nonforfeiting, limited tontine policy, fifteen-year endowment, with limited premium return, and signed a written application therefor, and also signed the same in the name of the plaintiff, Fannie Cravens, as beneficiary of the policy to be issued thereunder, which said application is herewith filed, . . . and made a part hereof as fully as if set forth herein. Said written application was thereupon delivered to defendant's agent at Kansas City, and was by him forwarded with the report of the medical examination of said Cravens, which said medical examination of said Cravens was made by the examiner of defendant company at Kansas City, in the state of Missouri, and by said agent forwarded to defendant's home office in the city of New York. (7) That thereafter, on the 10th day of May, 1887, said application and medical examination was received at the home office of the defendant in the city of New York, state of New York, and was there examined by the officers of defendant, and on the 11th day of May said application and medical examination was accepted and approved, and the policy in suit, No. 250,213, was thereupon executed by the officers of said defendant at said home office, which said policy is herewith filed, . . . and made a part hereof as fully as if set forth herein. (8) That said policy was transmitted by defendant to its agents at Kansas City, in Jackson county, and on the 20th day of May, 1887, the policy was delivered to said Cravens, in the county of Jackson, in the state of Missouri, by said agent, and the first premium, of \$589.50, was paid by said Cravens, in the state of Missouri, to the said agent of defendant, and by said agent transmitted to defendant's home office. (9) That said Cravens thereafter paid to defendant the premiums due upon said policy upon the 11th day of May, 1888, and on the 11th day of May, 1889, and on the 11th day of May, 1890, the amount of each of said premiums being received by the agent of the defendant from said Cravens at defendant's branch office in Kansas City, and transmitted to defendant's home office, said agent delivering therefor, to said Cravens, receipts of defendant signed by the chief officers of the company, and countersigned by said agent. (10) That default was made in the payment of the premium due on the 11th day of May, 1891, and said premium has not been paid, and no subsequent premium has been paid. (11) That said John K. Cravens died in Kansas City, in the state of Missouri, on the 2d day of November, 1892, and thereafter, on the 30th day of November, 1892, proofs of death in due form as called for by the policy of insurance were by Fannie Cravens made out and delivered to defendant, and received by defendant. A copy of said proofs of death is herewith filed, . . . and made a part hereof as fully as if set forth herein. (12) That the amount of paid-up insurance to 53 L. R. A.

which the policy in suit, No. 250,213, was entitled according to the terms of the application and policy, was \$2,670; that no demand for such paid-up policy was made by or on behalf of said Cravens within six months after default on May 11, 1891, or at any time; that defendant, upon the death of said Cravens, offered to waive the failure to make such demand, and tendered plaintiff, and still tenders, the amount of said policy, to wit, \$2,670, which she declined, and still declines, to receive. (13) At the date of the issuance of said policy the only statute of the state of New York regulating or in any way relating to the forfeiture of life insurance is that set forth in chapter 341 of the Laws of 1876 of the state of New York, as amended by chapter 321 of the Laws of 1877 of the said state, which said statutes may be referred to as if set forth in full herein. (14) The total number of policies issued during the year 1887 by defendant on the 'nonforfeiting, limited tontine policy plan, with fifteen years tontine period,' constituting the same tontine class with policy No. 250,213, issued to the residents of all the states and countries wherein defendant did business, was 5,172, covering aggregate insurance in the sum of \$20,154,981. (15) That said John K. Cravens, on the 11th day of May, 1891, was fifty-three years of age, and the term of temporary insurance procured at that date by three fourths of the net value of the policy taken as a single premium for the amount written in the policy was six years and forty-six days from the 11th day of May, 1891, making said policy, if subject to said extended insurance, in force at the date of the death of the said Cravens. (16) The amount which plaintiff claims under said policy is the face of the policy, to wit, \$10,000, less the amount of unpaid premiums, with interest thereon, leaving a balance claimed of \$8,749.21, with interest thereon at the rate of 6 per cent per annum from the 30th day of November, 1892, and the defendant admits and offers to pay the aforementioned sum of \$2,670, which the plaintiff declines to receive."

The several sections of the Revised Statutes of 1879 in force at the date of the policy sued on, and having any bearing upon the issues involved, are as follows:

"Sec. 5983. Policies Non-Forfeitable. When. No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the nonpayment of premiums thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with  $4\frac{1}{2}$  per cent interest per annum, and after deducting from three fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall



then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which such temporary insurance shall be in force shall be determined by the age of the person, whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid, but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

"Sec. 5984. A Paid-Up Policy may be Demanded, When. At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of  $4\frac{1}{2}$  per cent per annum, without deduction of indebtedness on account of said policy, will purchase applied as a single premium upon the table rates of the company; and in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or of a limited payment endowment policy payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: provided, that from such an amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and, provided, further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

"Sec. 5985. Rule of Payment on Commuted Policy. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in § 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: provided, however, that notice of the claim and proof of the

death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and, provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at 6 per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

"Sec. 5986. The Foregoing Provisions not Applicable, When. The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to nonforfeitable paid-up insurance for which the net value shall be equal to that provided for in § 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then and in any of the foregoing cases, this act shall not be applicable."

The plaintiff contends that the contract of insurance which forms the basis of this suit is a Missouri contract, and must be governed by its laws, notwithstanding the defendant is a corporation incorporated under the laws of the state of New York, has its chief office there, and that the contract provides that the contract contained in the policy and application shall be construed according to the laws of the state of New York, the place of said contract being agreed to be the home office of said company in the city of New York. This contention is not only predicated of the fact that the contract also provides "that under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premiums by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for," but upon the further fact that the application was by defendant's agent in Kansas City, Missouri, transmitted to defendant at its home office in New York city, upon receipt of which the company issued the policy containing the clause quoted, sent the same to its agent at Kansas City, who afterwards delivered the policy to the insured in Missouri, and then and there received the first premium. However perfect in form the contract may have been, and although all of its other terms and conditions may have been complied with, payment of the premium during the life and good health of the assured, and delivery of the contract to him, were conditions precedent in order to complete its execution; and as the premiums were paid, and the policy delivered to the

assured, in this state, it must follow that the contract was executed here. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822, was a suit upon a life insurance policy executed in New York by a corporation of that state doing business in this state, upon an application signed in this state by one of its residents, and made part of the contract, which provided that it should not take effect until the first premium was actually paid during the life of the person proposed for insurance, and which was delivered and the first premium paid in Missouri; and it was held, in the absence of evidence of the company's acceptance of the application in New York, to be a Missouri contract, and governed by the laws of Missouri. In *Hicks v. National L. Ins. Co.* 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690, it is said: "If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premiums paid there, is a New York contract, notwithstanding it is signed and issued by the insurer in another state, the reference is supplied by the case of *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822. The delivery of the policies in the present case was made in New York city to an agent of the assured, and in legal effect was as if the assured had been personally present and received them. Then, and not before, the policies took effect." In *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. 17, 5 Fed. 225, an application for a policy was made at Portland, Oregon, to the company's agent, who forwarded same to the company at Milwaukee, Wisconsin. The company thereupon, in Wisconsin, issued its policy, containing a clause, viz.: "This policy shall not take effect and become binding on the company until the premium shall be actually paid during the lifetime of the persons whose life is assured, to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium."—and transmitted same to its agent at Portland, Oregon, who there delivered it to the insured. The court said: "Where, then, was this contract made,—in Wisconsin or Oregon? The answer to this question involves the inquiry, Where did the final act take place which made the transaction a contract binding upon the parties? The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And until it was binding upon the company it was not binding on the applicant; in short, it was not yet a contract, but only a proposition." *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 400; *Thwing v. Great Western Ins. Co.* 111 Mass. 109; *Wood, Ins.* 189, note 2; *Hardie v. St. Louis Mut. L. Ins. Co.* 26 La. Ann. 242; *St. Louis Mut. L. Ins. Co.* 53 L. R. A.

*v. Kennedy*, 6 Bush, 450. In *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526, the policy was delivered in Missouri, to a citizen of Missouri, and the first premium there paid. The court said: "The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policies, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can, by special contract, upset the statutes of the state, and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this state under the terms and conditions named in the statute. It could not, by paper contrivances, however specious, withdraw itself from the operation of the laws by the force of which it could alone do business within the state. To hold otherwise would be subversive of the right of the state to decide on what terms, by comity, a foreign corporation should be permitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the state creating it, and, when it undertakes business beyond, it does so only by comity. The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance therefore is a Missouri contract, and subject to the local law." In the case of *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273, it was said: "The defendant is a New York corporation doing business in the state of Missouri. The insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York. The application was accepted, the policy fully prepared and signed in that state, and sent to Missouri, and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York. . . . Under these facts, I have little doubt as to the true answer to be made to this first question [viz.: 'Is the contract sued on governed and to be construed by the laws of the state of New York or by the laws of the state of Missouri?']

In *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545, it was held that the act of the legislature of the state of Missouri, March 23, 1874, in respect to policies of life insurance, extends to all policies [of life insurance] delivered in this state after the act went into effect. That was a suit against a foreign insurance company doing business in this state. In *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business by insertion of clauses in its policies. That was a case in which the defendant company insisted that by virtue of certain clauses in the application the contract was to be finally and fully executed in New York. In his opinion,—an opinion concurred in by Circuit Judge McCrary,—Judge Treat uses this language: 'The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance is therefore a Missouri contract, and subject to the local law.'

. . . In view of these authorities, and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss this question further, and simply hold that the Missouri statute controls." Affirmed in the Supreme Court of the United States, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822. The same rule is announced in *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. 541; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. 439; and in *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281. It is true that there was no express provision in the contract which formed the basis of the Clements suit, *supra*, as there is in the case at bar with respect to the state by whose laws the contract should be construed, or as to the place of contract; but defendant was at the time of the execution of the contract doing business in this state *ex gratia*, and could not, with respect to such business, evade the statute of this state, or withdraw itself from its operation, by the insertion of clauses in the policy. *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273. In *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281, it is said: "Where an insurance company does business in this state, and issues its policies to residents of this state, the validity of clauses in its policies must be determined by the laws of this state. The laws of this state establish a rule of public policy which overrides the freedom of contract of the parties, and makes waivers of statutory provisions ineffectual, although such waivers are contained in the strongest terms in the policies." Foreign insurance companies which do business in this state do so not by right but by grace, and must in so doing conform to its 53 L. R. A.

law. They cannot avail themselves of its benefits without bearing its burdens. Moreover, the state may prescribe conditions upon which it will permit a foreign insurance company to transact business within its borders or exclude them altogether, and in so doing violates no contractual rights of the company. *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243, 24 S. W. 164; *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281. It is therefore concluded that the contract is a Missouri contract, and governed by the laws of this state.

Being a Missouri contract, the statute then in force with respect to the subject-matter of the contract entered into and became part thereof, as much so as if copied therein. *State ex rel. Wolff v. Berning*, 74 Mo. 87; *Reed v. Painter*, 129 Mo. loc. cit. 680, 31 S. W. 920; *Havens v. Germania F. Ins. Co.* 123 Mo. 403, 26 L. R. A. 107, 27 S. W. 718; *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545. The question then is, Could the parties themselves enter into a contract either directly or indirectly waiving the provisions of the statute? It was held in *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822, that sections 5983, 5986, *supra*, established a rule of commutation upon default in payment of premiums after two premiums had been paid on a policy of life insurance, which could not be raised or waived by express provision in the contract, except in the cases specified in those statutes. The court said: "The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in § 5983, 'no policy of insurance' issued by any life insurance company authorized to do business in this state 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation;' and in § 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.' This construction is put beyond doubt by § 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections 'shall not be applicable,' necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy. . . . It follows that the insertion in

the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by the statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute." The recent case of the *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 620, 48 U. S. App. 482, 81 Fed. 796, was a suit upon a policy issued by the company, a corporation of the state of New York, and doing business in the then territory of Washington. The assured paid all premiums that accrued prior to July 14, 1890, according to the terms of the policy, but made default in the payment of the premium which fell due on that day, in consequence of which the corporation insisted that the policy was rendered void. The court observed: "That depends upon whether the contract is to be regarded as a Washington or a New York contract, for there is no statute of Washington affecting that provision of the policy which declares that, 'if any premium or instalment of a premium on this policy shall not be paid when due, this policy shall be void.' In the state of New York there is such a statute, and hence the principal question in the case is whether the policy in suit was a New York contract, and to be ruled in accordance with the statute of that state, or to be governed by the principles of the common law, which are in force in Washington in respect to such contracts of insurance. We think it clear that the policy in question was a New York contract. . . . It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that state, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the state (then territory) into which the defendant corporation went to solicit the business in question; for it may be true that every foreign corporation that enters a state other than that of its creation, and there transacts business, does so in subordination to the statutes of the state permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statutes of the state permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question." It is manifest from this decision that if the statutes of Washington had prohibited the forfeiture of the policy upon the ground of the nonpayment of premiums when due, as do the statutes of this state, the conclusion reached would have been different. The rule to be deduced from the authorities seems to be that, when no statute intervenes prohibiting it, a corporation doing business by permission in another state from that of its incorporation may by contract

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make the law of the state of its incorporation the applicatory law of the contract, but that, where the laws of the state in which it does business by license prohibit such corporations from making certain kinds of contracts, they can only act in accordance therewith. As the nonforfeiture clause in § 5983 does not come within the exceptions specified in § 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse, after being in force three full years, by the nonpayment of premiums, is void and of no effect, and that such statutory provision cannot be waived.

While defendant does not concede that the policy in suit can upon any theory be held subject to the statutes of this state, it is insisted that the facts of this case bring the policy within the exception provided by § 5986, as the unconditional commutation paid-up insurance provided therein was equal, at the time of default, to that provided by § 5984 of the statute, and the provision for extended insurance by the express terms of the statute was therefore not applicable. By the provisions of § 5986, *supra*, the three preceding sections are made inapplicable in case the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance therefor provided therein, or for the unconditional commutation of the policy to nonforfeitable, paid-up insurance, for which the net value shall be equal to that provided for in § 5984. The policy was a fifteen-year payment life. It provided that, in the event of default after being in force three full years, "a paid-up policy will be issued on demand made within six months after such lapse, with surrender of this policy, under the same conditions as this policy except as to payment of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual payments paid thereon when said default in the payment of premiums shall be made." The provision with respect to a paid-up policy provided by § 5984 of the statute is as follows: That on demand made within sixty days of default the company "shall issue its paid-up policy, which, . . . in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, . . . or at death, shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid [also providing for the deduction of indebtedness, and the surrender of the original policy]." It is argued that this comparison of the statute with the policy must obviously be made at the date of default, when the right of the insured to the benefit of his reserve matures, and as at this date, May, 1891, Mr. Cravens had paid four premiums, he was entitled to a commutation to paid-up insurance of the precise amount fixed by § 5984; that the method of computation is identical, and

therefore the value of the paid-up policy to which the insured was entitled at the time of the default, on making demand thereof, was precisely what he was entitled to under the statute; that it is immaterial under the policy that he had six months in which to make his demand, and under the statute only sixty days, or that he failed to make demand of the company for a paid-up policy, and that the company waived this failure, as the comparison must be made at the date of default, as his rights under the policy became fixed at that time. We are, however, inclined to a different view, and that this policy does not come within the provisions of, and is not governed or affected by, § 5984. This section, we think, has reference solely to paid-up policies, and gives the holder of a policy, who is entitled to extended insurance under § 5983, the right to compel the company, within a limited time from the beginning of such extended insurance, to convert the extended insurance into a paid-up policy of a prescribed value, if he so desire, but that this right ceases at the expiration of sixty days from the date that the unpaid premium becomes due, and, if no demand be made within that time, the right to paid-up insurance no longer exists. No demand for paid-up insurance was made in this case, and this section cannot be considered as controlling the rights of the parties to this action. Section 5986 exempts from the control of §§ 5983, 5984, and 5985 policies of insurance which contain a provision for an unconditional cash surrender of a fixed minimum amount, and policies which contain a provision for unconditional commutation to nonforfeitable, paid-up insurance of a fixed minimum amount, and also exempts from the control of said sections cases wherein the holder of the policy shall, within sixty days after default is made in the payment of the premium, surrender the policy and accept from the company another form of policy, or such consideration as the holder of the policy may be entitled to under it. This policy contains no provision for a cash surrender value, nor has anything been done by its holder to bring it within either of the two exempted cases.

The question then arises. Does the policy provide for its own unconditional commutation to nonforfeitable, paid-up insurance? The policy contains this provision: "That if the premiums are not paid as heretofore provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that . . . if this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium, a paid-up policy will be issued on demand, made within six months after such lapse, with surrender of this policy," etc. There can be no question but that it was a condition precedent to the right of the holder of the policy in question, after it lapsed for the nonpayment of premiums, to a paid-up policy, that demand be made thereof, with surrender of the policy, within six months after the policy lapsed,

and no such demand could be waived by defendant, so as to affect plaintiff's rights. *Hanthorne v. Brooklyn L. Ins. Co.* 5 Mo. App. 73, was a suit in equity to enforce specific performance of a contract of life insurance. The policy contained the following clause: "After two annual payments, should the party wish to discontinue (notice to the company being given before the net premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash." The assured paid more than two annual premiums. On December 28, 1871, another premium became due, which he failed to pay. In January, 1872, he notified the company that he wanted to discontinue his policy, and demanded a paid-up policy, which the company refused to issue, upon the ground that the assured had failed to comply with the conditions in the provision of the policy quoted. It was held that by an express term of the policy the defendant had a right to notice, before the then next premium became due, of the assured's wish to discontinue, and to demand a paid-up policy, which was a condition precedent to his right thereto, and in the absence of such notice he was not entitled to recover. *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807, was a suit upon a policy of life insurance which provided "that unless this policy shall be surrendered, and such paid-up policy shall be applied for, within ninety days after such nonpayment as aforesaid, then this policy shall be void, and of no effect;" and it was held that the surrender of the policy, and the application for a paid-up policy, within ninety days after nonpayment of the premium, were conditions precedent to plaintiff's right to recover. The same rule is announced with respect to policies containing similar provisions in the following cases: *Sheerer v. Manhattan L. Ins. Co.* 16 Fed. 720; *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427, 15 L. R. A. 449, 17 S. W. 796; *Hudson v. Knickerbocker L. Ins. Co.* 28 N. J. Eq. 167; *Coffey v. Universal L. Ins. Co.* 10 Biss. 354, 7 Fed. 301. *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281, was a suit upon a life insurance policy containing this provision, viz.: "If, after the payment of two or more annual premiums as above, any subsequent premium or instalment of premium be not paid when due, said company do thereupon and thereafter, and upon the same consideration hereinbefore set forth, but without further payment of premiums, insure said life for said term, but only in a sum to be ascertained by the table of paid-up insurance indorsed herein, and hereby made a part of this contract; such sum to be payable at the time and place, and in the manner, and to the persons above named." In that case the assured died after having paid two full annual premiums on said policy. The last instalment was paid March 4, 1888. The administrator of the assured claimed that the policy, at the date of the payment of the last instalment of premiums, had acquired a net value of \$80, to

be computed according to the terms of the policy, and that three fourths of such net value, taken and applied as a net single premium for temporary insurance for the full amount written in the policy, entitled the insured to temporary insurance for \$2,000 for a term expiring March 4, 1889, and brought suit for that sum. The defendant company resisted the recovery on the ground that the value of the policy, and the amount which the representatives of the assured were entitled to recover thereunder, must be determined by the terms of the contract between the assured and the company, and not by the provisions of the statute of the state of Missouri, the provisions of which were expressly waived by the parties, and were inapplicable under the exceptions made by § 5986. As there had been more than two full annual premiums paid on the policy, plaintiff claimed temporary insurance under § 5983, but the court held that the clause in the policy quoted provided for the unconditional commutation of the policy to nonforfeitable, paid-up insurance, that the policy came within the second exception of § 5986, and that plaintiff was entitled to paid-up insurance according to the terms of the policy, and not to temporary insurance under the provisions of § 5983. It does not appear that the policy in suit in that case required that a demand for a paid-up policy be made on the company at any time before it would agree to issue such a policy, in which event plaintiff's policy would have been a conditional one, and would have entitled the holder to temporary insurance for the face of the policy under § 5983. But in the case at bar the policy required that demand be made for a paid-up policy within six months after default in the payment of premium before the holder was entitled to a paid-up policy. Whether the holder would exercise that right or not was discretionary with him, and not for defendant to decide for him. It follows that the policy in suit is not governed by § 5986.

It is, however, controlled by §§ 5983 and 5985. By § 5983, three fourths of the net reserve is applied on the policy as a single premium, which continues the full amount of the policy in force, and then prescribes a rule for fixing the term for which such temporary insurance shall be in force. By § 5985 it is provided that, if the death of the assured occur within the term of temporary insurance covered by the policy, the company shall be bound to pay the amount of the pol-

icy, less the unpaid premiums, with compound interest thereon at 6 per cent. The policy was a fifteen-year endowment, issued May 11, 1887, for \$10,000. Age of the assured at that time was forty-nine years. Four annual premiums of \$589.50 were paid on it, default being made in the payment of the premium which fell due May 11, 1891. Its net value, based upon American experience table of mortality, with interest at 4½ per cent at the date of default in payment of premium, was \$1,957.21. Under § 5983 of the Revised Statutes, 1879, three fourths of the net value, or \$1,467.91, is applied as a single premium for temporary insurance at the attained age of the insured at the time of default in payment of premium. The insured, at time of default in premium in this case, being fifty-three years old, and the amount to be applied as a single premium for temporary insurance \$1,467.91, the insurance is in force for a period of nine years and seventy-one days from date of lapse, May 11, 1891, and upon this basis plaintiff is entitled to recover.

It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether, if so inclined. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243, 24 S. W. 164; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85. This case has recently been affirmed by the Supreme Court of the United States. It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the state Constitution, and that such legislation is not in conflict with any provision of the Constitution of the United States.

For these considerations, we reverse the judgment, and remand the cause, with directions to the court below to enter up judgment for plaintiff in accordance with the views herein expressed.

Gantt, Ch. J., and Sherwood, Brace, and Robinson, JJ., concur. Marshall, J., absent. Valliant, J., not sitting.

Rehearing denied.

Affirmed by Supreme Court of United States, May 28, 1900.

## NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire

v.

Walter E. DOW.

(.....N. H.....)

1. A statute making it unlawful to fish

in any of the streams, ponds, or lakes of the state for brook, speckled, or lake trout with intent to sell or trade fish so caught is not unconstitutional as operating to give wealthy sportsmen more than their just and equal share of the fish.

2. A statute forbidding fishing for

NOTE.—As to equal rights in respect to taking oysters or fish from public waters, see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 582; 53 L. R. A.

also Bittenhaus v. Johnston (Wis.) 32 L. R. A. 380; State v. Higgins (S. C.) 38 L. R. A. 561; and Gustafson v. State (Tex.) 43 L. R. A. 615.

trout with intent to sell or trade the fish caught is a valid exercise of the legislative power to enact equal laws for the protection of the public right of fishery, and of the police power of the state.

(July 27, 1900.)

**SUBMISSION** upon an agreed statement of facts of a case arising under an indictment charging defendant with violation of a statute against the capturing of fish for sale. *Verdict for the State.*

The facts are stated in the opinion.

**Mr. F. M. Beckford**, for the State:

Lake Winnepiseogee is navigable, and the property of the state.

*State v. Gilmanton*, 14 N. H. 467; *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545.

Judicial notice will be taken of the geography of the country.

*State v. Gilmanton*, 14 N. H. 477.

Large natural ponds are held by the state in trust for public use.

*Concord Mfg. Co. v. Robertson*, 66 N. H. 4, 18 L. R. A. 679, 25 Atl. 718.

They must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and proper uses to which they may be made subservient.

*Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 387, 13 L. R. A. 826, 21 Atl. 1090.

The right of capture and appropriation of fish is subject to regulation and control by the representatives of the people, so that there shall continue to be a common property.

*State v. Theriault*, 70 Vt. 617, 43 L. R. A. 290, 41 Atl. 1030.

State legislatures have an undoubted right to pass such restrictive laws.

13 Am. & Eng. Enc. Law, 2d ed. p. 572;

*State v. Roberts*, 59 N. H. 257, 47 Am. Rep. 199;

*State v. Campbell*, 64 N. H. 403, 13 Atl. 585.

Under the law no person or property is subject to unreasonable restraints or burdens.

It is a reasonable restraint, and one calculated to preserve the public (good) peace without infringing on the rights of any citizen.

*State v. White*, 64 N. H. 48, 5 Atl. 828.

**Messrs. Jewell, Owen, & Veasey**, for defendant:

The right to catch fish for food is a fundamental right of prime importance, so recognized from earliest times, and so regarded to-day.

The statute, which prohibits any person to engage in the business or occupation of fishing on any stream or pond at any time with intent to sell or trade fish so caught, while at the same time permitting everyone to fish and destroy trout in the same waters without restriction if they are not caught with intent to sell or trade, seems unwarranted and unconstitutional.

The sportsman, with all his friends, can fish and kill hundreds where defendant kills one. The sportsman does not fish to sell: he disposes of his magnificent and enormous catches to friends gratuitously, and uses the public print to advertise his 53 L. R. A.

achievements. He has violated no law. He kills more trout than a score like defendant can kill. He gives away a hundred and is protected in the slaughter. Defendant sells five to procure other food for his impoverished family, and is put in jail to protect the trout.

**Peaslee, J.**, delivered the opinion of the court:

"The power to enact" fish and game "laws was exercised previous to the adoption of the Constitution, and it has been so long used, and so beneficially for the public, that it ought not now to be called in question." *State v. Roberts*, 59 N. H. 256, 257, 47 Am. Rep. 199. "The duty of preserving the fisheries of a state from extinction, by prohibiting exhaustive methods of fishing, . . . is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food." *Lawton v. Steele*, 152 U. S. 133, 139, 38 L. ed. 385, 389, 14 Sup. Ct. Rep. 499. "From the earliest traditions, the right to reduce animals *feræ naturæ* to possession has been subject to the control of the law-giving power." *Geer v. Connecticut*, 161 U. S. 519, 522, 40 L. ed. 793, 794, 16 Sup. Ct. Rep. 600. "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds." *Phelps v. Racey*, 60 N. Y. 10, 14, 19 Am. Rep. 140; *Lawton v. Steele*, 119 N. Y. 226, 234, 7 L. R. A. 134, 23 N. E. 878. In the exercise of this power, the legislature regulates the time and method of taking fish or game, and prohibits the taking by one who has already taken a certain quantity. *State ex rel. Corcoran v. Chapel*, 64 Minn. 130, 32 L. R. A. 131, 66 N. W. 205. The authority to enact these limitations flows from the power to prohibit, and this rests upon the proposition that the individual has no vested right in fish and wild game not reduced to possession. *State v. Roberts*, 59 N. H. 484, 486.

In the present instance the legislature has enacted that "any person who shall, for the whole or any part of the time, engage in the business or occupation of fishing on any of the streams or ponds of this state for the brook or speckled trout, with intent to sell or trade fish so caught," shall be punished. Laws 1899, chap. 22. The defendant claims that this law is unconstitutional, assigning as one reason for his contention that the act operates to give the wealthy sportsmen more than their just and equal share of the fish. It is not apparent in what way the defendant is denied any right granted to others. If they may fish, so may he; and the prohibition of his fishing with intent to sell the fish to them equally enjoins them from fishing with intent to sell their fish to him. "The statute makes no discrimination. . . . Everybody is prohibited." True it is that the prohibition affects some more than others. "Such is necessarily the effect of all restrictive laws. . . . The equality of the Constitution is the equality of persons, and not of places.—the equality

of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an equal law." *State v. Griffin*, 69 N. H. 1, 29, 30, 41 L. R. A. 177, 39 Atl. 260.

It is further argued that the act is not calculated to promote the end sought, that it does not protect the fisheries of the state, and so, not being an exercise of the police power, is an unwarranted invasion of the private rights of individuals. This claim has no foundation in fact. The restraint of the acts of those who make a business of fishing must inevitably tend to decrease the number of fish caught, and whether this was a wise means by which to accomplish the legitimate end was a question for the legislature. *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210; *State v. Griffin*, 69 N. H. 1, 41 L. R. A. 177, 39 Atl. 260; *Phelps v. Racey*, 60 N. Y. 10; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758; *Allen v. Wyckoff*, 48 N. J. L. 90, 2 Atl. 659. "It is a matter of common knowledge that the rapid depletion of game . . . is caused by its indiscriminate slaughter by 'pot hunters,' who kill it for the general market. The practical question which confronted the legislature was how to prevent the undue depletion of such game from this cause. This could only be done by adopting some means that would, as far as possible, prevent the game from becoming a subject of commerce in the general market." *State ex rel. Corcoran v. Chapel*, 64 Minn. 130, 132, 32 L. R. A. 131, 66 N. W. 205.

The defendant cites no case to sustain his position; but in the dissenting opinions of Justices Field and Harlan in *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, it was reasoned that a restriction upon the sale of game lawfully killed was an unjustifiable interference with the right of property thereby acquired in the game, that upon the killing the property became absolute, and that a state could not enact that the right acquired should be a qualified one only. This reasoning is satisfactorily answered by that of the majority of the court, and by the reasoning of state courts in cases which have come before them. "It being conceded that the state, under its general police power, may lawfully prohibit the killing of the game birds in

question, it may, of course, control such killing, and the times and purposes thereof. It may lawfully enact that they may be killed and sold and held for sale only for domestic consumption. The state, in the exercise of its power, instead of prohibiting the killing altogether, permits the person killing them to acquire only a qualified right in them." *State v. Geer*, 61 Conn. 144, 152, 13 L. R. A. 804, 3 Inters. Com. Rep. 732, 22 Atl. 1012; *State ex rel. Corcoran v. Chapel*, 64 Minn. 130, 32 L. R. A. 131, 66 N. W. 205. "The legislature has never conferred an absolute property in quail upon the person who might kill the same. The killing of quail . . . was permitted, not for sale, —not to go upon the market as an article of commerce,—but for the mere use of the person who killed the birds. The person killing quail under this statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell, or the right to ship for the purpose of sale, and when such person undertakes to ship for sale he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists." *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758. "The question of individual enjoyment is one of public policy, and not of private right." *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600. "The cases cited abundantly establish the doctrine that it is competent for the legislature, for the purpose of protecting game or fish, to absolutely prohibit the sale of fish or game caught within the limits of the state during a closed season, or during the entire year." *People v. O'Neil*, 110 Mich. 324, 33 L. R. A. 696, 68 N. W. 227. The statute in question is a valid exercise of the legislative power to enact equal laws for the protection of the public right of fishery. It imposes upon all persons alike "restrictions and limitations upon the time and manner of taking fish." *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199.

In accordance with the stipulation in the case, the order must be:

*Verdict directed for the State.*

All concur.

#### NORTH CAROLINA SUPREME COURT.

W. S. FLEMING et al.

v.

Maggie S. BORDEN, Appt.

(126 N. C. 450, 127 N. C. 214.)

#### 1. The receipt by the creditor's agent

NOTE.—Effect of usury in consideration for extension of time to principal on surety's liability.

I. Effect of payment of usury.

II. Effect of contract to pay usury.

III. Summary.

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of the money stipulated for in an agreement between debtor and creditor for extension of a debt is sufficient to make the contract binding so as to discharge the surety.

#### 2. That interest paid for the extension of time for payment of a debt is usurious

##### I. Effect of payment of usury.

The case of FLEMING v. BORDEN holds that a surety is released by a contract for an extension of time, made by the principal debtor and the creditor without the consent of the surety. al-



will not destroy the contract for the extension, so as to prevent a release of the surety's liability.

3. That a woman who mortgaged her property for her husband's debt is dead, and no administrator has been appointed for her property and no guardian for her children, so that there is no one to pay the debt at the time of a contract for its extension, will not prevent the extension from operating as a discharge of the mortgage.
4. The rule that when the trustee is barred by the statute of Limitations the *cestui que trust* is also barred has no application to a case where the deed creating the trust authorizes the *cestui que trust* to convey the property, and directs the trustee to join in the deed, under which authority the property is mortgaged by an instrument in which the trustee conveys in fee simple, after which he dies, since he has no interest to descend to his heirs against which the statute can run.

though the consideration for such extension is the payment of usury. This is in accord with the weight of authority.

There has been some conflict in the different states, and even in decisions of the courts in the same state, on this question. In Missouri, New York, and North Carolina the contrary has been held, but such decisions have been overruled.

In the following cases it is held that a surety is released by an extension of time granted to the debtor by the principal, although the consideration for such extension is the payment of usury: *Vary v. Norton*, 6 Fed. 808; *Cox v. Mobile & G. R. Co.* 44 Ala. 611; *Niblack v. Champeny*, 10 S. D. 165, 72 N. W. 402; *Camp v. Howell*, 37 Ga. 812; *Scott v. Saffold*, 37 Ga. 384; *Knight v. Hawkins*, 93 Ga. 709, 20 S. E. 266; *Kennedy v. Evans*, 31 Ill. 258; *Danforth v. Semple*, 73 Ill. 170; *Myers v. First Nat. Bank*, 78 Ill. 237; *Harbert v. Dumont*, 3 Ind. 346; *Lemmon v. Whitman*, 75 Ind. 818, 89 Am. Rep. 150; *Kenningham v. Bedford*, 1 B. Mon. 325; *Duncan v. Reed*, 8 B. Mon. 382; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Wild v. Howe*, 74 Mo. 551; *Billington v. Wagoner*, 33 N. Y. 31; *LaFarge v. Herter*, 9 N. Y. 241; *Draper v. Treacott*, 29 Barb. 401; *National Bank v. Place*, 15 Hun, 564; *Proude v. Bishop*, 25 App. Div. 514, 49 N. Y. Supp. 956; *Scott v. Harris*, 76 N. C. 205; *White v. Whitney*, 51 Ind. 124; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Blaser v. Bundy*, 15 Ohio St. 57; *Osborn v. Low*, 40 Ohio St. 347; *Grayson's Appeal*, 108 Pa. 581; *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11, 55 S. W. 301; *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111; *Austin v. Dorwin*, 21 Vt. 38; *Turrill v. Boynton*, 23 Vt. 142; *Armistead v. Ward*, 2 Patton & H. (Va.) 504; *Glenn v. Morgan*, 23 W. Va. 467; *Hamilton v. Prouty*, 50 Wis. 592, 36 Am. Rep. 866, 7 N. W. 659; *Riley v. Gregg*, 16 Wis. 666.

And the same was said to be the rule in the following cases: *Montague v. Mitchell*, 28 Ill. 481; *Wittmer v. Ellison*, 72 Ill. 301; *Abel v. Alexander*, 45 Ind. 529, 15 Am. Rep. 270; *Forbes v. Sheppard*, 93 N. C. 111, 8 S. E. 817; *Parsons v. Harrold*, 46 W. Va. 122, 32 S. E. 1002.

The receipt of interest in advance, although at a usurious rate, will support a contract to forbear; and, if made without the knowledge or assent of the surety to the obligation, will exonerate him from liability. *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Niblack v. Champeny*, 10 S. D. 165, 72 N. W. 402. In the last case it was said: "The au-

#### On rehearing.

5. A wife who executes a mortgage on her separate property to secure her husband's debt occupies the position of a surety, and is discharged from liability by an agreement for extension of payment, made without her knowledge or consent, notwithstanding the contract of forbearance was based upon a usurious consideration.
6. A purchaser of land at a mortgagee's sale acquires no title, legal or equitable, where the mortgage was given by a wife to secure her husband's debt, and the lien on the land has been discharged by an agreement for an extension of time, made without her knowledge or consent.
7. Infant children of a woman who has mortgaged her property as security for her husband's debt are not estopped from asserting their title in case the property is sold after her obligation is discharged and she has died, as against a purchaser in good

faith. The authorities are conflicting, but we think the better rule is that, where the usurious interest has been paid, as in this case, it constitutes a sufficient consideration for the extension."

So, "where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, that will, in effect, be giving time to the debtor, and will discharge the surety." *Scott v. Safford*, 37 Ga. 884.

In *Abel v. Alexander*, 45 Ind. 529, 15 Am. Rep. 270, it was said: "This court has repeatedly decided that the payment of usurious interest in advance constituted a sufficient consideration to support an agreement to extend the time of payment of the principal. *Harbert v. Dumont*, 3 Ind. 346; *Redman v. Deputy*, 26 Ind. 338; *Calvin v. Wiggam*, 27 Ind. 489; *Cross v. Wood*, 30 Ind. 378. The ruling in the above cases was based upon two grounds: (1) That the payment included legal interest; (2) that, although the usurious interest might be recovered back in an independent action, or might be recouped in an action upon the note, the use of the usurious interest constituted a sufficient consideration for the agreement to extend the time of payment of the principal of the note."

And a surety on a note will be discharged by an extension of time where the consideration for the extension is the payment in advance of usurious interest after the maturity of the note without the consent of the surety. *Knight v. Hawkins*, 93 Ga. 709, 20 S. E. 266.

And the payment of usury in advance for an extension of time will discharge a surety not consenting. *Duncan v. Reed*, 8 B. Mon. 382. In this case it was said that if the contract was to pay usury thereafter, it is no discharge of the surety.

The payment of interest by the maker on an overdue note from the date of maturity to a date in the future is a valid consideration for an agreement to extend the payment to such date, and will discharge a surety if made without his knowledge. *Grayson's Appeal*, 108 Pa. 581. In this case it was held that it was not material whether such interest was usurious, as the excess could be applied to the principal, and the lawful interest paid in advance was a good consideration for an extension.

In *Grayson's Appeal*, 108 Pa. 581, *supra*, the case of *Hartman v. Danner*, 74 Pa. 36, was distinguished, as there the consideration was the payment of usury only, not interest, after the maturity of the obligation in advance for further time; and as the law at once applied the usury to the debt overdue there remained no valid consideration for the contract. But in this case time was given in consideration of the

faith of the title secured at the mortgagee's sale, where they had no knowledge of the facts so as to make them guilty of fraud in permitting the mortgage to remain uncanceled.

8. A motion for a new trial for newly discovered evidence cannot be considered on a petition to rehear on appeal, even if due diligence has been shown.

(May 1, 1900.)

**A**PPEAL by defendant from a judgment of the Superior Court for Beaufort County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. A. O. Gaylord, for appellant:

Even if the agreement to extend the time of payment of the note was made, it was usurious and void, and therefore not such a

binding contract as would discharge the surety.

*First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582; *Ward v. Sugg*, 113 N. C. 489, 24 L. R. A. 280, 18 S. E. 717.

The \$50 charged was not for interest to become due, but was a payment for time that had expired, and when paid was not in excess of the amount actually due.

7 Wait, Act. & Def. p. 421.

Stickney's letter to Brown directed him to pay the \$50 to J. L. Fowle, and to notify him. Notice, in this case, was necessary to make this transaction a payment.

*Strayhorn v. Webb*, 47 N. C. (2 Jones, L.) 199, 64 Am. Dec. 580; *Carroway v. Coz*, 44 N. C. (Busbee, L.) 173.

When the alleged agreement to extend was made, Maria Brown, the alleged surety, was dead, and could not be affected or injured

interest paid in advance covering the period of extension.

And where a bank indorsed on the back of a note at maturity "Int. pd. and time extended" to July 25, 1896, and this was done by charging up to the debtor's account usurious interest, the surety was released. *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11, 55 S. W. 801. In this case the court said that if the note had embraced 8 per cent without disclosing usury on the face the maker could only avoid the same to the extent of usury, and the legal interest was a valid consideration for the extension. That under Shannon's Code (Tenn.) § 8499, if usury does not appear on the face of a note it is voidable only to the extent of usury.

And a surety is discharged by an agreement between the holder of a note and the payee to extend the time of payment in consideration of the execution of a note for usury which was subsequently paid in part. *Camp v. Howell*, 37 Ga. 312.

In *Montague v. Mitchell*, 28 Ill. 481, where the holder of a note accepted 3 per cent a month in cash, paid by the principal for extending the time of payment, it was held that the surety on such note was discharged. In this case the court does not discuss the question of usury, but simply that the surety was released on the ground of an extension.

And a surety is released where the time of payment of a note is extended by the holder to the principal debtor without the assent of the surety, in consideration of the payment of usurious interest. *Kennedy v. Evans*, 31 Ill. 258. In this case the court does not discuss the question of usury, but places the decision on the ground that further time for payment was given to the principal until the principal became insolvent.

A contract to extend the time of payment of a note releases a surety not consenting, if money is paid for such extension, whether it is usury or not. *Danforth v. Semple*, 73 Ill. 170.

Under Indiana Acts 1845, p. 12, permitting the holder of a note to retain interest that is usurious, the payment of usury in consideration of an extension of time will be a valid consideration, and will discharge a surety not consenting to such extension. *Harbert v. Dumont*, 3 Ind. 346.

And, the payment of usurious interest for a time already elapsed, on a note or other obligation to pay money, constitutes a good consideration for an agreement to extend the time of payment, though under the law the debtor, or his sureties, if they choose, may recoup the amount so paid. *Lemmon v. Whitman*, 75 Ind. 318, 39 Am. Rep. 150.

53 L. R. A.

Under Ind. law March 7, 1861 (2 Gavin & H. 656), providing that if a greater rate of interest than is heretofore allowed shall be contracted for or received or reserved the contract shall not, therefore, be void, and the plaintiff shall only recover his principal with 6 per cent interest, a contract of forbearance is not void for usury. An agreement, upon a sufficient consideration to give further time to the principal, without the consent of the surety, discharges the surety. *Calvin v. Wiggam*, 27 Ind. 489. In this case a quantity of tobacco was given as a payment in advance for an extension of time.

In *Austin v. Dorwin*, 21 Vt. 38, it was held that if the payment had been made expressly to apply on the note it would seem that there would have been a sufficient consideration for the contract of delay, as the payment was made before the note became due, and the payment before that day being a benefit to the creditor is a good consideration for the promise.

In *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817, the court said, in regard to an extension granted on a sufficient consideration: "The exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been paid." In this case money was paid for an extension of time.

In the following cases, holding that a surety was released by an extension of time granted to the debtor in consideration of the payment of usury, it was further held that the creditor could not avoid the effect of the extension by claiming that the agreement to extend was void for usury, and that such contracts could only be avoided by the debtor or those in privity with him. *Riley v. Gregg*, 16 Wis. 607; *Hamilton v. Pronty*, 50 Wis. 592, 36 Am. Rep. 866, 7 N. W. 659; *Turrill v. Boynton*, 23 Vt. 142; *Armistead v. Ward*, 2 Patton & H. (Va.) 504; *Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Draper v. Trescott*, 29 Barb. 401; *Froude v. Bishop*, 25 App. Div. 514, 49 N. Y. Supp. 955; *Scott v. Harris*, 76 N. C. 205; *Billington v. Wagoner*, 33 N. Y. 31; *LaFarge v. Herter*, 4 Barb. 346, Affirmed in 9 N. Y. 241; *National Bank v. Place*, 15 Hun, 564; *Vary v. Norton*, 6 Fed. 808.

The payment of usurious interest is a valid consideration for an extension of time upon a promissory note, and being a valid agreement, made without the consent of the surety, will operate as a discharge. *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111. In this case it was said that under Tex. Rev. Stat. art. 2979, providing that all written contracts which violate the preceding article by stipulating for a greater rate of interest, than 12 per cent shall be

by the extension, and would not be discharged.

*First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582; *Carter v. Duncan*, 84 N. C. 676; *Stallings v. Lane*, 88 N. C. 214.

If the trustee is barred, the *cestui que trust* is barred also.

*Clayton v. Rose*, 87 N. C. 106; *Herndon v. Pratt*, 59 N. C. (6 Jones, Eq.) 327; *Clayton v. Cagle*, 97 N. C. 300, 1 S. E. 523; *King v. Rhew*, 108 N. C. 696, 13 S. E. 174.

*On petition for rehearing.*

The cases cited in the opinion in support of the release of the mortgage by an agreement to extend the time of payment without the consent of the surety are all either upon notes or bonds.

The cases in which the principle has been applied to the discharge of the land of a wife whose land was mortgaged to secure

the husband's debt are where it was asserted in an action to foreclose, or other equitable action before a sale, or where, as in *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56, the purchaser was the assignee of the indebtedness, and a party to the agreement to extend the time of payment.

Upon default of payment the only interest left in the mortgagor was an equitable interest, and the exercise of the legal power of sale, now become absolute, could only be arrested by the injunctive power of a court of equity.

If it is sought to work a discharge of the mortgage by something entirely outside of the instrument, such discharging matter must be asserted before a sale under the power; otherwise an innocent purchaser should get an unassailable title.

2 Jones, Mortg. 3d ed. § 1805.

void and of no effect for the whole rate of interest, but the principal sum of money or the value of the contract may be recovered, such contracts are void only as to interest and at the instance of the defendant.

And if the creditor agrees to extend the time of payment for a usurious consideration paid without the consent of the surety, he is precluded during the extended time from maintaining an action against the principal for he will not be permitted to take advantage of his own violation of the statute in avoidance of his agreement, and thus prevent the sureties from establishing their defense. *Froude v. Bishop*, 25 App. Div. 514, 49 N. Y. Supp. 955. The court said that it was held in *Draper v. Trecott*, 29 Barb. 401, that the plaintiff cannot avail himself of the usury as rendering the agreement invalid when the consideration was proved by the surety, and that in the case of *Billington v. Wagoner*, 33 N. Y. 31, the usurious consideration must necessarily have been disclosed by the defendant's proof. The court further said that the case of *Denick v. Hubbard*, 27 Hun, 350, was inconsistent with the *Billington* case, and must be overruled.

In *Armistead v. Ward*, 2 Patton & H. (Va.) 504, the court said that the usurer could not take advantage of his own wrong; otherwise it would be a premium for extortion, since a bona fide creditor by an extension for legal interests would release his sureties, while the usurer, by agreeing for illegal interest, would escape those consequences, and retain both the usurious premiums and also the liabilities of his sureties.

In *Farwell v. Meyer*, 35 Ill. 41, where usury was paid on a note for extensions, and a judgment was taken on a warrant of attorney attached to the note, an action was brought by the sureties to enjoin the judgment on the ground that they were released by such extensions made without their knowledge. The injunction was denied on the ground that it was not proved that the agent collecting the usury was authorized by the owner of the note to make such agreement. But the sureties were entitled to credits on the judgment to the extent of the usury so paid. The court said: "But it is evident that the owner of the note, whoever he was, received the sums of money paid by Zimmerman for forbearance, and they ought to be applied in part payment of the debt." It would seem that the authority to collect usury would also include the power to make the contract that secured the usury. In the case of *FLEMING v. BORDEN* the agent received the money under an agreement of the creditor with the debtor, which was held to be the same as if the creditor had received it himself.

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In *Wittmer v. Ellison*, 72 Ill. 301, it was said: "Our statute, unlike that of New York, does not render every contract tainted with usury wholly void. An executory contract to pay usurious interest could not be enforced against the debtor, and would not, therefore, constitute a legal consideration. On that ground was placed the decision in *Galbraith v. Fullerton*, 53 Ill. 126. To the same effect is *Tudor v. Goodloe*, 1 B. Mon. 322. But in the case at bar the consideration was paid. The lender who received it cannot set up the usury, and allege invalidity of his agreement. *Kenningham v. Bedford*, 1 B. Mon. 325. The reasoning and decision in that case apply with particular force to this case, arising under a statute which does not render usurious contracts wholly void. But we are of opinion the remedy of appellee, the surety, must be sought in court of equity."

But in the following cases it was held that the surety was not released by an extension of time, where the consideration for such extension was the payment of usury: *McKamy v. McNabb*, 97 Tenn. 258, 36 S. W. 1091 (contract for extension void); *Wilson v. Langford*, 5 Humph. 320 (contract for extension void).

And where the usury was paid at the expiration of the extended time. *Green v. Lake*, 2 Mackey, 162.

And where the usurious contract for the extension was the original contract. *Hunt v. Postlewait*, 28 Iowa, 427; *Jones v. Brown*, 11 Ohio St. 601.

And where it was held that the payment of usury was a payment of the principal to that extent. *Polkinghorne v. Hendricks*, 61 Miss. 366; *Nightingale v. Meginnis*, 34 N. J. L. 461 (statute deducted the usury paid from principal); *Hartman v. Danner*, 74 Pa. 36 (contract void); *Calvert v. Good*, 95 Pa. 65 (contract void).

The following overruled cases also held that the payment of usury for an extension would not release the surety: *Marks v. Bank of Missouri*, 8 Mo. 316; *Farmers' & T. Bank v. Harrison*, 57 Mo. 503; and *Wiley v. Hight*, 39 Mo. 130 (these three cases were overruled in *Wild v. Howe*, 74 Mo. 551, and *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517); *Denick v. Hubbard*, 27 Hun, 347, and *Vilas v. Jones*, 1 N. Y. 286 (both overruled in *La Farge v. Herter*, 9 N. Y. 241; *Billington v. Wagoner*, 33 N. Y. 31; *Froude v. Bishop*, 25 App. Div. 514, 49 N. Y. Supp. 955); *First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582 (overruled in *Carter v. Duncan*, 84 N. C. 678); *Howell v. Sevier*, 1 Lea, 360, 27 Am. Rep. 771 (following *Vilas v. Jones*, 1 N. Y. 286, *supra*).

In *Wild v. Howe*, 74 Mo. 551, it was said

Even if, under the circumstances, this latent equity can be entertained, it is inferior to that of the defendant who has paid, or caused to be paid, the indebtedness; whereas the plaintiffs are absolutely without equity, but rely upon a barefaced technicality caused by an indulgence to the plaintiffs. Even if they had parted with something, the equity of the defendant Maggie would be greater, as her loss has been occasioned by the neglect of the plaintiffs to assert their rights.

*Wilmington & W. R. Co. v. Kitchin*, 91 N. C. 39; *State ex rel. Barnes v. Lewis*, 73 N. C. 138, 21 Am. Rep. 461; *Norfolk Southern R. Co. v. Barnes*, 104 N. C. 27, 5 L. R. A. 611, 10 S. E. 83.

*Messrs. Small & McLean and Shepherd & Shepherd*, also for appellant:

The true relation of mortgagor and mort-

gagee in North Carolina is the same as at common law.

1 Jones, *Mortg.* 3d ed. § 45; *Hemphill v. Ross*, 66 N. C. 477; *Ellis v. Hussey*, 66 N. C. 501; *Wittkowski v. Wasson*, 71 N. C. 456; *Russell v. Roberts*, 121 N. C. 322, 28 S. E. 406; *Parker v. Beasley*, 116 N. C. 1, 33 L. R. A. 231, 21 S. E. 955.

The mortgage is here regarded as a legal conveyance, and the legal estate in the mortgage is only divested by performance of the "proviso in the contract."

If the proviso or condition is not performed, the only thing left for the mortgagor is his equity of redemption, and he must go into equity for relief against the legal estate, which by default has become absolute.

2 Jones, *Mortg.* 3d ed. § 793.

Any discharging matter outside of the

that in *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517, "the case of *Wiley v. Hight*, 39 Mo. 130, to which plaintiffs' counsel has cited us, as establishing a contrary doctrine, as well as the case of *Farmers' & T. Bank v. Harrison*, 57 Mo. 506, and of *Marks v. Bank of Missouri*, 8 Mo. 318, are reviewed and in effect overruled."

In *Hunt v. Postlewait*, 28 Iowa, 427, it was held that forbearance given to the principal in a promissory note after the same became due, upon his paying the usurious interest originally agreed upon and accrued, was insufficient to release the surety: It was said: "If the 20 per cent interest was agreed to be paid by the original contract, then the subsequent agreement to pay it cast no new or different obligation upon the principal: or if there was no consideration for the agreement to extend; or if the interest was not paid in advance, and was paid pursuant to the original contract,—then the surety would not be released, and their verdict should not be for defendant."

In *Polkinghorne v. Hendricks*, 61 Miss. 366, it was held that an extension of time given upon prepayment of interest without the assent of the surety did not discharge him, because of the usury, which caused a forfeiture of all interest, and that the forbearance was without consideration or legal obligation. The court said: "The case of *Brown v. Propfit*, 53 Miss. 649, is not applicable because of the change in the statute as to interest. At the date of the transaction between the appellee and Noonan, taking more than 10 per cent interest per annum caused a forfeiture of all interest. Code 1880, § 1141. A result of this is that the interest paid in advance by Noonan was a payment of the principal to that extent."

In *Nightingale v. Meginnis*, 34 N. J. L. 461, indorsers claimed to have been discharged on account of an agreement to extend the time of payment made without their knowledge or consent. The maker of the note paid the sum of \$10 in addition to the legal interest, and in consideration of such payment the plaintiff agreed to a month's delay in the payment of the sum due. It was held that such premiums, being mere overpayments, did not form any legal consideration for a new promise, or release the indorser, under *Nixon's N. J. Digest*, providing that in cases of suits on contracts for the payment of money and on which a higher rate of interest shall be reserved or taken than is allowed by law, the amount actually lent without interest may be recovered, and if illegal interest shall have been paid such sum shall be deducted from the amount due.

In *Wilson v. Langford*, 5 Humph. 320, it was held that where the debtor gave to the holder

of a bill a separate bill single for 6 per cent additional interest for an extension, the sureties on the original bill were not discharged. This was on the ground that the agreement set out in the bill was unlawful and void, and was not binding upon either party. The court said: "If the creditor complied with it and received the money secured by the smaller bill single, he subjected himself to a criminal prosecution by indictment to fine and imprisonment. It presented not the least obstacle to his institution and maintenance of an action upon the original security, according to its terms."

In *Stone's River Nat. Bank v. Walter*, 104 Tenn. 11, 55 S. W. 301, it was said that in the cases of *Wilson v. Langford*, 5 Humph. 320; *Howell v. Sevier*, 1 Lea, 360, 27 Am. Rep. 771; and *McKamy v. McNabb*, 97 Tenn. 238, 36 S. W. 1091,—the agreement for delay rested upon a consideration entirely usurious, and therefore wholly unlawful; that in the *Wilson Case* after the debt became due the debtor gave his separate bill single for 6½ per cent as additional interest; and it was held that such agreement was not binding. The court said that in the *Howell Case* the creditor agreed to an extension upon a note due in consideration of the debtor paying therefor \$30 in addition to the principal and interest; and there it was held that this wholly unlawful consideration deprived the surety of availing himself of the rule of equitable discharge; that in the *McKamy Case* the holder at maturity agreed to an extension for a year upon the payment of \$36 in addition to the interest which the note bore.

## II. Effect of contract to pay usury.

There is some conflict of authority as to whether an agreement to pay usury will be such a consideration for an extension of time as will release a surety not consenting. It seems that the weight of authority is that such an agreement will not release the surety. This is on the ground that such a contract is void and not enforceable. The cases to the contrary are usually those where the contract is valid to the extent of legal interest therein contained.

In the following cases it is held that a surety will not be released by an agreement of the debtor to pay usury in consideration of an extension of the time of payment: *Galbraith v. Fullerton*, 53 Ill. 126; *Kyle v. Bostick*, 10 Ala. 589; *Gilder v. Jeter*, 11 Ala. 256; *Cox v. Mobile & G. R. Co.* 37 Ala. 320; *May v. Shepherd*, 1 Mackey, 430; *Silmeyer v. Schaffer*, 60 Ill. 479; *Braman v. Howk*, 1 Blackf. 392; *Shaw v. Binkard*, 10 Ind. 227; *Tudor v. Goodloe*, 1 B. Mon. 322; *Pyke v. Clark*, 8 B. Mon. 262; *Scott v. Hall*, 6 B.

terms of the deed must be asserted in a court of equity.

If the collateral agreement as to extension of time *ipso facto* divested the estate of the mortgagee the mortgagor could not have the legal title.

How can plaintiffs come into a court of equity and ask that the purchaser, Mrs. Borden, be converted into a trustee and surrender both money and land, unless they show that she had notice, and is not a bona fide purchaser? The mortgagor has enjoyed the money, the mortgagee has received his by reason of her payment, and she alone is to be the loser.

She had a right to look to the record and deal with the mortgagee according to the terms of the deed. She was not required to look further.

Mon. 285; Anderson v. Mannon, 7 B. Mon. 217; Patton v. Shanklin, 14 B. Mon. 15; Berry v. Pullen, 69 Me. 101, 31 Am. Rep. 248 (agreement not in writing); Roberts v. Stewart, 31 Miss. 664; Fernan v. Doubleday, 3 La. 216; Payne v. Powell, 14 Tex. 600; Burgess v. Dewey, 83 Vt. 618; Smith v. Hyde, 36 Vt. 303; Meiswinkle v. Jung, 30 Wis. 361, 11 Am. Rep. 572.

While it is perfectly well settled that a valid agreement between a creditor and the principal debtor, giving time after the maturity of the note, discharges the surety, yet the agreement must be a binding one; otherwise it is a mere voluntary indulgence and no valid defense for the surety. A void promise to pay illegal interest is not a valuable consideration for a promise to forbear. It is a mere *nudum pactum*. May v. Shepherd, 1 Mackey, 430.

In Danforth v. Sempie, 73 Ill. 170, it was said: "In the case of Galbraith v. Fullerton, 53 Ill. 126, it was held that a mere agreement to pay usurious interest for extension of time for payment did not constitute a valid agreement, and would not release the surety. But in that case there was nothing paid the creditor, and the contract was violative of the interest laws, and incapable of being executed or enforced by legal proceedings."

In Kyle v. Bostick, 10 Ala. 589, holding that a surety was not released where time was given in consideration of a promise to pay usury, it was said: "If the money had been in fact paid by the debtor, instead of a promise to pay it merely, the case would be different. There would then have been a consideration for the delay; and it would not have lain in the mouth of the creditor to say that it was an illegal one. Being an executed contract, it would be obligatory on him, as one of the parties to it."

In Braman v. Howk, 1 Blackf. 392, it was held that an obligee, by giving further day of payment to the principal obligor without the consent of the surety, does not thereby release the surety; nor does the alleged consideration for this forbearance alter the case. In this case the court said: "If that consideration was a promise to pay usurious interest, there is no averment that any such interest was paid; consequently the case is not affected by it as a bar to the action."

In Shaw v. Binkard, 10 Ind. 227, holding that a surety was not discharged by a usurious agreement between the maker and the payee of a note, it was said: "It is true that, in New York, such contracts were by statute void. But we are not, so far as this question is affected by the statutes, able to see any distinction between that case and this. There the contract was void, and therefore of no binding efficacy."

2 Jones, Mortg. § 1898; Pender v. Pittman, 84 N. C. 372.

Is it possible that they can recover upon the agreement to extend alone, with an admitted sale under the power, and the purchaser in possession for nine years?

Where a plaintiff would convert a purchaser into a trustee, and seek to charge him because he bought with notice, and therefore *mala fide*, if the allegation of notice is not admitted the plaintiff is bound to prove it.

Gahee v. Sneed, 21 N. C. (1 Dev. & B. Eq.) 333; Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Johnson v. Newman, 43 Tex. 642; Harrick v. Gurley (Tex. Civ. App.) 48 S. W. 1003; 2 Jones, Mortg. § 1830.

A party seeking the aid of equity and the interposition of its powers to entitle him to

Here, the reception or reservation of the usurious interest is an illegal act, and, so far from being binding, it is inoperative, for the reason that it is expressly provided by statute that such interest may be recovered by the person, etc., who may have paid it, with damages."

In Redman v. Deputy, 26 Ind. 338, it was said: "Shaw v. Binkard, 10 Ind. 227, was under a statute making the entire contract for interest void for usury; giving authority to the person paying to recover such interest. In the case at bar the person paying the usurious interest could not recover it back. To the extent of legal interest, it was a valid payment. It is true that in a suit on the note the maker could have the 4 per cent applied on the principal, but the holder would have the use of the \$10 for the entire year. In Harbert v. Dumont, 3 Ind. 346, this court held that the receipt of usurious interest, while the statute of 1845, enacting that usurious interest paid should not be recovered back, was in force, was a benefit to the recipient and a valid consideration for an agreement to extend the time for the payment of a note."

In Tudor v. Goodloe, 1 B. Mon. 322, holding that a usurious contract for forbearance is void and does not release a surety, the court said: "The agreement, in this case, for the future payment of usury, being prohibited by the statute, was 'utterly void' and therefore did 'not suspend for a moment the rights of any of the parties.'"

Add a contract between the assignee and creditor, giving time for payment on a promise to pay usurious interest, does not release the assignor. Pyke v. Clark, 3 B. Mon. 262. In this case the court said: "We are satisfied that this case has not been brought within the principle of the case of Kenningham v. Bedford, 1 B. Mon. 325, but falls within the principle settled by this court in the case of Tudor v. Goodloe, 1 B. Mon. 322. It is not shown that by the terms of the agreement the usury was to be paid in advance for a future specific indulgence, nor that it was in fact so paid, but the indulgence was to be granted upon a promise to pay it from year to year."

In Scott v. Hall, 6 B. Mon. 285, it was said: "At any time, therefore, after the note fell due, during any of the periods of four months, at the end of which usury was to be paid, the complainants might have sustained their bill of *quia timet*, requiring the principal to make payment of the note, or under the statute have given notice requiring suit to be brought on the same, and no obstacle could have been successfully opposed to either remedy, as the promise to pay usury was not obligatory upon the principal."

relief sought must place himself in a position to demand relief.

2 Pingrey, Mortg. § 1430; *Manning v. Elliott Bros.* 92 N. C. 48.

Laches on the part of the trustees is another reason why the plaintiffs should have no relief.

2 Jones, Mortg. § 1922.

Usurious contracts are absolutely void.

*Ward v. Sugg*, 113 N. C. 491, 24 L. R. A. 280, 18 S. E. 717; *Scott v. Harris*, 76 N. C. 205.

**Mr. W. B. Redman**, for appellees:

The debt was the debt of J. L. Brown, and was secured by a mortgage upon the property of the wife.

The mortgagee, for a valuable consideration, agreed to extend the time of payment for one year,—this without the consent of the wife. This discharged her liability.

and the agreement to give time, consequently, without consideration and invalid, as has been settled by this court in the cases of *Tudor v. Goodloe*, 1 B. Mon. 324; *Kenningham v. Bedford*, 1 B. Mon. 325, and *Pyke v. Clark*, 3 B. Mon. 262."

An agreement by a creditor with the principal debtor to extend the time of payment of a note for part of the accrued interest while the note still carried interest which was usurious was held not to be such a binding agreement as released the surety. *Anderson v. Mannon*, 7 B. Mon. 217. In this case the creditor also obtained a credit for an account in consideration of the extension, but there was no release of the account, and the debtor surrendered to the creditor no obligation for its payment, and the agreement would not constitute a bar for the holder of the note in case the account was attempted to be collected. It was held to amount to no more than a promise not to collect the account.

In *Patton v. Shanklin*, 14 B. Mon. 15, the court said: "Where the promise to pay usury, and not the payment thereof, constitutes the consideration relied on, it is wholly illegal and invalid, although it may have been partially executed, because its full execution cannot be enforced, and therefore the contract for indulgence is not obligatory on either party."

In *Roberts v. Stewart*, 31 Miss. 664, a plea of discharge of the surety was held insufficient. The court said: "First. It does not show what rate of increased interest Blackman agreed to pay in consideration of the indulgence, or whether it was paid or secured to be paid, so as to give the creditor the benefit of it. Second. If it was not paid, as must be presumed from the substance of the plea, and was secured to be paid, by note or otherwise, that contract was void for usury, and an agreement to give time, founded on such a consideration, will not be binding on the creditor, because it is not legally obligatory upon the debtor, and will not discharge the surety."

In *Fernan v. Doubleday*, 3 Lans. 216, where the indorser proved that the payee had extended the time for payment of the note in consideration of an unexecuted promise by the maker to pay usury, it was held that the owner of the note might avail himself thereof, and that there was no valid agreement to extend the time of payment so as to discharge the indorser. The court said: "It is quite obvious that the weight of authority is decidedly in favor of the doctrine that where the usurious contract to extend the time has not been executed it cannot be interposed as a defense by the surety."

In *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111, 53 L. R. A.

*Dinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56; *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817; *Scott v. Fisher*, 110 N. C. 311, 14 S. E. 799; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989.

That Mrs. Borden was a purchaser for value and without notice of plaintiff's right, and therefore she has the superior equity, cannot be considered by this court now on the case made by the record.

*Chemical Co. v. Pegram*, 112 N. C. 614, 17 S. E. 298; *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368.

A purchaser under a power purchases at the peril of the sale being void if a material condition precedent to the exercise of the power does not exist.

*Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642; 2 Perry, Tr. p. 185, § 602; 2 Beach, Modern Eq. Jur. § 440, p. 506.

it was said that in *Payne v. Powell*, 14 Tex. 601, it was held that an obligation for the payment of usury was not a sufficient consideration for an agreement to extend the time so as to discharge the sureties, as it was invalid for want of consideration. The court says: "It is evident that the reason given by Justice Wheeler for the invalidity of the agreement for the extension of the time of payment would be obviated by the payment of such consideration in money."

In *Burgess v. Dewey*, 33 Vt. 618, it was held that a simple agreement on the part of the principal to pay usury was not a sufficient consideration to extend the time of payment, and did not discharge the surety. It was further held that the payment of such usury at the expiration of the time of such extension did not discharge the surety. In this case the court said: "It is equally well settled, in this state, that the payment of usurious interest is a sufficient consideration to support an agreement to delay the payment of the debt. . . . But in this case there was no payment in fact made until the expiration of the time limited by the agreement, so that it cannot be said there was any delay or agreement to delay based upon the consideration of anything paid."

And a surety will not be discharged where a note was given for a usurious consideration, although such note was paid after the expiration of the time of extension. *Smith v. Hyde*, 36 Vt. 303. In this case it was said that the only difference between *Burgess v. Dewey*, 33 Vt. 618, and this case is that in this case the agreement to pay usury was evidenced by note, but such a note can be regarded only as an executory agreement.

In *Hamilton v. Prouty*, 50 Wis. 592, 36 Am. Rep. 866, 7 N. W. 659, it was said that in *Melzwinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572, it was held that while the usurious agreement for an extension was executory as to both parties it was void as to both, and did not discharge the surety on the note. But the question here presented did not there arise because the \$50 was not paid, although the opinion says: "Whether the \$50 was paid or not." This language was "explained by Judge Dixon himself, in a subsequent note to *Riley v. Gregg*, 16 Wis. 667, and found in *Vilas & Bryant's ed.* pp. 697, 704, 705, where, among other things, it is stated that the question whether the lender, of his own mere motion, shall be permitted to repudiate or assert the validity of an executed agreement must still be regarded as an open one." . . . The question presented, therefore, . . . has never before been decided by this court."

The power of sale was vacated by the discharge of the lien, and ceased to exist prior to the sale, and the sale was therefore void.

*Mayo v. Lcggett*, 96 N. C. 237, 1 S. E. 622; *Jordan v. Furthing*, 117 N. C. 181, 23 S. E. 244; *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239; *Capehart v. Biggs*, 77 N. C. 261; *Parker v. Bcasley*, 116 N. C. 1, 33 L. R. A. 231, 21 S. E. 955.

**Furches, J.**, delivered the opinion of the court:

This is an action for the possession of land, in which the defendant denies title in the plaintiffs, alleges title in herself by meane conveyances from plaintiffs' ancestors, and also by color of title ripened by adverse possession, and the statute of limitations. The facts presented are as follows: That in June, 1850, John L. Brown and wife, M.

L. Brown, conveyed the land in controversy to Ashley Congleton, in trust for M. L. Brown for life, then for the issue of John L. and M. L. Brown, and, if the said M. L. Brown should die without leaving issue, then for the said John L. Brown. But this deed expressly provided that the said John L. Brown and M. L. Brown shall have full power and authority, by and with the consent of each other, to convey the same at any time, "and said trustee shall join in the said conveyance, whether the same be in fee simple or otherwise;" that on the 9th day of February, 1881, the said John L. borrowed \$500 from J. B. Stickney, giving his bond due three years after date at 8 per cent payable annually, and secured the same by a mortgage on this land executed by John L. and M. L. Brown and the trustee, Congleton. This mortgage was in the usual form, con-

Under Me. Rev. Stat. chap. 45, providing that, in the absence of an agreement in writing, the legal rate of interest is 6 per cent a year, a surety was not released by a parol agreement of the creditor to extend the time of payment of a note as long as the debtor wanted it, on the payment of 8 per cent interest. This decision is on the ground that the contract, not being in writing, was void, and was no consideration for an extension. *Berry v. Pullen*, 69 Me. 101, 31 Am. Rep. 248. In this case it was said that the rule seemed to be that if usury had been paid the surety would have been released.

But in the following cases it was held that an agreement by the debtor with the creditor to extend the time of payment would release a surety not consenting to such agreement: *Kelly v. Gillespie*, 12 Iowa, 55, 79 Am. Dec. 516; *Coriell v. Allen*, 13 Iowa, 289; *Wheat v. Kendall*, 6 N. H. 504; *Washington v. Talt*, 3 Humph. 543; *Austin v. Chittenden*, 33 Vt. 553; *Chichester v. Mason*, 7 Leigh, 244; *Fay v. Tower*, 58 Wis. 286; *Moulton v. Posten*, 52 Wis. 169, 8 N. W. 621.

And the same was held in the following cases, where a statute avoided the usurious contract only to the extent of the usury: *Stallings v. Johnson*, 27 Ga. 564; *Redman v. Deputy*, 26 Ind. 338; *Cross v. Wood*, 30 Ind. 378; *Brown v. Proffit*, 53 Miss. 649; *McComb v. Klittridge*, 14 Ohio, 348; *Wood v. Newkirk*, 15 Ohio St. 295.

Where the creditor, for a valuable consideration, suspends his right of action against the principal debtor, and gives further time for the payment of the note, without the consent of the surety, pending which the principal becomes insolvent and entirely unable to pay the debt, such agreement is a good defense for the surety in an action against him on the note. If the consideration thus paid is an additional note of the principal, forming a contract usurious in its nature, such usury does not make the contract a nullity, as the party contracting for the same cannot set up the usury and claim that his agreement to give time was without consideration. *Kelly v. Gillespie*, 12 Iowa, 55, 79 Am. Dec. 516.

And extension of the credit beyond the time specified in a promissory note, under a contract founded upon a good consideration between the creditor and the principal, without the consent of the surety, has the effect to discharge such surety. That the contract for extension of credit was supported by a note for usurious interest as its only consideration will not avoid the effect of discharging the surety from his liability. *Coriell v. Allen*, 13 Iowa, 289.

And a contract to extend the time of payment

of a note, founded on a promise to pay usurious interest, will discharge a surety not consenting thereto. *Wheat v. Kendall*, 6 N. H. 504.

In *Washington v. Talt*, 3 Humph. 543, it was held that an extension of time given to the principal debtor in consideration of a duebill executed for usurious interest will exonerate the surety.

In *Wilson v. Langford*, 5 Humph. 320, holding that a separate bill by the debtor for usury was unlawful and void, and that it did not release the surety, even if paid, it was said that the case of *Washington v. Talt*, 3 Humph. 543, did not conflict, saying: "Whatever may be thought of the facts of that agreement, as constituting usury, or otherwise, it is clear that the court believed that a large portion of the consideration for that agreement was not usurious, the main circumstance in that case, also, justifying the discharge of the surety, is the actual interference of the surety to have the debt paid by the principal, on suit brought against him, and the delusive conduct on that subject of the creditor."

And in *Austin v. Chittenden*, 33 Vt. 553, it was held that an indorser of a note was discharged where the plaintiff had taken in satisfaction another note with different makers, but which was executed and payable in New York and was void on account of usury. The defense was made of an extension of time without the defendant's knowledge. It was held that the plaintiff could not set up that the new note was void. In this case the court said: "The taker is regarded as the wrongdoer, and the debtor as the injured party, and therefore the law will allow the debtor to avoid the contract, but estops the creditor from taking any advantage of his own greed and extortion."

And after a levy under an execution, an indulgence granted to the debtor without specifying for what time, in consideration of an agreement to pay usurious interest, was held by the court of chancery to discharge the surety, and this decree was affirmed by an equal division of the court of appeals. *Chichester v. Mason*, 7 Leigh, 244. In this case the decision appears to have been on the ground of releasing a lien under a levy to the detriment of the surety.

A usurious note given by the principal debtor for an extension of time is a valid extension binding the holder of the note, and the surety will be discharged. *Fay v. Tower*, 58 Wis. 286. In this case it was said that the holder of the extended note could not be heard to allege that the note taken for the extension was usurious, and that there was no consideration for his agreement to extend. The court further said that "the fact that the note given for the ex-

veying the fee simple, with the condition that it should become void upon the payment of said bond. On the 3d of March, 1882, the trustee, Congleton, died, leaving three minor children, two of whom were minors at the commencement of this action. The other had been of age for three years and five months when the action was commenced. In August, 1884, the said M. L. Brown died, leaving, her surviving, her husband, John L. and the plaintiffs Mollie L. Fleming, Dora L., John L., and Lena M. Brown; the last three named being minors under twenty-one years of age, except Mrs. Fleming, who was under coverture when this action was commenced, and is still. The plaintiffs allege that this was their mother's land, that the debt was that of their father, and that the mortgage was only a security for the debt; and they further allege that the security,

the mortgage lien on the land, was discharged by a contract made and entered into by Stickney, the mortgagee, and John L. Brown, the principal debtor, for an extension of time on the debt so secured by the mortgage; that this agreement was in the fall of 1884, to extend for one year for \$50; that in January, 1888, Stickney sold under the mortgage, when Arthur Borden bought and took deed to W. C. Ayers, who, on March 3, 1888, conveyed the same to the defendant, Maggie Borden, and that she has been in possession of the same ever since the date of her deed, in March, 1888. Upon the admitted facts and the evidence in the case the court submitted the following issues:

(1) Did Stickney agree with John L. Brown to extend time of payment of the mortgage debt from February 9, 1885, to

tension in this case was paid long since, while in *Moulton v. Posten*, 52 Wis. 189, 8 N. W. 621, the note given for the extension had not been paid, is not important.

A usurious note given by a debtor for an extension will discharge the surety, although such note has not been paid. *Moulton v. Posten*, 52 Wis. 189, 8 N. W. 621. In this case it was said: "The agreement for extension was executed by the giving of a note for the consideration of it as effectually as it would have been by paying the same in money. . . . He [the holder] could not have been heard to allege that the note taken for the extension was usurious, and that there was no consideration for his agreement to extend. The right to make that allegation was in Smith alone."

The maker of a note at its maturity made an agreement with the holder for delay in consideration of a usurious contract. After the contract was made the maker became insolvent. It was held that an indorser on the note, not consenting to the extension, was discharged. *Stallings v. Johnson*, 27 Ga. 564. In this case it was said: "We are not prepared to say, then, that the illegality of a part of the consideration is, of itself, sufficient, in any case, to render the contract void. But if so sufficient in some cases, it cannot be that this is one of the cases, because we have a statute which makes contracts involving usury void only for the usury, but good for the rest—good for the principal. Cobb, 293. By this statute, then, so much only of the contract for indulgence as involved usury was void; the rest was good."

Under Ind. act, Dec. 19, 1865 (Special Sess. p. 176), that provided that a contract to pay more than 6 per cent was void as to the excess, but money voluntarily paid could not be recovered back, an agreement, made while the interest law of 1865 was in force, by a creditor with the principal debtor, with the consent of the surety or the guarantor, to give a limited time after the debt became due, in consideration of the payment in advance of 4 per cent in excess of 6 per cent interest, was held to release the surety and the guarantor. *Cross v. Wood*, 30 Ind. 378.

So, under a similar statute of Indiana of 1861, an extension of time in pursuance of an agreement to pay 10 per cent will release the surety, as the contract is valid as to 6 per cent. *Redman v. Deputy*, 26 Ind. 338.

If the holder of a note which has become due agrees with the principal maker of said note that he may retain the sum due for a definite period of time upon his promise to pay usurious 53 L. R. A.

interest, and such maker agrees to keep said sum for such definite time, and to pay said interest, this agreement will discharge a surety on said note not consenting to such contract for forbearance. Although the usury cannot be collected, the legal rate can be; and the absolute right to get interest for a given time is a valuable consideration to uphold a promise to forbear. *Brown v. Proffit*, 53 Miss. 649. In this case the court said: "When our statute made usury a cause of forfeiture of all interest, it was justly held that a promise to pay usury was not a consideration for a promise to forbear. *Roberts v. Stewart*, 31 Miss. 664. A change in the statute causes a change in the result of such an agreement."

And a usurious note given for an extension of time by a debtor will release a surety not consenting thereto. *McComb v. Kitttridge*, 14 Ohio, 848. In this case the court said that such a contract with us is not wholly void because the statute steps in and pares it down to the legal rate, and permits that to be collected.

So, the promise by the principal debtor to pay usurious interest is a sufficient consideration to support an agreement by a creditor to give further time, and will discharge a surety on the original contract under the Ohio statute making such contract void as to the excess above 6 per cent. Such contract is good as to the legal interest. *Wood v. Newkirk*, 15 Ohio St. 295.

In *May v. Shepherd*, 1 Mackey, 430, it was said that "the cases in Ohio seem to hold the promise to pay usurious interest a good consideration for forbearance on the ground that under a state statute such a promise is valid for the legal interest, and void only for the excess."

### III. Summary.

The weight of authority is to the effect that an extension of time granted to the debtor by the creditor in consideration of the payment of usury will release a surety not consenting: That an executory contract to pay usury will not release a surety except in the states where such a contract is valid to the extent of legal interest. Some cases hold that the creditor is estopped from claiming a usurious payment to be void on the ground that to hold it so would afford a premium to the usurer, as a creditor extending time on the payment of legal interest would lose his claim on the surety, while a usurer would not, if he could plead the illegality of his own act.

I. T.



February 9, 1886, in consideration of the payment by Brown of 10 per cent interest on the debt for the year ending February 9, 1885, to wit, \$50?

A. Yes.

(2) Was said consideration paid by Brown and, if so, when?

A. Yes, April, 1885.

(3) Did R. T. Hodges have knowledge of his alleged appointment as trustee in the proceeding entitled "John L. Brown and others *ex parte*?"

A. No.

(4) Are the plaintiffs the owners of and entitled to recover possession of the land described in the complaint?

A. Yes.

(5) What is the rental value of the land for the period beginning July 4, 1894, up to the present time?

A. \$300.

Thereupon the court rendered judgment that the plaintiffs are the owners of and entitled to the possession of the land, etc.

Upon the close of the evidence the defendant moved to nonsuit the plaintiffs for the reason that the evidence, all taken to be true, did not make out a case for the plaintiffs. This was refused, and we see no error in its refusal. It seems to us that it could hardly be disputed but that there was evidence tending to prove all the facts alleged by the plaintiffs, and sufficient to authorize the jury to find the issues submitted to them as they did. But, taking the issues as found, and the facts as admitted, the case presents some very interesting questions of law, upon the solution of which the rights of the parties depend. The evidence with regard to the contract and consideration for the extension of time was that the mortgagee, Stickney, proposed to Brown, the principal debtor, that if Brown would pay him \$50 interest, instead of \$40, he would extend the time twelve months. This offer was accepted by Brown, and the money paid to Stickney's attorney or agent. The defendant asked the court to charge the jury that this did not constitute a contract to extend the time of payment, first, for the reason that Stickney did not receive the money. But the court held that, if the agent received it under the contract and agreement of Stickney with Brown, this was the same as if Stickney had received it himself. And we think this must be so. The defendant further contended that, if he did receive it, it was usurious interest; that a contract to extend time must be upon a good consideration; that the usurious payment of interest was not a good consideration, and did not support the contract; and cited *First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582, as authority for this contention; and it is so held in that case. But in *Carter v. Duncan*, 84 N. C. 676 (the next term after the case of *First Nat. Bank v. Lineberger* had been decided), the case of *First Nat. Bank v. Lineberger* was overruled; and *Carter v. Duncan* has been held to be the law ever since, and has been cited with approval in 53 L. R. A.

several cases, among them *Forbes v. Shepard*, 98 N. C. 111, 3 S. E. 817; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989. And, as was said in *National Bank v. Sumner*, 119 N. C. 591, 26 S. E. 129, we think this doctrine has been carried far enough. But it seems to us that these cases ought to be considered as settling the doctrine in this state, and the court below properly refused to give this instruction. This covers the defendant's prayers down to the fifth.

The fifth prayer asks the court to instruct the jury that, as Mrs. Brown was dead when this agreement for extension of time was made, it did not have the effect to discharge the mortgage, as it was not shown that she had an administrator, or that her children had a guardian, and there was no one to pay the debt. The court refused this prayer, and the defendant excepted. We cannot sustain the exception. The discharge is by operation of law, and we cannot say that it shall apply in some cases, and not in others. We have not been furnished with any authority for making such exception.

The sixth prayer is that the original trustee, Congleton, was dead, and that his interest descended to his heirs at law; that one of them had been above the age of twenty-one for more than three years when this action was commenced; that where the trustee is barred, the *cestui que trust* is also barred; and that, as one of the trustees was barred, they were all barred, and the plaintiffs, though infants and *femes covert*, were also barred. This is a correct proposition of law, as applied to some trusts. But, taking the view of the case we do, it is not necessary for us to decide this question. The deed of trust to Congleton expressly authorizes John L. and M. L. Brown to convey in fee simple or any less estate, and that it shall be the duty of the trustee, Congleton, to join them in making such deed. They exercised this power in making this mortgage to Stickney, and the trustee, Congleton, to join them in making it. Congleton never had anything but the bare legal title to the land, and when this mortgage was made, which is a deed in fee simple, with other trusts attached, all the estate he ever had in the land passed out of him into Stickney. Congleton died before it is alleged that there was any discharge of the land from this debt on account of extension of time; and when he died he had no estate to descend to his heirs. It is true that, if Congleton had been the equitable owner as well as the legal owner, the equitable right of redemption would have descended to his heirs. But the only thing their father ever had was the naked legal title, and this was gone. He had nothing to descend to his heirs, and they had no interest to redeem. And, indeed, it does not seem to be claimed that they should have done so. But the defendants claim that the naked legal title was in them, and, as they did not bring suit for the possession of the land, the statute is a bar to plaintiffs' right to recover. But as it is seen that they had no legal title to the land, and, we think, no equitable estate, the doctrine contended for

by defendants does not apply. For the purposes of this case, it is not necessary for us to decide where the legal title was after the discharge of the land from the debt, so that it was not in the heirs of Congleton. It may be that when the mortgage deed was made to Stickney the trust was thereby terminated, and that Mrs. Brown became the absolute owner subject to the mortgage encumbrance. And, if this was not so, it would seem that the legal estate was in the defendant; and, if so, she held the naked legal title in trust for the plaintiffs, and the statute could not run in her favor; and, if both the legal and equitable estates were in the plaintiffs, the statute or presumption on account of possession did not run against them on account of their infancy and coverture. The land being discharged from the payment of the debt by reason of the extension of time, the mortgagee had no right to sell under the mortgage, unless it was the naked legal title; and the purchaser at the sale got nothing more. It is like selling after the debt had been paid. *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 239. It is true that John L. Brown seems to have been at the sale, made no objection to it, and did not then let it be known that he had obtained an extension of time. And, if it had been his land, it would seem that this would be an estoppel in pais. But it was no estoppel as against the plaintiffs who are infants and *femes covert*. It may be a hardship on the defendant, if she was an innocent purchaser without notice (which, if so, is not presented by this appeal), but such is said to be "the quicksands of the law."

*The judgment is affirmed.*

A petition for rehearing having been filed, *Douglas, J.*, on November 27, 1900, handed down the following response:

This case is now before us on a petition to rehear, having been decided in 126 N. C. 450, *ante*, p. 316, 36 S. E. 17. The facts are sufficiently set forth in the former opinion, to which, after careful consideration, we feel it our duty to adhere. The decisive question was whether the contract for the extension of payment operated as a discharge of the debt as far as Mrs. Brown was concerned. We think it did. In *Hinton v. Greenleaf*, 113 N. C. 6, 18 S. E. 56, this court says: "It is settled by abundant authority that, 'where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety, . . . and will be discharged by anything that would discharge a surety or guarantor who was personally liable.' . . . These contracts of forbearance were made without the knowledge or assent of Mrs. Greenleaf, and, in our opinion, resulted in a discharge of her property from all liability under the said deed of trust. This property occupied, as we have seen, the position of a surety, and it is common learning that 'time or forbearance given by the creditor to the principal debtor by a contract which binds him in law and would bar his action against

the debtor will discharge the surety.' " This case cites a large number of authorities, and is cited with approval in *Weil v. Thomas*, 114 N. C. 197, 201, 19 S. E. 103; *Smith v. Old Dominion Bldg. & L. Assn.* 119 N. C. 257, 26 S. E. 40; *Hedrick v. Byerly*, 119 N. C. 420, 25 S. E. 1020; *Shew v. Call*, 119 N. C. 450, 455, 26 S. E. 33; *Meares v. Butler*, 123 N. C. 206, 205, 31 S. E. 477. It is needless here to recapitulate all the authorities cited in the above-named cases. It is contended in behalf of the defendant that, as the contract of forbearance was made upon a usurious consideration after the passage of the act of 1876-77, brought forward as § 3836 of the Code, the said contract was absolutely void and of no effect either as to binding the creditor or releasing the surety. We cannot adopt this view of the matter in the face of the repeated decisions of this court to the contrary. In *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817, this court says on page 115, 98 N. C., page 819, 3 S. E.: "The exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been paid." citing *Scott v. Harris*, 76 N. C. 205; *First Nat. Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582, modified in *Carter v. Duncan*, 84 N. C. 679; *Brandt, Suretyship*, § 304; *Baylies, Sureties*, 251. In *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989, this court says: "So it is now well settled that 'the exoneration of the surety is the same when the contract of forbearance is usurious in terms, and especially when the consideration has been paid.' " As far as the surety is concerned, his exoneration by the creditor's contract of forbearance with the principal has the same effect as if the debt had been paid; that is, the debt is canceled as to him. As the wife's land under mortgage for her husband's debt stands simply in the relation of surety, as to it the debt is extinguished. There is a clear distinction between the extinguishment of the debt and the bar to its collection raised by the statute of limitations. We are therefore brought to the question whether the extinguishment of the debt destroys the mortgagee's power of sale. We think it does. The mortgage is not the debt itself, but merely incidental thereto. It is intended merely to secure the payment of the debt, and when the debt is paid its object is fulfilled. It is true the legal title passes to the mortgagee, but only for the purposes of the mortgage as expressed upon its face. If the debt is paid before maturity, the title reverts by the very terms of the mortgage, which thereupon becomes null and void. After default the debtor still retains his equity of redemption, and upon payment of the debt before foreclosure is entitled to a reconveyance of the legal title. If the mortgagee still retains the title, he holds it as a naked trustee for the mortgagor. Even while the mortgage is in full force and effect, the mortgagee with power of sale holds the land as trustee for the mortgagor as well as for himself. *Bobbitt v. Blackwell*, 120 N. C. 253, 26 S. E. 817, and cases there-

in cited. The practice of inserting powers of sale in mortgages was recognized by this court with great reluctance, and has always been regarded with extreme jealousy, but not now with the same disfavor. *Kornegay v. Spicer*, 76 N. C. 95; *Whitehead v. Hellen*, 76 N. C. 99; *Mosby v. Hodge*, 76 N. C. 387; *Shew v. Cull*, 119 N. C. 450, 26 S. E. 33. In *Capehart v. Biggs*, 77 N. C. 261, this court says: "In our case the plaintiff might invalidate a sale made under the power by proof that nothing was due under the mortgages, and so the power was defunct." In *Hutaff v. Adrian*, 112 N. C. 260, 17 S. E. 78, this court says: "Upon the allegations in the complaint taken as true the defendants' bond and mortgage are alike barred by the statute of limitations. . . . A sale under such mortgage would carry to the purchaser no title." In *Jenkins v. Daniel*, 125 N. C. 161, 34 S. E. 230, this court says on page 168, 125 N. C., page 240, 34 S. E.: "The extension of time without the consent of the surety discharges the surety, or the security given by a third party;" citing *National Bank v. Sumner*, 119 N. C. 591, 26 S. E. 129; *Button v. Walters*, 118 N. C. 495, 24 S. E. 357. "This presents the question whether the mortgage of February, 1890, extended the time of payment of the note. . . . If it does, it was a discharge of the lien of the mortgage of the wife on her land. The mortgagee would have no right to sell under the same, and the defendant Speight would acquire no title by reason of said sale and her purchase." In the case at bar, as the lien upon the land had been discharged, the defendant's vendor purchasing at the mortgagee's sale acquired no title whatever, either legal or equitable, and hence could convey none to her. It matters not to her where the legal title may now be, since it is not in her. Whether it reverted to the plaintiffs or remained in the mortgagee as their naked trustee does not affect the merits of this action. We are not inadvertent to

certain authorities which hold that a purchaser in good faith has a right to presume that an unanceled mortgage is still in full force. This doctrine, whether right or wrong, has no application here. However it may be presented, it finally rests upon the doctrine of estoppel. Are infant children estopped by a mere failure to assert their rights of which they have no knowledge? We think not. They would not be affected even with actual notice, except, perhaps, in some rare instances, where their conduct would amount to actual fraud.

It is suggested that this is a case of conflicting equities, which should be resolved in favor of the defendant in possession; but we see no conflicting equities. Whatever may be the equitable rights of the defendant, they do not conflict with those of the plaintiffs, because she has no equities against the plaintiffs. None of her money went to them, nor did it go to pay their debt or exonerate their property. They never owed the debt, and their land had been exonerated by operation of law before it was bought by the defendant, or even sold by the mortgagee. If she has any equities, by subrogation or otherwise,—and that question is not before us,—it seems to us that they must be against either the father, whose debt she paid, or those who received her money. What legal rights she may have against her vendor we have no means of knowing. This may seem a hard rule, and we frankly admit that we have carried it as far as we care to go; but so far we must go in deference to the settled decisions of this court and in justice to the trusting wife and helpless children. Perceiving no error in our former judgment, the petition to rehear is dismissed.

We do not think that a motion for a new trial for newly-discovered evidence is properly before us on a petition to rehear, even if due diligence had been shown.

*Petition dismissed.*

#### PENNSYLVANIA SUPREME COURT.

George A. WELLS, Admr., eto, of Helene Roberts, Deceased,  
v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY of Boston, Massachusetts, Appt.

(101 Pa. 207.)

1. No recovery can be had on a policy of life insurance in case death is caused by voluntary submission to an illegal operation performed in order to get rid of an illegitimate foetus.

2. The question of the medical neces-

Notes.—On the general subject of death caused by crime as affecting liability of insurance company there are some cases in a note to *Darrow v. Family Fund Soc.* (N. Y.) 6 L. R. A. 495, and also in note to *Sheanon v. Pacific Mut. L. Ins. Co.* (Wis.) 9 L. R. A. 685.  
53 L. R. A.

sity for an abortion to get rid of an illegitimate foetus should not be submitted to the jury in an action upon a policy upon the life of deceased, where no suggestion of such necessity appears in the evidence.

3. A woman who solicits and submits to a criminal abortion to get rid of an illegitimate foetus violates the criminal laws within the meaning of a clause in a life insurance policy exempting the company from liability for death caused by violation of, or attempting to violate, the criminal law.

(April 24, 1899.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Luzerne County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

**Messrs. W. S. McLean and J. B. Woodward**, for appellant:

The facts once established or conceded, their legal effect is for the court. When, therefore, upon all the evidence, no question of fact is left in doubt or controversy the trial judge should direct a verdict; but if facts are in doubt, or if there is conflict in the evidence relating to them, the doubt must be resolved, or the conflict decided by the jury before the legal value of such facts can be pronounced by the court.

*Cogle v. McKee*, 151 Pa. 603, 25 Atl. 115.

When there is no real controversy as to the facts the court may give a binding instruction to the jury.

*Gardner v. McLallen*, 4 W. N. C. 435; *Holland v. Kindregan*, 155 Pa. 156, 25 Atl. 1077.

The act of Helene Roberts in submitting to the operation for abortion was a misdemeanor on her part under the common law.

2 Wharton, Crim. Law, old ed. § 1221, new ed. §§ 592, 599; *Scott v. Philadelphia*, 5 Legal & Ins. Rep. 18; *Com. v. Demain*, 3 Clark, 487; *Mills v. Com.* 13 Pa. 631.

It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated.

*Mills v. Com.* 13 Pa. 631; *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427.

The necessity for procuring an abortion or miscarriage in order to save the life of mother or child is the rare exception; the presumption is against such necessity.

*State v. Lee*, 69 Conn. 186, 37 Atl. 79; *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380; 1 Am. & Eng. Enc. Law, 2d ed. p. 195, note 3.

**Messrs. John T. Lenahan and H. W. Palmer**, for appellee:

When there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury however strong or persuasive may be the countervailing proof.

*Howard Exp. Co. v. Wile*, 64 Pa. 201; *Peel v. Elder*, 62 Pa. 316, 1 Am. Rep. 414; *Grambs v. Lynch*, 20 W. N. C. 376; *West Branch Bank v. Donaldson*, 6 Pa. 179; *Fulton v. Lancaster County*, 162 Pa. 306, 29 Atl. 763; *Lehigh Coal & Nav. Co. v. Evans*, 176 Pa. 32, 34 Atl. 999.

**Green, J.**, delivered the opinion of the court:

We are clearly of opinion that the learned court below should have affirmed the sixth point of the defendant, and directed the jury to render a verdict for the defendant. There was no dispute about the facts of the case, nor any question as to the law. That the deceased woman voluntarily submitted to an operation for abortion upon her person, and that she caused it to be done by her own importunity to that end, and that she died from the direct effects of the operation, was established by the overwhelming testimony in the case, without the least shade of contradictory evidence. The substance of 53 L. R. A.

all this was conceded in the charge of the court to the jury, and the judge instructed the jury that if they believed that the operation was submitted to voluntarily, without any justifiable medical reason, they should find for the defendant. The court affirmed the first and second points of the defendant, which presented the subject in that aspect alone. But the learned court intimated that there might have been some other intervening cause that produced the death of the party, and submitted that question to the jury thus: "Did any other cause, taking in consideration where it was alleged it was performed, intervene, which produced blood poisoning or septicæmia, and caused death? If it did, the company will have to pay the amount of this policy. If it did not, you should return a verdict in their favor." As there was not the smallest fragment of testimony as to the existence of any other cause of the death of the insured than the abortion, it was grave error to submit such a question to the jury. It only tended to mislead them and direct their attention to a false issue. There was no question that the policy was a Massachusetts contract, and was governed by the law of that state. It was also shown that the supreme court of that state had decided, in a case almost precisely similar to this, that there could be no recovery on a policy of life insurance upon the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation, known to her to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541. The testimony in the present case proved conclusively, and without the least contradiction, that the insured procured the operation for an abortion to be performed upon her person, and that she died in direct consequence of the operation. Dr. Crawford testified on this subject as follows: "She told me in the meantime that she had undergone an operation; she had an abortion. . . . She told me that it was done in Nanticoke, one week, I think, or about one week, prior to that time; that it was done by the insertion of an instrument into her womb. She told me, too, that several previous attempts had been made by the same person to produce the abortion; that those attempts had failed. At the time she mentioned (a week before), she had again visited the abortionist; and that he then performed a different operation; that he did what he called 'dilating' her womb,—that is, introduced in and forced it open." He also testified that he told her she would certainly die, and she replied, "Oh, no; I am not going to die. I have had as many as six abortions, or had an abortion produced as many as six times, and I have always gotten well, and I will now." She repeated a similar statement in the presence of Mrs. Harvey, when she said, "Oh, pshaw! I am not going to die. I have had this done two or three times before;" and to Mr. Whalen, who testified, "Well, she said she had that done several times be-

fore; that she would get over it;" and to Mr. Divison, who testified that she said "she would not die; that this had been done before, and she had always recovered." To Dr. Stoeckel, who delivered the fœtus, she named the person who performed the operation, saying it was a Dr. Dan, of Nanticoke. She was asked:

Q. What did she say about Dr. Dan, if anything?

A. She said that he had performed several operations which were not successful.

Q. On her?

A. On her. And she asked me, to use her own words, if I thought he hadn't made a botch of it. . . .

Q. Whether or not she told you how many times she had been down to see Dr. Dan?

A. She spoke of two or three times.

Dr. Stoeckel also testified that she did not discover any malformation of the womb; and, when asked whether she discovered any medical reasons for the abortion, replied, "I didn't discover anything of that sort." Dr. Crawford testified directly that she died from the effects of an abortion. In addition to this, the medical testimony all showed that the conditions resulting from an abortion were present, and that her death was the consequence of those conditions. Against all this testimony, there was not a particle of evidence in contradiction. There was not so much as a suggestion that there was any medical occasion for the operation, and the court was in serious error in submitting such a question to the jury. It was not necessary to establish by specific proof that there was no such necessity, because the whole of the testimony disclosed the purpose of the deceased to have the operation performed in order to get rid of an illegitimate fœtus; but Dr. Stoeckel did testify that she could not discover any medical reasons for the abortion. In the *Hatch Case* the supreme court of Massachusetts decided that there could be no recovery in such circumstances, on the ground of public policy, saying, "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth." We see no reason to question the soundness of this proposition, and it has our approval. As we have a criminal statute imposing severe punishment for the perpetration of the crime of abortion, it follows that our own public policy corresponds with that pronounced by the supreme court of Massachusetts. But, in addition to this, the offense is a crime at common law. In 1 Wharton, Crim. Law, § 592, it is said: "At common law, the destruction of an infant unborn is a misdemeanor, sup-

posing the child to have been born dead; though, if the child die subsequently to birth, from wounds received in the womb, it is homicide." In the case of *Mills v. Com.* 13 Pa. 633, we said: "'Miscarriage,' both in law and philology, means the bringing forth the fœtus before it is perfectly formed and capable of living, and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word 'abortion' is synonymous and equivalent to 'miscarriage,' in its primary meaning. It has a secondary meaning, in which it is used to denote the offspring; but it was not used in that sense here, and ought not to have been. It is a flagrant crime, at common law, to attempt to procure the miscarriage or abortion of the woman; because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life, and therefore it is punished." In 1 Wharton, Crim. Law, § 599, it is said, "All parties concerned in the offense are responsible, whatever may be the part they take." We do not think it can be questioned that the woman who solicits the commission of the offense, and submits her body for its perpetration, can be regarded as other than a participant in its commission, and is therefore criminally responsible. Viewed in that light, in the present instance, the deceased comes directly within the operation of the prohibitory clause of the policy; for she was actually engaged in the violation of the criminal law of Massachusetts, where the contract was made, and of Pennsylvania, where she was at the time the offense was committed. The act was also highly immoral and illegal, as well on her part as on the part of the person who performed the operation; and therefore it would be contrary to public policy to permit a recovery. Upon the whole case, it was the plain duty of the court below to direct a verdict for the defendant. The case of *Morris v. State Mut. L. Assur. Co.* 183 Pa. 572, 39 Atl. 52, has no application, as its controlling facts are entirely different.

*Judgment is reversed, and judgment is now entered in favor of the defendant.*

Mary E. WEST, Appt.,

v.

Louis EMANUEL.

(198 Pa. 180.)

**A druggist is not guilty of negligence in selling to customers proprietary medicines in the package and under the label of the proprietor or patentee, without making an analysis of the contents.**

(January 7, 1901.)

NOTE.—For authorities in this series as to negligence in the sale of drugs, see *Craft v. Parker, W. & Co.* (Mich.) 21 L. R. A. 139, and note; *Meyer v. King* (Miss.) 35 L. R. A. 474; and *Wise v. Morgan* (Tenn.) 44 L. R. A. 548.

**A**PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Allegheny County, in favor of defendant in an action brought to recover damages for the death of plaintiff's daughter, which was alleged to have been caused by a headache powder sold to her by defendant. *Affirmed.*

It appeared from the evidence that plaintiff's daughter, Edna West, was, on Sunday, November 27, 1898, suffering with headache. That she said she would have to get something, and went to defendant's drug store, and purchased a Kohler's headache powder. She immediately returned home and took the powder between 6 and 7 o'clock in the afternoon. Shortly after retiring she was discovered by her mother and sister to be in distress, and to be unconscious. Their efforts to arouse her proving fruitless, they sent for physicians, who were also unable to afford relief, and she expired at about half-past 10 in the evening.

Further facts appear in the opinion.

*Messrs. O'Brien & Ashley*, for appellant:

The vender of drugs is bound to know what he is selling, to such an extent, at least, as to insure that he is not selling the ignorant public a deadly poison disguised as a useful medicine. If this is not the rule, to what purpose are the stringent penal regulations governing the sale of poisons (see act May 24, 1887, P. L. 189), and the various acts regulating the practice of pharmacy, and the qualifications for dispensing medicines? See Act June 16, 1891, and May 24, P. L. 313.

The vastly larger proportion of the ordinary druggist's business is in commercial wares. Doubtless for every preparation of his own he sells ten of those he bought elsewhere. In neither case is he an agent, but a principal working for his own profit. The patent medicines and others which he sells are his property or merchandise; and when asked for a remedy, and he sells it, does he not guarantee, at least, that if it does not prove efficacious and cure, it will not kill?

Is it not actual negligence for him to fail to inquire and ascertain, at least, that his remedy will not prove dangerous and even fatal? Is he to be excused from all responsibility, on his assertion that he did not know the nature of the medicine?

*Smith v. Hays*, 23 Ill. App. 244; *Fleet v. Hollenkemp*, 13 B. Mon. 227, 56 Am. Dec. 563; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Longmeid v. Holliday*, 6 Eng. L. & Eq. 562.

*Mr. George H. Quail* for appellee.

#### Per Curiam:

At the close of the plaintiff's case, and on motion of the defendant, the court entered a compulsory nonsuit, which, on application of the plaintiff, it refused to take off. As the evidence introduced by the plaintiff failed to establish or disclose a cause of action against the defendant, the nonsuit was properly entered. The Kohler Headache Powders were in demand at least twelve or

fifteen years ago, and from that time on they were to be found for sale in most, if not all, of the principal drug stores. They were recognized and regarded as an efficient and proper remedy for headaches, and were mainly used to relieve them. They were a patent or proprietary medicine manufactured by Kohler, and sold by him to the drug stores, which sold them to their customers. In the sales of patent or proprietary medicines furnished by the compounder of the ingredients which compose them the druggist is not required to analyze the contents of each bottle or package he receives. If he delivers to the consumer the article called for with the label of the proprietary or patent upon it, he cannot be justly charged with negligence in so doing.

*Judgment affirmed.*

Patrick ENRIGHT *et al.*, *Appts.*,

*v.*  
PITTSBURGH JUNCTION RAILROAD COMPANY.

(198 Pa. 166.)

**A railroad company cannot eject from its train a boy ten years old who is trespassing on it, or cause him by fright or fear to leave the train, while it is in rapid motion, so as to endanger his life.**

(January 7, 1901.)

**A**PPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 3, for Allegheny County in favor of defendant in an action brought to recover damages arising from injuries caused to Joseph Enright by the alleged negligence of defendant. *Reversed.*

The facts are stated in the opinion.

*Messrs. T. T. Donehoo and Horace J. Miller*, for appellants:

While, under some circumstances, it has been held that a railroad company owes no duty to a trespasser, it has always been the law that this does not justify a positive act which endangers a trespasser's life; and this is especially true in the case of infant trespassers.

*Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 70 Pa. 119; *Arnold v. Pennsylvania R. Co.*

NOTE.—As to ejection of trespasser from train, see, in this series, *Southern Kansas R. Co. v. Sandford* (Kan.) 11 L. R. A. 432, and *note*; and *Burch v. Baltimore & P. R. Co.* (D. C.) 26 L. R. A. 129.

As to master's liability for servant's tortious injury to third person in the absence of any contractual relation, see *Ritchie v. Waller* (Conn.) 27 L. R. A. 161, and *note*; *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 28 L. R. A. 433; *Pierce v. North Carolina R. Co.* (N. C.) 44 L. R. A. 316; *Baltimore Consol. R. Co. v. Pierce* (Md.) 45 L. R. A. 527; *Nelson Business College v. Lloyd* (Ohio) 46 L. R. A. 314; and *Galveston, H. & S. A. R. Co. v. Zantlinger* (Tex.) 47 L. R. A. 282.

115 Pa. 135, 8 Atl. 213; *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *Barre v. Reading City Pass. R. Co.* 155 Pa. 170, 26 Atl. 99.

If there be any evidence beyond a mere scintilla, however slight, from which the jury may draw any inference favorable to the plaintiff, the case should be submitted; and, if it inadvertently happens to be withdrawn from the jury by judgment of nonsuit, the latter should be taken off by the trial court.

*Bastian v. Philadelphia*, 180 Pa. 227, 36 Atl. 746.

Had the boy been permitted to remain in his position in the car while in motion, or had the train been stopped, this accident would not have occurred, for the boy himself states that he would not have fallen from the car had he not been scared into doing so by the agent and employee of the company.

*Levin v. Second Ave. Traction Co.* 194 Pa. 156, 45 Atl. 134.

*Mr. Johns McCleave*, for appellee:

The boy was voluntarily where he had no right to be, and where he had no right to claim protection.

*Flower v. Pennsylvania R. Co.* 69 Pa. 210, 3 Am. Rep. 251.

The child being unlawfully upon the car, the defendant company owed it no duty, and is not liable for the injury.

*Cauley v. Pittsburgh, O. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Baltimore & O. R. Co. v. Schwindling* 101 Pa. 258, 47 Am. Rep. 706.

The rule as to the management of street cars, which are constructed and run so as to be under the immediate control of the driver, and to stop every few feet, is not intended to be applied to the management of steam engines drawing immense loads, difficult to start and difficult to stop.

*Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 3 Am. Rep. 251; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485; *Barre v. Reading City Pass. R. Co.* 155 Pa. 170, 26 Atl. 99; *Levin v. Traction Co.* 194 Pa. 156; *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 70 Pa. 119.

**Mestresat, J.**, delivered the opinion of the court:

Joseph Enright, a boy of ten years, in company with two other boys, boarded a freight train on defendant's road while it was standing at the foot of Fortieth street, in the city of Pittsburgh, on the afternoon of the 5th day of September, 1897. They got on a Pittsburgh & Western iron flat car located about the middle of the train. A Baltimore & Ohio engine pulled the train, and an engine of the defendant company pushed it. A brakeman saw the boys get on the train, but at that time did not offer to put them off. The destination of the boys was Schenley Park, to see the goat races. After the train had stopped at the

foot of Fortieth street long enough to attach the pushing engine, it started south in the direction of the park. When it emerged from the tunnel at or near the park, Joseph's companions jumped off. The train then was going pretty fast, and for that reason the boy did not wish or intend to attempt to get off. At that time the brakeman who was on the train, and two cars from Joseph, waved a stick, and hallooed at him, "Here comes the detective!" The boy, being frightened by the conduct of the brakeman, left the car on which he was riding, and got on the bumper between it and the car next in front of it. After he did so, the brakeman again waved his stick at him, and hallooed, "Here comes a detective!" The boy then, through fear, attempted to get off the train while it was moving rapidly, and, falling under the wheels of the car on which he had been riding, was seriously injured. His right leg was taken off and his left leg was badly lacerated. Such, briefly stated, are the facts of the case as disclosed by the testimony. The learned judge of the court below granted a compulsory nonsuit, and subsequently refused to take it off, for the reason, as stated in his opinion, that "this case is ruled by the case of *Cauley v. Pittsburgh, O. & St. L. R. Co.* 98 Pa. 498," 40 Am. Rep. 664. We must, therefore, assume that the court below held that the action of the brakeman resulting in the injury of Joseph Enright was not negligence for which the defendant company was liable.

The liability of the defendant in this action depends upon the question whether it owed a duty of ordinary care and prudence to the plaintiff's son under the circumstances of the case, and whether it exercised such duty. If no obligation of that character rested upon the defendant, then it is exonerated from any liability for the action of its employee in causing the boy to place himself in a perilous position, which resulted in his injury. The testimony, which we must assume to be true, establishes the fact that the boy was frightened by the brakeman, so that he attempted to get off the train before he otherwise would have done so. The defendant's employee, therefore, while in the line of his duty, caused the boy to make an attempt to leave the train while it was moving rapidly. This act occasioned the injury to the plaintiff's son. Was it negligence? The solution of this question will determine the correctness of the judgment of the court below. If the position assumed by the court and urged by the appellee's counsel be correct, then a railroad company owes no duty whatever to a person of any age who enters upon one of its trains as a trespasser. The company, under such circumstances, may with impunity at any time eject a person from a train at the peril of life and limb. Its employees may throw the trespasser from the train, though death necessarily results from their action. The child of tender years, whose discretion cannot protect him,—as in this case,—who has entered its train with the knowledge and without objection of the brakeman, may be cast from the train with

impunity while its rapid speed insures the greatest danger. Such is the logical conclusion from the rulings of the court below. We cannot assent to a doctrine fraught with so much danger to the public, and with so little regard for the rights of the individual. As said by Mr. Justice Gordon in *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485, "it would so illy accord with Christian civilization as to render its maintenance impossible." It cannot be supported by reason. It ignores a duty owed by a man to his fellow men in civilized society. It repudiates an obligation resting alike upon the individual and the corporation. The plaintiff's son was a trespasser upon the defendant's train. He had no right to be there, and the brakeman would have been justified in expelling him. The defendant owed no duty to carry him in safety to his destination, or to surround him with safeguards to protect him from falling from the train while in motion. He was not a passenger, nor entitled to protection as such. The defendant was not required to stop its train to permit him to alight, nor to run the train at any particular speed to suit the boy's convenience, or for his safety. No duties of this character devolved upon it. But, conceding this to be true, it does not follow that the defendant, by its employees, could eject the boy from the train, or cause him, by fright or fear, to leave the train while in rapid motion, so as to endanger his life. The child being on the train, and it running at a rapid speed, it became the duty of the defendant and its employees not to eject him. This duty arose from the circumstances. The failure to observe it was "a want of ordinary care under the circumstances," which is negligence. The brakeman knew the train was in motion, and hence saw the danger which must result from his conduct if the boy attempted to leave the train. His act was done, therefore, with full knowledge of the peril in which it placed the child. Consequently, the defendant, through its employee, disregarded a plain duty, which resulted in the painful and serious injury of the plaintiff's son.

The simple proposition to be determined here is the right of the defendant, by its employee, to endanger the life of a child of tender years by compelling him to alight from a freight train while it is moving at a rapid speed. The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in causing him to alight while the train was in motion. The cause of the boy's injury, therefore, is directly attributable to the negligent act of the defendant's employee in frightening him so that he attempted to quit the train in the face of imminent danger. We think the defendant company was negligent, and should answer for its conduct. This position is sustained by many decisions of this court. In *Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485, Mr. Justice Gordon, delivering the opinion, says: "That the defendant's driver or con-

ductor was grossly negligent in compelling a child of twelve years of age to jump—and that backwards—from the platform of a moving car, no one can well deny. . . . It was a mistake to hold that, because the child was a trespasser, it could therefore be ejected in a manner which endangered its life or limb. In the case of *Pennsylvania Co. v. Toomey*, 91 Pa. 256, we held, per Mr. Justice Mercur, that such a disposition of a trespassing adult could not be allowed; and that ordinary care must be used to avoid injury even to a trespasser is fully established by the cases of *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Hydraulic Works Co. v. Orr*, 83 Pa. 332, and *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457." In *Arnold v. Pennsylvania R. Co.* 115 Pa. 140, 8 Atl. 213, it is said: "But the second rule to which we have adverted is that even a trespasser cannot be ejected from a train without a reasonable regard for his safety. This rule, as stated by Mr. Justice Hunt in the case of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, is as follows: Whilst a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to a passenger, it is nevertheless not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts. And this same doctrine has been approved by our own authorities [citing them]. If, then, we assume that the plaintiff was a trespasser, still the defendant had a duty to perform with reference to his safety which it was not at liberty to neglect; hence the court erred in directing a nonsuit." In *Barre v. Reading City Pass. R. Co.* 155 Pa. 173, 26 Atl. 99, the court says: "Assuming as a fact defendant's allegation that plaintiff was a trespasser, that would not justify the driver in removing her from the rapidly moving car so forcibly and with such utter disregard for her personal safety. If the testimony was believed—as it must have been—by the jury, the driver was fully aware of the plaintiff's situation, and how she was sustaining herself, and he could not have been ignorant of the fact that she was a child of tender years. Knowing all this, he was at least bound to exercise such care in putting her off as not to endanger her life or limbs. Even trespassers are entitled to humane consideration; but plaintiff's youth exempted her from the charge of being a trespasser, in the legal signification of the word."

The learned counsel for the appellee contends that the facts of this case bring it within the decisions of the court in *Flourer v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706, and *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664. It is therefore necessary to briefly refer to these cases, and see what they decide. In *Flourer v. Pennsylvania R. Co.*, a boy, who was standing on the platform of a water tank, was requested by the fireman, who was acting as temporary engineer, to put in the hose, and turn



the water on the engine tank. He climbed up the side of the tender to put in the hose, and as he did so some detached freight cars belonging to the train ran down without any brakeman, and struck the car behind the tender, driving the tender and engine forward. The boy fell from the tender, and was killed. In the opinion of the court, by Mr. Justice Agnew, it is said that the case turned "wholly on the effect of the request of the fireman, who was temporarily engineer, to put in the hose and turn on the water." It was therefore held that, it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendant was not liable. In *Baltimore & O. R. Co. v. Schwindling* a boy of five or six years went upon the platform of a railroad station for his own amusement, and while standing on the edge of the platform, looking at an approaching train, was struck and injured by an iron step which was bent and projected a few inches from the car of a passing train. The boy was told to step back from the position he occupied on the platform, but he refused to do so. Upon the authority of *Gillis v. Pennsylvania R. Co.* 59 Pa. 141, 98 Am. Dec. 317, it was held that under these facts there could be no recovery, and that "the controlling feature of the inquiry in all such cases is, Was there a duty to the plaintiff which was violated by the defendant? If there

was not, there was no legal liability." We think it apparent that the two cases just referred to do not sustain the contention of the appellee. The facts clearly distinguish them from the one at bar. It must be conceded that *Cauley v. Pittsburgh, C. & St. L. R. Co.* supports the position of the appellee. It was before the court twice, and is reported in 95 Pa. 398, 40 Am. Rep. 664, and 98 Pa. 498. Both opinions were written by the same justice, and from both judgments two justices dissented. The opinion in the first report of the case is broader, and goes much further, than the syllabus, in which there is nothing that conflicts with the views expressed in this opinion. The second opinion reiterates the views enunciated in the first opinion. We have examined carefully the decisions of this court cited in both opinions, and are convinced that they do not sustain the conclusion of the court on the facts disclosed in the *Cauley Case*. We do not think the doctrine announced in the opinions filed in that case is supported by reason or authority, and, in so far as it conflicts with the views herein expressed, the case is overruled. It follows that the learned judge of the court below was in error in withdrawing the case from the jury, and hence the assignments of error must be sustained.

*The judgment is reversed, and a proce-  
dendo awarded.*

## RHODE ISLAND SUPREME COURT.

George C. CARR *et al.*  
*v.*

George A. CARPENTER, Jr.

(22 R. I. 528.)

**The right to take seaweed stranded on the beach below high-water mark belongs to the owner of the upland, and he may maintain an action of trespass against one who removes the seaweed without his consent.**

(March 27, 1901.)

**ON DEMURRER** to the declaration in an action brought to recover damages for disturbance of plaintiff's right to take seaweed which had stranded upon the shore in front of his property. *Demurrer overruled.*

The facts are stated in the opinion.

*Mr. A. B. Crafts*, for defendant, in support of demurrer:

The state holds the fee to the shore between high and low water mark as trustee for the public.

*Allen v. Allen*, 19 R. I. 114, 30 L. R. A. 497, 32 Atl. 166.

The state, being a trustee for the public, could not make any grant inconsistent with the right of the public. No such right

could be claimed by prescription. *Nullum tempus occurrit regi.*

The right of the people to "the privileges of the shore" is preserved by the state Constitution and statutes. No such grant can, therefore, be presumed in individual cases.

Seaweed landed below ordinary high-water mark belongs to the state in trust for the public.

*Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46; 21 Am. & Eng. Enc. Law, 1st ed. p. 982; *Cooley*, Torts, 2d ed. \*366, 431.

In every case the owner of the soil where the seaweed is landed has been given the ownership of the seaweed by virtue of his ownership of the soil, and every one of these cases sustains the claim that the state owns the land below high-water mark, and that the seaweed there belongs to the public.

*Healy v. Thorne*, Ir. Rep. 4 C. L. 495; *Brew v. Haren*, Ir. Rep. 11 C. L. 198, Ir. Rep. 9 C. L. 29; *Hove v. Stawell*, cited in Ir. Rep. 11 C. L. 206; *Wyse v. Leahy*, Ir. Rep. 9 C. L. 384; *Mulholland v. Killen*, Ir. Rep. 9 Eq. 471; *Daley v. Murray*, Ir. L. R. 17 Eq. 185; *Hamilton v. Atty. Gen.* Ir. L. R. 9 Eq. 271, Ir. L. R. 5 Eq. 555; 3 Washb. Real Prop. 54, 55, 59; *Emans v. Turnbull* (N. Y.) 3 Am. Dec. 427, note.

**NOTE.**—Upon the question of the right of the owner of land bounding on tide water to control the shore below high-water mark, see authorities collected in *notes* to *Miller v. Mendenhall* 53 L. R. A.

(Minn.) 8 L. R. A. 89; and *Eisenbach v. Hatfield* (Wash.) 12 L. R. A. 632. See also *Middletown v. Newport Hospital* (R. I.) 1 L. R. A. 191, and *Allen v. Allen* (R. I.) 30 L. R. A. 497.

Seaweed, kelp, and other marine plants do not belong to the owner of the shore so long as they are afloat, or moved about by the tides, or not attached to the soil.

*Anthony v. Gifford*, 2 Allen, 549.

*Mr. W. P. Sheffield, Jr.*, for plaintiffs, *contra*:

The title of the state to the shore (between high and low water mark) has always been subject to certain rights of the riparian proprietors, owners of the upland. Among these rights are:

The right to build out, not interfering with navigation, subject to legislative permission.

*Engs v. Peckham*, 11 R. I. 210.

The right of access from the sea, the "great highway of nations."

*Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654.

The American doctrine with reference to seaweed is set forth in an early case by Kent, Ch. J., in *Emans v. Turnbull*, 2 Johns. 313, 3 Am. Dec. 427.

This doctrine is generally followed in the United States.

Angell, *Tide Waters*, 260.

Rhode Island has always followed the doctrine laid down by Kent in *Emans v. Turnbull*, and this right of the riparian owner to the seaweed when grounded has been recognized in this state for generations as one of the most valuable property rights, in wills and deeds of land, partition suits, and in creating easements, both in gross and appurtenant.

*Kenyon v. Nichols*, 1 R. I. 106; *Bailey v. Sisson*, 1 R. I. 233; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715; *Watson v. Knowles*, 13 R. I. 639; *Middletown v. Newport Hospital*, 16 R. I. 319, 1 L. R. A. 191, 15 Atl. 800.

In *Allen v. Allen*, 19 R. I. 115, 30 L. R. A. 497, 32 Atl. 166, the court in enumerating the private rights of the riparian proprietor whose land borders upon tide water, in the shore between high and low-water mark, calls these rights "in the nature of franchises or easements," and includes "the right to take seaweed stranded upon the shore."

**Douglas, J.**, delivered the opinion of the court:

The plaintiff, who is the owner of land bounding upon the sea, brings this action of trespass on the case, claiming damage for the disturbance of his easement or incorporeal right to take the seaweed which has become stranded on the shore adjacent to his land. The defendant demurs to the declaration on the ground that the right to take seaweed landed upon the beach below high-water mark is in the public, and not in the owner of the adjacent upland. The demurrer must be overruled. The right to take seaweed is not one of the rights which the state holds in trust for the public, like navigation or fishery, but a private right in the shore, which belongs to the land bordering upon the beach, and which the littoral owner may control and convey. The original 53 L. R. A.

right to the shore under the common law is in the sovereign. By early grants in England certain portions of the shore were given to the lords of manors, the sovereign retaining for the use of the public only the right of navigation in some cases, and in others only the rights of navigation and fishery. So, in this country, the fee of the shore was given by colonial ordinance in some cases to the owner of the adjacent upland, as in Massachusetts in 1641; while in other colonies, as in Rhode Island, it remained in the sovereign, now represented by the legislature of the state. But, whether the fee between high and low water mark belongs to the state or to individuals, the respective rights of the parties are not generally affected by that circumstance. "In this country . . . the common rights of the people in these waters [in tide waters], both before and since the Revolution, may be said generally to be confined to what is of public use; while the owners of lands adjoining navigable waters are permitted to enjoy what remains of the rights and privileges in the soil beyond their strict boundary lines, after giving to the public the full enjoyment of their rights." Gould, *Waters*, § 168. The state may not give up its right to control the private rights, as well as the public ones, but it may suffer the littoral proprietor to acquire as against all the world but itself these private rights which naturally fall to him as the first appropriator, so that he becomes by the common law of the state the owner of these rights, with the exclusive power to exercise them as long as this does not interfere with the public rights of which the state reserves control. The right of access to the sea is one which the state cannot arbitrarily take from the littoral owner. The right to build wharves below high-water mark is one which in this state is attached to the upland, but which the state may regulate in the interest of the public right of navigation. The court says in *Engs v. Peckham*, 11 R. I. 210, 223: "At common law the erection of a wharf in tide waters is not indictable as a nuisance unless it obstructs navigation. In this state this doctrine has been liberally applied for the benefit of riparian proprietors. Such proprietors have been very freely permitted to erect wharves, and even to make new land by filling the flats in front of their land. We are not aware that the state has ever laid claim to any wharf so built, or any land so made, unless the cove lands . . . can be considered an exception." So the right to take seaweed and drift stuff, and the right to take sand and stones from the beach, have always been recognized and upheld by our courts as rights attached to the ownership of the upland bordering on the sea. No doubt the state, as owner of the fee, might limit and perhaps take away, these rights. At any rate, the sovereign power could have done so before the "long-continued usage had acquired the force of law" (Gould, *Waters*, § 336); but the littoral owner now holds these rights in the beach to the exclusion of the

public or other individuals. The first case in this country upon the subject is *Emans v. Turnbull*, 2 Johns. 313, 3 Am. Dec. 427, decided in 1807. The *locus* was a barren strip of land bordering on tide water. The defendant had forcibly prevented the plaintiff from taking any seaweed which had collected on the beach adjacent to this land, and justified his assault by claiming that seaweed, when it lodged upon the beach, became his by reason of his ownership of the upland. The seaweed was taken evidently below high-water mark, for the report says (p. 317): "It appeared that, if the seaweed were left on the beach, it would be driven up by the sea, form a row, and protect the bank from being washed and the sand from being thrown upon the neck." In New York the fee of the shore is in the state, except as it has been given to others by patent, so that this early case is exactly in point. After verdict for the defendant, the case came before the supreme court, of which James Kent was then chief justice, and he delivered the opinion, denying the motion for a new trial. After deciding that the defendant was the owner of the neck, he continues: "The next point in the case is whether the seaweed thrown by the sea upon the shore or beach of the neck did thereby vest in the owner of the soil or belong to the first occupant. The plaintiff's right, if any, rested upon occupancy. . . . Any stranger would have had an equal right to take it. The seaweed thus thrown up by the sea may be considered as one of those marine increases arising by slow degrees, and according to the rule of the common law it belongs to the owner of the soil. The rule is that, if the marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but, if it be sudden and considerable, it belongs to the sovereign. (2 Bl. Com. 261; Hargrave Law Tracts, 23.) The seaweed must be supposed to have accumulated gradually. The slow increase, and its usefulness as a manure and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachments of the sea to which other parts of his estate may be exposed. This is one sound reason for vesting these maritime increments in the proprietor of the shore. The *jus alluvionis* ought, in this respect, to receive a liberal encouragement in favor of private right." This case was approved by Angell in his book on Tide Waters,—a work which embodied the results of accurate research and discriminating judgment, and which must be considered good authority as to the law of Rhode Island from the earliest times. In Massachusetts, in *Phillips v. Rhodes*, 7 Met. 322, the supreme court approve Chief Justice Kent's opinion, and it has ever since been followed in Massachusetts, Maine, and New Hampshire. The supreme court of Connecticut, in *Church v. Meeker*, 34 Conn. 433, say of *Emans v. Turnbull*: "The decision, however, establishes a rule where one

did not exist, and was needed; and, although it favors the riparian proprietor, it does injustice to no one. And it may be sustained also without a serious departure from principle if we look at the fact that the weed, when cast upon the land, belongs to no one, and the owner may justly, as well as equitably, be deemed the first occupant. The decision has been followed in Massachusetts and elsewhere, . . . and, there being none the other way, we are disposed to follow it also, for the sake of uniformity and certainty in respect to a matter of growing importance. The Connecticut case itself is not authority, for a statute in Connecticut regulated the taking of seaweed from shores owned by the state. The question, however, arose again in Connecticut, and the court, in *Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46, decides that seaweed cast upon the beach between high and low water mark does not belong to the littoral proprietor, but to the public, or first taker; and they repudiate the idea of Chief Justice Kent that the doctrine of accession can have any application, because the weed does not lodge upon the land of the private owner, but only near to it. The learned court overlooked the fact that all accretion to upland is formed by deposit upon the adjoining flats. The deposit of weed retains the sand or soil, which otherwise would be washed away, and a nucleus of augmentation is formed, which, by slow degrees, becomes perceptible and permanent. If among the private rights of the littoral owner we must class that of filling out, and of acquiring newly-made soil, as all agree, why should he not be entitled to this natural accretion as well? This seems to us to be no violent stretch of principle to serve a natural equity.

But, whatever may be our conclusion as to the logical grounds for the doctrine, it is certain that it has been recognized as the common law of this state whenever the question has arisen. The authorities of Angell on Tide Waters and *Emans v. Turnbull* were approved by the court in *Kenyon v. Nichols*, 1 R. I. 106, which reviews and approves a former unreported decision. The defendant pleaded that by general custom he and all the inhabitants of the state had the right to take seaweed from the shore, and the demurrer of the plaintiff to this plea was sustained. The court says (p. 110): "The question raised by the defendant's plea in bar was decided by this court at its August term, 1846, in this county, in the action of *Knowles v. Nichols*. That was an action for trespass for taking and carrying away seaweed from the lot mentioned in the declaration of the present plaintiff, and evidence was offered on the part of the defendant to prove by custom a right in all the inhabitants of the state to take seaweed from said lot for the purpose of cultivation. The court ruled that this evidence was not admissible; that such a right in the soil of another could not be established by custom; such right can only be claimed by prescription. Upon a reconsideration of this question, and a careful review of the authorities

we are unanimously of opinion that the ruling of the court in that case was correct. That decision is supported, not only by the authorities cited by the plaintiff's counsel, but by the current of authorities from *Gateward's Case*, 6 Coke, 60, and the cases of *Hardy v. Hollyday*, 4 T. R. 718, note, and *Grimstead v. Marlowe*, 4 T. R. 717, down to the present time. The claim made by the defendant is to have an interest or profit *a prendre* in the soil of another. This point is sustained by the reasons given in the adjudicated cases for vesting marine increments in the proprietor of the adjoining land. *Emans v. Turnbull*, 2 Johns. 313, 3 Am. Dec. 427; *Angell, Tide Waters*, 260." Judge Curtis, in the United States circuit court, in *Knoules v. Nichols*, 2 Curt. C. C. 571, 577, Fed. Cas. No. 7,897, thus refers to this case: "In *Kenyon v. Nichols*, 1 R. I. 106, an action on the case was sustained for disturbance of the plaintiff's commonable right in this very land by taking seaweed therefrom. I consider it, therefore, to be the established law of the state, which seems to me consistent with sound principles, that the right to take seaweed and sea manure from a beach is a lawful commonable right. . . . It was also argued that the supreme court of the state had decided . . . that the general treasurer had not authority to convey the soil of this 10-acre common lot, and that the title was now in the state. I am inclined to agree with that learned court in this conclusion, though I have not had occasion very fully to examine its grounds. But it is quite consistent with the rights claimed by the plaintiff that the title to the soil should be in the state. The defendant, however, also insists that the rights of common also are in all the inhabitants of the state. What has been above said indicates my opinion on this subject." The next Rhode Island case in which the subject was considered is *Bailey v. Sisson*, 1 R. I. 233. This was a bill for partition of the right to take from a beach in Little Compton seaweed and sand. The court, after deciding that such a right is peculiarly within the jurisdiction of a court in equity, and that the parties are joint owners of the right as appurtenant to their upland property, enter a decree beginning as follows: "That partition be made of the said right to take seaweed and sand from the White Farm beach in proportions corresponding to the respective interests of the parties in the lands to which said right is appurtenant," etc. The beach in question, being in Little Compton, may have been formerly under the jurisdiction of Massachusetts, where the fee of the littoral proprietor extends to low-water mark. If so, no mention is made of that circumstance. The right, as appurtenant to the adjacent farm and uplands, is unconditionally recognized. *Hall v. Law-*

*rence*, 2 R. I. 218, 57 Am. Dec. 715, construed a grant of "free liberty of carrying away gravel and seaweed off the beach" belonging to part of the farm, and also "stones below high-water mark, and also liberty to tip the seaweed on the bank" of the same part of the farm, to create a right of common appurtenant limited by the requirements of the land to which it appertained, and which passed with a right of way incident to it on conveyance of such land with its appurtenances. No contention was made that these were rights which the owner of the farm bordering on the beach did not possess. The court dealt with all these rights as real and valuable, and very carefully examined and decided the effect upon them of the conveyances of the estates to which they were attached. *Watson v. Knoules*, 13 R. I. 639, holds that the grant from a riparian owner of "all the sea manure and drift stuff which lands on the west shore" did not include goods from a wreck. The case touches the question we are considering only by recognizing the right of the riparian owner to sea manure, and by implication his power to grant the right to another. In *Middletown v. Newport Hospital*, 16 R. I. 320, 1 L. R. A. 191, 15 Atl. 800, this court issued an injunction against the owners of land bordering upon the ocean in Middletown, where the state has always held the fee below high-water mark, to enforce certain privileges in the shore in favor of the inhabitants of the town, covenanted to them by the owner's ancestor; among these rights being the right to a landing place and the right to take seaweed, sand, shells, and "all such drift stuff as any of the inhabitants aforesaid shall take up in the surf or under highwater mark against said commonage or beach." After this uniform line of decision, this court, in *Allen v. Allen*, 19 R. I. 115, 30 L. R. A. 497, 32 Atl. 166, enumerated among the private rights which belong to the littoral proprietor that of taking seaweed stranded on the beach adjacent to his land. To alter the rule after it has been so well settled and so long acquiesced in would disturb rights of property which in many cases have largely fixed the values given and received for littoral estates, and this alone would forbid the court to make such change without the clearest proof of error. But we have no doubt that the rule is founded in good law as well as upon natural equity,—in the case where the proprietor owns to low-water mark, upon his ownership of the soil; in the case where he owns only to high-water mark (the state not asserting any claim), upon the doctrine of accession.

*Demurrer overruled*, and case remitted to the Common Pleas Division for further proceedings.

## NORTH CAROLINA SUPREME COURT.

Margaret LUTON, Admx., etc., of Alexander  
Badham, Deceased, *Appt.*,  
v.  
Hannibal BADHAM.

(127 N. C. 96.)

1. A recovery of the value of improvements made on land under an oral contract for its conveyance to the party making them, which is broken by refusal to convey after the improvements are made, may be had on the ground that they have been obtained by fraud.
2. Oral evidence is admissible to show that improvements were made upon land under an oral contract that the land should be conveyed to the party making them.
3. Continued possession by the purchaser of land under a parol contract

is not necessary to enable him to recover the value of improvements placed by him upon the property on faith of the contract, which has been repudiated by the vendor.

(*Douglas, J., dissents.*)

(October 30, 1900.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Chowan County in favor of defendant in an action brought to recover the value of improvements placed upon land by plaintiff's intestate while he was in possession under a parol contract to purchase. *Reversed.*

The facts are stated in the opinions.

*Messrs. Busbee & Busbee* for appellant.

*Messrs. Pruden & Pruden and Shepherd & Shepherd* for appellee.

**NOTE.**—Rights in respect to compensation for improvements on land, made in good faith, under an oral contract or gift.

- I. Introductory.
- II. When vendee entitled to recover for.
  - a. Under parol contract.
  - b. Under parol gift.
- III. When vendor unable to make title.
- IV. Particular and peculiar cases.

I. Introductory.

At the common law the true owner of land, *i. e.*, the one in whom the legal title lay,—could recover the possession of the land and all that appertained to it, although it had been improved by another in good faith, believing that the land belonged to him; and such true owner was not liable for, nor bound to make any allowance for, such improvements or betterments, as they are sometimes termed.

Common-law courts afterwards loosened this rigid rule, holding that an action for mesne profits was equitable in its nature, and that the defendant in such an action might set off or recoup the value of improvements to the realty, made by him in good faith under the belief that he had or was entitled to have the title thereto,—to the extent of the rents and profits. Previous to this, courts of chancery held that when one came into their tribunals to assert or have his title assured, such court, acting upon the maxim that he who seeks equity must do equity, would impose, as a condition for granting the relief sought, that the complainant should allow the defendant, who had made considerable and permanent improvements in good faith, the amount which the improvements had enhanced the value of the real property over and above the rents.

The principle of the common law is, that the rightful owner is under no obligation to pay for improvements which were never authorized. *Gregg v. Patterson*, 9 Watts & S. 209.

This doctrine has been changed in most jurisdictions so as to allow a bona fide occupant, under color of title, to mitigate the claim for damages and mesne profits by introducing proof of the value of permanent and useful improvements. This principle was engrafted upon the common law through the medium of equity. *Sedgwick & W. Trial of Title to Land*, 691; *Walker v. Humbert*, 55 Pa. 407; *Morrison v. Robinson*, 81 Pa. 456.

The general policy of the law, where no statute intervenes, is to allow the value of improve-

ments only by way of set-off against, or in mitigation of, damages for the detention of the land, that the value of betterments cannot therefore usually exceed the amount of the plaintiff's damages and mesne profits. *Sedgwick & W. Trial of Title to Land*, 698.

At common law there is no liability on the part of the owner of real estate for improvements made in good faith by an occupying claimant. The right to recover therefor is based upon the statute, and the claimant must bring himself within its provisions. *Lunquest v. Ten Eyck*, 40 Iowa, 213.

It is a well-settled principle of equity, moreover, that when a bona fide possessor of property makes meliorations upon it in good faith and under an honest belief of ownership, and the real owner is for any reason compelled to come into a court of equity for relief, that court, applying the familiar maxim that he who seeks equity must do equity, will compel him to pay for those improvements, as far as they are permanently beneficial to the estate and enhance its value. *Story, Eq. Jur.* 779; *Pom. Eq. Jur.* 1241; *Skiles's Appeal*, 16 W. N. C. 246.

This is the extent to which the courts of this state (Pennsylvania) have gone in allowing for improvements. *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43.

By the English and American common law, the true owner recovers his land in ejectment without liability to pay for improvements which may have been made upon it by an occupant without title. Improvements annexed to the freehold, the law deems part of it, and they pass with the recovery. Every occupant makes improvements at his peril, even if he acts under a bona fide belief of ownership. 2 Kent, Com. 334. Such is the rigid rule of the common law. It is founded upon the idea, that the owner should not pay an intruder, or disseisor, or occupant, for improvements which he never authorized. It is supposed to be founded in good policy, inasmuch as it induces diligence in the examination of titles, and prevents intrusions upon, and appropriations of, the property of others.

Chancery, borrowing from the civil law, made the first innovation upon the common-law doctrine. And it came at length to be held, in equity, that when a bona fide possessor of property (for equity, no more than law, would aid a *malæ fide* possessor) made meliorations and improvements upon it in good faith, and under an honest belief of ownership, and the real owner was for any reason compelled to come into a court of equity, that court, applying the fa-

**Furches, J.**, delivered the opinion of the court:

The plaintiff is the administratrix of Alexander Badham, her former husband, and the defendant is the father of her intestate. The plaintiff alleges that the defendant was the owner of a vacant lot in the town of Edenton, and upon the marriage of her intestate the defendant proposed to him that, if he would build upon and improve said vacant lot, it should be his; that he would make him a fee-simple title to it; that upon this agreement her intestate entered upon said lot, and greatly improved the same, by erecting a dwelling and other outhouses thereon, which improvements greatly enhanced the value of said lot, to the amount of \$400; that her husband and intestate lived on said lot in the dwelling house he had built with the plaintiff, his wife, from

1892 until 1897, when he died, leaving the plaintiff and two children, the result of their marriage; that plaintiff continued to occupy said house and premises for some time after the death of her intestate, when she surrendered the possession to the defendant upon his request, and upon his promise to give her a part of the rent for the benefit of her said children, but that since the defendant has gotten possession of said property he refuses to pay her any part of the rent, and refuses to convey said land to her children; that said contract and agreement between her intestate and the defendant was never reduced to writing, her intestate having full confidence in the defendant, and believing that he would keep his said promise, and convey him the lot; that said contract and agreement being in parol only, and the defendant refusing to carry out the agreement

millar maxim that he who seeks equity must do equity, and adopting the civil-law rule of natural equity, would compel him to pay for those improvements or industrial accessions, not the cost, indeed, but so far as they were permanently beneficial to the estate, and enhanced its value. Story, Eq. Jur. 779a, 799b; Putnam v. Ritchie, 6 Paige, 390; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875, enriched by the learning and research of that distinguished jurist; 2 Story, 606, Fed. Cas. No. 1,876; Green v. Biddle, 8 Wheat. 77, 5 L. ed. 566; Willard, Eq. Jur. 312; Sugden, Vendors, chap. 22, §§ 54, 55, 57.

This was the extent of relief to bona fide possessors. "I have not," says Chancellor Walworth in Putnam v. Ritchie, 6 Paige, 390, "been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights."

Courts of law next modified the strict rule of the common law (which makes the occupant of land which is owned by another, no matter how good the faith of the occupant may be, liable for the rents and profits) to this extent, viz., that where such owner brought his action for mesne profits, which courts of law treated as an equitable action, the bona fide occupant might set off or recoup the value of his permanent improvements to the extent of the rents and profits demanded, but no farther. Per Dillon, J., in Parsons v. Moses, 18 Iowa, 440.

The equity courts of many of the states (notably New York) have adhered to the rule stated, and affirmed by Chancellor Walworth in Putnam v. Ritchie, 6 Paige, 390, and steadily and persistently declined to advance from that position. Mickles v. Dillaye, 17 N. Y. 80; Thomas v. Evans, 105 N. Y. 609, 59 Am. Rep. 519, 12 N. E. 571. And see, to the same effect, Griewold v. Bragg, 18 Blatchf. 202, 48 Conn. 577.

But in 1841 the circuit court of the United States for Maine found itself confronted with a case in which, if the rule alluded to was thus limited, great apparent injustice would be done to the plaintiff. The plaintiff was the owner, through several mesne conveyances, of lands purchased at an administrator's sale, made by order of the probate court in a proceeding therein to sell the land to pay the debts of the intestate owner. The persons under whom plaintiff claimed had made permanent improvements on the land, largely increasing its original value.

Thereafter one of the heirs of the original owner brought ejectment for his share, and recovered a judgment for an undivided fourth-part thereof on account of some fatal irregularity in the proceedings in the probate court. Plaintiff thereupon filed his bill in equity to enjoin the execution of the judgment in the ejectment action, and to recover for the improvements. In delivering the opinion of the court sustaining the bill, and referring it to a master to take an account of the enhanced value of the premises by reason of the improvements; and of the rents, etc., that eminent equity jurist and writer, Judge Story, after stating the rule before mentioned, said: "But it has been supposed that courts of equity do not, and ought not to, go further, and to grant active relief in favor of such a bona fide possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in Putnam v. Ritchie, 6 Paige, 390, 403, 404, 405, entertained this opinion, admitting at the same time that he could find no case in England or America, where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a bona fide purchaser, in such a case, where he has manifestly added to the permanent value of the estate by his meliorations and improvements without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity." Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875.

On the coming in of the master's report the same learned judge delivered the judgment of the court as follows: "It appears by the master's report that the present value of the land with the improvements and meliorations is \$1,000; and that the present value of the land without these improvements and meliorations is but \$25; so that in fact the value of the land is increased thereby \$975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has by his improvements and meliorations added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is

and to convey said property, the plaintiff asks that he may be decreed to account and pay for the valuable and permanent improvements her intestate put upon said lot.

The defendant answers, and admits that the plaintiff's intestate was his son; that he went upon said lot and occupied the same with his family until his death; and that he built some small house for his use while there, but not the dwelling house, which defendant alleges he built. But he denies that there was any agreement between him and plaintiff's intestate that, if he would go upon said lot and improve it, he would convey said lot to the plaintiff's intestate, and denies that he said anything to said intestate to induce him to improve said lot, with the expectation that he would convey the same to him; that, as the intestate was his son, he simply permitted him to occupy said lot without rent,

a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation." *Bright v. Boyd*, 2 Story, 605, Fed. Cas. No. 1,876.

This opinion of Judge Story has been frequently cited and commented upon, and while some of the courts and judges have hesitated to advance from the former rule, others have boldly approved the position taken by Judge Story. *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 653; *Valle v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557; *Blodgett v. Hitt*, 29 Wis. 169; *Union Hall Assn. v. Morrison*, 30 Md. 281; *Hatcher v. Eriggs*, 6 Or. 31.

*Cole v. Johnson*, 58 Miss. 94, is identical in its facts and conclusions with *Bright v. Boyd*, but does not mention that case as an authority.

And it would, indeed, seem strange that a state of facts which will furnish a perfect affirmative defense in an equity action should not constitute a cause of action, when necessary, in a suit in equity. In other words, that accident shall determine the assertion of what is a conceded equitable right.

## II. When vendee entitled to recover for.

### a. Under parol contract.

A testator had permitted two of his sons to enter upon lands and make certain improvements thereon. During the time they were doing so and occupying the land the acts of both the testator and his sons indicated plainly that the testator did no act which would signify his intention to release his right and title to the land. The evidence showed that large improvements were made; but it also showed that the testator had all along determined not to part with his control over the property, and that the sons were well aware of that determination. It was held that they made the improvements relying merely on the testator's bounty; and that in that view they had no equitable claim, either to the property itself, or to an allowance for their improvements. *Foster v. Emerson*, 5 Grant, Ch. (U. C.) 135.

Although a court of equity will not specifically enforce a parol gift of land, yet, if the donee enters and makes improvements upon it, a court of equity will never allow the donor to reclaim the possession of the land without making compensation for the improvements. This would be to allow him to make profit by the labor and expense of the donee, when such labor and expense

and defendant admits a demand for title, and for an account and settlement for improvements, and that he has refused the same; but he did not formally plead the statute of frauds.

Upon the trial the court formulated issues as to whether there was a parol contract or agreement between the defendant and intestate that, if intestate would improve said lot, defendant would make him a title to it, and, if there was, did plaintiff's intestate, in pursuance of said agreement, enter upon said lot, and place valuable permanent improvements thereon. Upon these issues the plaintiff introduced Isaac Owens and other witnesses, and asked them if they ever heard the defendant say how it was and under what circumstances the plaintiff's intestate entered upon, improved, and occupied said lot; stating that the purpose of asking these

were bestowed under a promise that the donee should have the land. *Evans v. Battle*, 19 Ala. 398.

What was said in the above case would seem to be *obiter*, for it was immediately followed by "but the bill is not framed for this purpose, and the allegations are insufficient to warrant such relief."

The doctrine that one who is induced to enter upon unimproved land by a parol promise that it shall be settled upon him, or by a parol contract of sale, where such promise or contract is refused performance on the part of the owner of the land, and the same is held to be void under the statute of frauds, and the purchaser or other party to whom the promise is made enters upon the land and makes substantial and valuable improvements, the latter is entitled, upon such failure of the other party to perform, to compensation for such improvements, has been the settled rule in North Carolina. *Hedgepeth v. Rose*, 95 N. C. 41; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Vann v. Newsom*, 110 N. C. 122, 14 S. E. 519; *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228; *Barnes v. Brown*, 71 N. C. 507; *Smith v. Stewart*, 83 N. C. 406; *Baker v. Carson*, 21 N. C. (1 Dev. & B. Eq.) 381; *Albee v. Griffin*, 22 N. C. (2 Dev. & B. Eq.) 9; *Chambers v. Massey*, 42 N. C. (7 Ired. Eq.) 286; *Thomas v. Kyles*, 54 N. C. (1 Jones, Eq.) 302; *Love v. Neilson*, 54 N. C. (1 Jones, Eq.) 339; *Winton v. Fort*, 58 N. C. (5 Jones, Eq.) 251; *Daniel v. Crumpler*, 75 N. C. 184.

But it has also been held in that state, that, where the plaintiff sets forth one contract for the purchase and sale of real property which the defendant denies, and sets forth another contract widely different from it, both by parol, and it is a question, whether either of them is understandingly entered into by the parties, parol testimony will not be received to determine what the contract was. *Ellis v. Ellis*, 16 N. C. (1 Dev. Eq.) 341.

To the same effect, *Dunn v. Moore*, 38 N. C. (3 Ired. Eq.) 364, and *Sain v. Dulin*, 59 N. C. (6 Jones, Eq.) 195. The latter case disapproves *Thomas v. Kyles*, 54 N. C. (1 Jones, Eq.) 302, and distinguishes *Love v. Neilson*, 54 N. C. (1 Jones, Eq.) 339.

These three cases seem to be directly in conflict with the rule laid down in *LUTON V. BADHAM*.

Where a man is put in possession of land by the owner upon an invalid or verbal sale, which the owner falls or refuses to complete, and, in the expectation of the performance of the contract, makes improvements, a court of equity will directly and actively, upon a bill filed by

questions was to prove that there was such a parol contract between the defendant and intestate as that alleged in the complaint. The defendant objected, objection sustained, and the witness was not allowed to answer. Plaintiff thereupon submitted to a judgment of nonsuit, and appealed. This is the case, and the only question presented for our consideration is as to the competency of this evidence.

It would seem that *Sain v. Dulin*, 59 N. C. (6 Jones, Eq.) 195, and *Dunn v. Moore*, 38 N. C. (3 Ired. Eq.) 346, cited by the defendant, sustain the ruling of the court. But the question has been before the court a great number of times, and we must admit that the opinions do not appear to be always in harmony. A parol contract for the sale of land is not a void contract, but voidable upon denial or a plea of the stat-

ute of frauds. *Thomas v. Kyles*, 54 N. C. (1 Jones, Eq.) 302; *Gulley v. Macy*, 84 N. C. 434. But when the alleged contract is denied, or the statute of frauds pleaded, this avoids the contract, because the party alleging it is not allowed to show by parol evidence what the contract was. The English rule seems to have been that the statute of frauds must be pleaded, or the party would be allowed to proceed with parol evidence to establish the contract. But our courts have extended the rule so as to include a denial of the contract as well as by pleading the statute of frauds. *Gulley v. Macy*, 84 N. C. 434, and many other cases. Whether it would not have been better that we had followed the English rule is not now an open question, as the rule seems to be firmly established the other way in this state.

But the plaintiff contends that she is not

him against the owner for an account, make him compensation to the full value of all his improvements, to the extent they have enhanced the value of the land, deducting the rents and profits, and will treat the land as subject to a lien therefor. *Rhea v. Allison*, 3 Head, 176.

Where a vendor makes a parol agreement for the sale of land, and puts the purchaser in possession, and afterwards refuses to complete the contract for the sale of the land on the ground that it is void by the statute of frauds, he is bound to pay for the improvements made by the purchaser thus put in possession. *Thouvenin v. Lea*, 26 Tex. 612.

A party making improvements on land, held by void contract of purchase, is not entitled to recover the value of such improvements in an action of assumpsit. He can recover, however, in chancery the value of such improvements as may have added to the permanent value of the estate. *Mathews v. Davis*, 6 Humph. 324.

Where a parol contract for the sale of land provided for a forfeiture in case of nonpayment of the purchase money.—\$35, and the defendant had cleared the land and put improvements upon it at the cost of several hundred dollars, being allowed by the vendor to do so without warning, after the time for payment had elapsed and a right to the forfeiture had accrued, the case stands simply upon a parol contract of sale, unexecuted by either party, except as to the possession, and which, upon the bill of the vendee tendering payment and praying for a specific execution or a rescission upon equitable terms, the vendor must either execute, by conveying the land according to contract, upon receiving payment of the purchase money with interest, or he must repudiate and submit to the usual terms of rescission, as applicable to parol sales of land, which would be that the vendor be allowed interest on the price agreed upon for the lands, and for waste done, and required to pay for improvements, and the account should be so settled. *Bellamy v. Ragsdale*, 14 B. Mon. 364.

Defendant obtained a judgment in ejectment against plaintiff. Thereafter plaintiff brought his action in equity to restrain perpetually the judgment at law, and had judgment to that effect in the trial court. The agreement alleged in the bill was not in writing. The court held that the statute of frauds presented an insuperable bar to a specific execution, but, being satisfied that the plaintiff built the mill and other improvements under the faith of assurance from the defendant that he should be unmolested in the use and possession of them, defendant before he was allowed to gain possession, ought to be compelled to compensate plaintiff for the 53 L. R. A.

improvements remaining upon the premises, deducting therefrom a reasonable sum for the use of the mill. *McCracken v. Sanders*, 4 Bibb, 511.

Plaintiff lived on one of his father's farms as a tenant from year to year for twenty-three years prior to the death of his father, first farming the same on shares and afterwards at a low money rent. A new house being needed on the place, plaintiff was told by his father to go on and build and the farm should be his. Plaintiff did at his own expense build a dwelling house and other buildings, and made other improvements at considerable cost, and continued to occupy the farm as a tenant from year to year until the death of his father. It was held that the contract of transfer of the land was void as being within the statute of frauds, but that, the plaintiff having been in possession as tenant paying rent and having made valuable improvements, which improvements inured to the benefit of the owner and were made upon the assurance of the owner that the tenant should subsequently have the premises by deed or devise, and by the fault of the owner the tenant failed to acquire title, he may recover the value of the improvements. *Smith v. Smith*, 28 N. J. L. 208, 78 Am. Dec. 49.

The possessor of real property under a bona fide parol contract for the purchase thereof, who made valuable permanent improvements thereon upon the faith of such parol contract, is entitled to recover in a court of equity the value of such improvements. *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 653.

Complainant's father-in-law in his lifetime and while in apparent good circumstances, proposed to complainant to grant his daughter, complainant's wife, a house and lot of ground if complainant would repair and make it comfortable for a residence, at the same time informing the latter that he intended the property for the said daughter. Complainant entered into the possession of the property, and, under a full belief that it would be secured to him as his own, he was induced to expend a large sum of money in making permanent and valuable improvements increasing the value of the property three or four times. The transaction was entirely oral, no written contract being made, the only writings being correspondence between the parties, which the court held did not amount to a contract. The donor afterwards died insolvent and the trustee of his creditors now claimed that the property was subject to the estate, and that the alleged agreement to transfer was fraudulent. The Supreme Court of the United States held, in an action to compel specific performance and for such other relief as complainant was entitled to, that



claiming the right to establish—to set up—a parol contract; that she is not asking a specific performance, nor is she asking damages for the breach of a parol contract; that her contention is that, by reason of the contract or agreement between her intestate and the defendant, the intestate was induced to enter upon the defendant's land, and place permanent and valuable improvements on the same; and that this is a new cause of action, collateral to the contract, based upon a new consideration given by equity to prevent fraud. If the plaintiff is entitled to maintain this action against the defendant, it is purely upon equitable principles. Before the junction of the jurisdiction of law and equity in the same court, a bargainee, in a parol contract for the sale of land where the contract was repudiated by the bargainor, could not have relief against the bargainor

in a court of equity, if legal demands alone were involved. If the bargainee had paid the purchase price or a part of it in money or specific personal property, he had a right of action at law to recover the same back. And a court of equity would not aid him, unless there was something else connected with the transaction that gave him an equity. Then the court of equity, having acquired jurisdiction of the matter, would proceed to investigate and settle legal, as well as equitable, demands. *Chambers v. Massey*, 42 N. C. (7 Ired. Eq.) 286. But no such question as this can arise now, as the same courts have both jurisdictions, and administer both law and equity.

If the plaintiff's intestate entered upon the defendant's land under a parol contract, and placed valuable and permanent improvements thereon, and the defendant, after such im-

specific performance could not be adjudged, but that complainant was entitled to the value of the improvements placed by him upon the property: that he was not liable to pay rents for the same, and that the property should be sold and the proceeds of the sale applied to the payment of the money expended by the complainant in making improvements upon the property, and the balance paid for the benefit of the creditors of the father-in-law. *King v. Thompson*, 9 Pet. 204, 9 L. ed. 102.

In *McNamee v. Withers*, 37 Md. 171, it was stated that the principle is well established that if one person expends his money in erecting beneficial improvements on land of another, upon the faith of a parol contract by the latter to convey, where specific execution of the contract cannot be decreed because of the uncertainty of the proofs of its terms, a court of equity will decree compensation to the extent of the value of such improvements, and in some cases will grant relief by declaring the same to be an equitable lien upon the property. *King v. Thompson*, 9 Pet. 204, 9 L. ed. 102, approved and followed.

A decree in favor of the payment for the improvements was, however, reversed on the ground that there was no parol agreement proved.

A bill in equity will be retained for the purpose of affording a party, who has made beneficial and lasting improvements on land occupied by him under a contract void by the statute of frauds for the purchase of the same, and which the owner refused to fulfill, a reasonable compensation for such improvements. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274.

The judgment was afterwards reversed on appeal by the court of errors on the ground that the parol contract had been partially performed, and the case was therefore not within the statute of frauds. 14 Johns. 15, 7 Am. Dec. 427.

When in an action brought for the specific execution of a parol contract, such specific execution cannot be decreed by reason of the vendor's pleading the statute of frauds in bar of such decree, it is the duty of the court to decree compensation to the complainant, to the amount of the purchase money by him paid and interest thereon; and also for all beneficial and lasting improvements which he may have made on the premises. *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45, citing with other authorities *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273.

Where it appears that a parol contract for the sale and purchase of lands was made, upon the faith of which the vendee took possession and made valuable and permanent improvements, though the latter cannot enforce its 53 L. R. A.

specific execution in equity, where the proofs of the terms of the agreement is uncertain and contradictory, the bill will be retained to decree a pecuniary compensation equivalent to the improvements. If this were not so, the vendee would sustain an injury for which he would be remediless, or else have a remedy at law, at best doubtful or inadequate. *Goodwin v. Lyon*, 4 Port. (Ala.) 297.

Defendant made application to plaintiff's agent for the purchase of land, for the purpose of building upon it at once, and paid to the agent the first cash instalment. Thereafter the superior of the agent discovered that this land was of a class which he had been directed not to sell, and he disapproved the application of which the defendant was notified, but in the meantime he had completed his house. It was held that the defendant was entitled to the value of his improvements. *Hannibal & St. J. R. Co. v. Shortridge*, 86 Mo. 662.

Plaintiff being in possession of land under a parol contract by the owner to purchase, raised a crop of oats thereon. The owner refused to convey, and the defendants, who were his agents, expelled the plaintiff from the farm and repossessed themselves of it. When the crop was ripe the plaintiff commenced harvesting it, but was driven off by the agents, who took possession and harvested the crop. It was held that the plaintiff was entitled to recover the value of the oats. *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318.

An agent of the owner of real property was a general real-estate agent, and assumed to sell the land in question. The plaintiffs, claiming that their agent had no power to sell, except to find a purchaser and report to them, and that the contract of sale was to be made by them,—brought this action for the land. The defendant consented to a rescission of the contract, and offered to restore the premises, but prayed that he have judgment for the amount that his improvements had enhanced the value of the land. The land had no rental value outside of the improvements put there by defendant. It was held that an allowance of rent on the land as improved, deducted from the sum the defendant was entitled to recover for improvements made upon the land by him, was all the plaintiffs could ask in judgment. *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420, 42 S. W. 617.

Where it appears that the nonexecution of a parol contract for the sale of land was not altogether attributable to the wilful delinquency or fault of the vendee, and the vendor may be benefited by meliorations made in good faith, the court will allow the value of them to the

provements were made, repudiates the contract, and refuses to convey, the plaintiff has an equitable cause of action. *Ellis v. Ellis*, 16 N. C. (1 Dev. Eq.) 343; *Albea v. Griffin*, 22 N. C. (2 Dev. & B. Eq.) 9; *Lyon v. Crissman*, 22 N. C. (2 Dev. & B. Eq.) 268; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Chambers v. Massey*, 42 N. C. (7 Ired. Eq.) 286; *Thomas v. Kyles*, 54 N. C. (1 Jones Eq.) 302; *Love v. Neilson*, 54 N. C. (1 Jones Eq.) 339; and many other cases. The court says in many of these cases that it would be against equity and good conscience to allow the bargainor to repudiate his contract, and thereby to reap the benefit of the bargainee's money and labor.

But it is contended by the defendant that, if this is so, the defendant is protected from any liability to account for the reason that

vendee on equitable principles, which is the difference between the value of the land in the condition in which the vendor received it back from the vendee, and of that in which it was when the vendee received it first from the vendor, to be estimated at the time of the vendee's eviction, and to be diminished by the value of the use of the land by the vendee as it was when he first took possession of it. *Hawkins v. Beal*, 4 Dana, 6.

In ejectment, the fact that the defendant has made permanent and valuable improvements, in good faith and under color of title, is no defense to the action; but if such fact is set up in the answer in such language as to contain the essential facts to justify a set-off of the value of improvements against rents, it will be treated as a good answer for that purpose, although no offer is made of such set-off. *Anderson v. Fisk*, 86 Cal. 625.

If a person relying confidently upon a parol agreement which vests no title in him, in good faith proceeds to erect improvements upon land which are greatly to the benefit thereof, equity in a proper case will afford him relief. Where in an action for use and occupation the defendant requested the court to charge that if he took the house as a purchaser, on condition that he was to pay rent if the plaintiff lost the land, then the plaintiff cannot recover, as there was no evidence that the land was lost before the commencement of the suit, which charge the court refused,—held error. *Barnes v. Shindolster*, 14 Ga. 131.

A contract for the purchase of land, though not put in writing, is not entirely nugatory, but compensation as damages for the breach of it will be allowed the purchaser for all that he did in pursuance of the contract, and in satisfaction of his part thereof, and for all permanent improvements made upon the land, in reliance upon the contract, with the knowledge of the vendor, and which the vendor gets the benefit of by taking back the land, deducting the value of the rents and profits of the land during the occupancy of the purchaser. *Bender v. Bender*, 37 Pa. 419.

A vendee under a parol contract for the sale of land, who has gone into possession and made valuable improvements thereon, has a right to make his election and treat the contract as void; but as the improvements were made under a subsisting parol contract, he has also the right to come into a court of equity to have his claim for compensation enforced. The equity springs from the fact that the contract was not void, but voidable, and that either party has the right to avoid it. *Rhea v. Allison*, 3 Head, 170. The equity of the vendee is the amount of the en-

he has denied the contract, and the law will not allow the plaintiff to prove it. And this is admitted to be true, so far as establishing the contract for the purpose of enforcing a specific performance, or the recovery of damages for a breach thereof. But cannot the plaintiff prove there was a contract under which her intestate was induced to enter and put valuable improvements on the land? If she cannot, the fraud upon which the plaintiff's action is based is protected by the simple answer of the defendant. This, it seems to us, cannot be and is not the law in this state. In *Albea v. Griffin*, *supra*, which seems to be regarded as the leading case, it does not distinctly appear that the defendant denied the contract, and, if he did not, certainly no stress is put upon that fact by the learned judge who wrote the opinion. The opinion in *Albea v. Griffin*

enhancement of the value of the land in market, resulting from the permanent improvements made upon it; this value to be estimated at the time he made his election to avoid the contract.

But as the vendee seeks the enforcement of an equity, he is bound to do equity; hence, he is required to account for the benefits derived from the use and occupation of the property. As he elects to repudiate the contract, and along with it the payment of the purchase money, equity requires him to account for reasonable rents. *Masson v. Swan*, 6 Heisk. 455.

Compensation for improvements will not be adjudged to one who has, subsequently to his entry upon the premises, repudiated the contract for the title under which he entered. *French v. Seely*, 7 Watts, 231, 32 Am. Dec. 758; *Long v. Finger*, 74 N. C. 502.

Where a purchaser of land by parol refuses to perform the contract and takes advantage of the statute of frauds to avoid it, he cannot recover of the vendor the value of his improvements in assumpsit. *Young v. Pate*, 3 J. J. Marsh. 101.

A vendee of land by parol, who has failed to comply with his contract of purchase, and has paid no part of the consideration, but has continued in possession, and made permanent improvements, with notice that the vendor was opposed to the improvements being made, cannot hold the vendor, who has taken possession, responsible for the enhancement of the value of the land by reason of the improvements. *Ralner v. Huddleston*, 4 Heisk. 223.

Plaintiff made a contract by parol with the defendants, who were selectmen of the town, to purchase a house owned by the town, and defendants, without authority, verbally agreed to sell the house to the plaintiff for the stipulated price, and he took possession and proceeded to make repairs. Thereafter he was notified by the defendants to proceed no farther, and he suspended the work and removed from the house. Thereafter the town appointed an agent to make sale of the house, who notified the plaintiff that he might have it upon the same terms agreed upon between him and the selectmen, but he declined to take it. In an action against the selectmen to recover the amount of the repairs made by the plaintiff, it was held that the action would not lie. *Farnam v. Davis*, 32 N. H. 302.

One who enters upon the land of another with his consent, under a parol agreement to purchase, and makes improvements thereon, solely upon the expectation of acquiring the title, cannot recover of the owner the expense of such improvements, if the owner merely refuses to execute the parol agreement, but does

was written by Judge Gaston at June term, 1838, and at June term, 1839, he wrote the opinion in the case of *Lyon v. Crissman*, 22 N. C. (2 Dev. & B. Eq.) 268, in which he uses this language: "If the objection be that the agreement is void, because not reduced to writing, and this objection could avail anything, it should have been set up in the pleadings. But this has not been done. The plaintiff avers one agreement, and the defendant sets up another, and the parties have left it to proof which representation of the transaction is the true one." *Ellis v. Ellis*, 16 N. C. (1 Dev. Eq.) 343, was an action for specific performance of a parol contract for the sale of land, and alternate relief was demanded for betterments. The answer denied the contract, and the court held that it could not be specifically enforced, but allowed evidence, and ordered

not turn the other out of possession, or deprive him of the benefit of his improvements. *Miller v. Tobie*, 41 N. H. 84.

An intestate made a parol contract with the defendant for the purchase of 100 acres of land at \$8 per acre. Twenty dollars were paid, and one half of the purchase money was to be paid thereafter, when the defendant's bond and mortgage given to the state for the land became due, and the residue in a reasonable time thereafter. The defendant had received from the intestate various payments on account of the land, and the intestate had cleared, enclosed, and sowed 8 acres. The plaintiff as administrator of the intestate offered to pay the defendant on account of 50 acres possessed by the intestate (the latter having sold to another party the other 50 acres, which party had paid the defendant therefor \$133 by agreement), which the defendant refused to receive; and when the plaintiff demanded a deed he refused to give any, or to do anything about it. The action was brought to recover the money paid by the intestate, and for the labor performed by him in clearing the land. The trial judge charged the jury that the plaintiff was entitled to recover, not only for the money paid by the intestate, but also for the clearing and improvements on the land, and they found a verdict accordingly for \$413.36. On a motion to set aside the verdict the supreme court held that the conduct of the defendant could be viewed in no other light than as a relinquishment of the contract. He refused to receive any more money from the plaintiff. He took back the possession of the premises which had previously been in the possession of the intestate; offered them for sale, and actually delivered over the possession to a third person. The contract being considered as rescinded, no doubt could be entertained but that the plaintiff was entitled to recover back the money paid by the intestate. The plaintiff, however, ought not to have recovered any compensation for the improvements. There was no express or implied undertaking by the defendant to pay for them. When the work was done by the intestate, it was for his own benefit; and if he voluntarily abandoned his contract, without any stipulation as to the improvements, he must be deemed to have waived all claim to any compensation for them. *Gillet v. Maynard*, 5 Johns. 85, 4 Am. Dec. 329.

Where a purchaser, in an action against him by the vendor to enforce a specific performance of a contract for the sale of lands, denies that the contract was valid or binding, and shields himself behind the statute of frauds, he cannot ask for compensation for his improvements, as 53 L. R. A.

an account as to rents and profits and for betterments. In *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, which was an action on a parol contract for betterments, where the defendant did not admit the contract as alleged, and set up a different contract or state of facts to those alleged by the plaintiff (and this was an action by the personal representative), and the plaintiff was allowed to prove the agreement, and the court granted the relief prayed for and ordered an account to be taken, in the opinion of the court the following language is used: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*, 21 N. C. (1 Dev. & B. Eq.) 381, in which there was a divided court, but *Ruffin*, Ch. J., and *Gaston*, J., concurring, and *Albee v. Griffin*, 22 N. C. (2 Dev. & B. Eq.) 9, by a unanimous court, to *Hedgepeth v. Rose*,

by so doing he would ask the court to stretch forth its strong arm of equity interposition to protect him, and at the same time divest it of its jurisdiction by setting up a defense which, if valid, precludes all equitable relief. *Lockett v. Williamson*, 37 Mo. 388.

#### b. Under parol gift.

A father, being the equitable owner of land, allowed his two sons the use or occupation of the premises without any arrangement as to the terms on which they should hold the same, the whole transaction being a matter subject to future arrangement. Previous to such occupation by the sons the father had erected a granary on the land for and in respect to the outlay in the erection of which the sons had supplied him with goods to the amount of £249 13s 7d. Thereafter the sons erected upon the land two other granaries, a coal shed and a dwelling-house of the value of £1,200. It was held that the father could not take possession of the land again without allowing to his sons the amount of money that they had laid out upon it, and such amount was a lien and charge upon it as against the father. That this view was confirmed by the circumstances stated, that goods to the value of £249 13s 7d were furnished to him by his sons, which he was not to pay for, but which were to be taken by him as remuneration for the amount of the money which he had laid out in building the granary. That both this sum and the sums laid out by the sons upon the land were a charge upon the land, and the court would not allow it to be taken away from the sons without paying them these sums. *Unity Joint Stock Mut. Bkg. Asso. v. King*, 25 Beav. 72, 27 L. J. Ch. N. S. 585, 4 Jur. N. S. 470.

An intestate placed his son in possession of certain wild land, and announced his intention of giving it to him by way of advancement. Thereafter the son lived upon the land and made very valuable improvements upon it worth nearly double the price of the land in its unimproved state. The father was ready to convey the land to the son, but died before his intention was carried out. It was held that the son in equity was entitled, either to the land itself, or at least to a lien for his expenditure in improving it. That while there was much doubt as to whether he was not entitled to a decree declaring him absolutely entitled to the land, it was clear that he was entitled to the lesser relief of a charge for his improvements, upon the authority of *Unity Joint Stock Mut. Bkg. Asso. v. King*, 25 Beav. 72, 27 L. J. Ch. N. S. 585, 4 Jur. N. S. 470, the circumstances of

95 N. C. 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own acts." This was an action by the personal representative. *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169, is to the same effect as *Pitt v. Moore*, where plaintiffs brought an action for possession of land,

and defendants answered, setting up a parol contract of purchase by their ancestor, alleging permanent improvements, and asking payment for the same. The plaintiffs replied, denying the contract and defendants' right to have pay for improvements. But the court allowed evidence to be introduced to establish the parol contract, which the jury found to have been made by defendants' ancestor, and the court ordered a reference as to rents and profits and improvements, and this court affirmed the judgment. *Thomas v. Kyles*, 54 N. C. (1 Jones Eq.) 302, is a case where the plaintiff alleged that his intestate made a parol contract with the defendant for the purchase of land, entered upon and took possession thereof, and put valuable improvements on the same. The defendant answered, denying the contract. But the plaintiff was allowed to prove the con-

which case were less strong than this, as in the present case there was proof of an intention on the part of the father to confer the ownership upon the son, which was absent in that. *Blehn v. Blehn*, 18 Grant, Ch. (U. C.) 497, and *Hovey v. Ferguson*, reported with it.

Where the owner of real estate puts a relative into possession thereof, for the purpose of cultivating and improving the same, under the promise of a future gift, and the occupier, influenced by such expectation, makes lasting and valuable improvements upon the premises, with the knowledge of the owner, such occupier will be entitled to the full value of the improvements, although it may exceed the amount of the rents and profits. But although in such case the owner could not put forth any independent claim to rents and profits, still, when the occupier comes to be compensated for his improvements, the value of what he has actually enjoyed, the rents and profits, enters upon principles of natural equity as a necessary element into the compensation. *Ridley v. McNairy*, 2 Humph. 174.

A person who has occupied and made valuable permanent improvements upon land, upon the faith of a promise by the owner, the father of his wife, to deed the same to his daughter as a gift, has a lien upon the land for such improvements made in good faith upon the strength of such promise. *Mechanics' Sav. Bank v. Scoggin* (Tenn. Ch. App.) 52 S. W. 718.

A wife having a separate estate, relying upon a clause in the will of her husband's father, whereby he devised certain real property to his son and wife during their natural lives, and on their death to such children as they may have surviving, and their children, occupied the land with her children, and from her separate estate made valuable permanent improvements on the land. Thereafter the owner by a codicil changed his will so as to give his son only a life estate with remainder to his children. In an action brought by the wife to assert her rights to the land, or if this could not be done, to ascertain the cost of the improvements she had put on the land and have the same declared a lien upon it, a decree to the latter effect was adjudged; and this action was affirmed by the supreme court. *Dunn v. Dunn* (Tenn. Ch. App.) 51 S. W. 119.

Where there was a positive gift by a father to a son of land which the father had laid off and designated as the son's share of his estate, in a will which he then executed and exhibited to all his children, and the son was put in immediate possession by the father and thus encouraged to treat the property as his own, and remained in undisturbed possession as owner by 63 L. R. A.

himself and his tenant for more than seven years, and during his own occupancy expended at least \$1,000 of his own money in permanent improvements, with his father's knowledge and assent, and the father had had the land transferred on the assessment books from his own name to that of his son, and the latter thereafter paid the taxes thereon, the son having made these improvements and paid the taxes relying upon the good faith of these assurances of his father that the land was to be and was in fact his property,—upon this state of case the court reversed a judgment sustaining a demurrer to a bill in equity, brought by the son against the father to enjoin proceedings to oust the plaintiff from the property, and for, among other things, compensation for the improvements thus made, and to a decree establishing a lien therefor on the property, holding that relief to this extent at least was clearly authorized by the cases of *Shepherd v. Bevin*, 9 Gill, 32; *Haines v. Haines*, 4 Md. Ch. Dec. 133, s. c. on appeal 6 Md. 435; *Hardesty v. Richardson*, 44 Md. 617, 22 Am. Rep. 57; and *King v. Thompson*, 9 Pet. 204, 9 L. ed. 102. *Duckett v. Duckett*, 71 Md. 357, 18 Atl. 535.

Although a donor, who is a married woman, is not estopped from revoking a gift of real property where the statute provides that she can only convey by deed, yet if the donee occupies and makes valuable permanent improvements upon the property during a series of years with the knowledge and consent of the donor he will be entitled to the value of such improvements made in good faith with the donor's consent. *Robert v. Ezell*, 11 Tex. Civ. App. 176, 32 S. W. 362.

A son, under a parol gift from his father, entered upon and expended large sums of money in improving a tract of land, and in an equity action to compel the father to account for the improvements a decree in accordance with the prayer of the petition was affirmed. *Hamilton v. Hamilton*, 5 Litt. (Ky.) 28.

The plaintiffs made a parol gift of the land in question to defendants, who were husband and wife. The latter took possession with the understanding and agreement that the land would be conveyed at some future date. After possession under this parol agreement for eleven years, family troubles arose and plaintiffs demanded possession of the premises. No title having passed the possession was restored to the plaintiffs, but only upon the condition that the latter be allowed to set off against the rent from the time possession was demanded the enhanced value of the land by reason of improvements made thereon by the defendant. *Bourne v. Odam*, 17 Ky. L. Rep. 636, 32 S. W. 398.

tract by parol evidence, and, while the court refused to compel a specific performance, the plaintiff's claim for betterments was allowed. Other cases might be cited as authority for the admission of parol evidence, to show that the party entered and placed valuable improvements on land under a parol contract or promise to convey, but we do not deem it necessary to do so. It seems to be settled by this court that it may be done; and the cases cited show that where a party is induced to go upon land, and put valuable improvements thereon, by the owner thereof, upon a parol promise to convey the same to the party putting the improvements on the land, and the owner afterwards refuses to convey, it is held by this court to be a fraud upon the party so induced, and the court will compel him to pay for such improvements.

It was also contended for the defendant

that the right to have pay for improvements only exists while the bargainee is in possession, and *Albea v. Griffin*, and *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228, were cited as authority for this position. But neither of these cases, nor any other case that has been called to our attention, supports this contention. In these cases and other like cases, the bargainee being in possession, the court said that such bargainee should not be turned out until the bargainor paid for the improvements. This was only a means resorted to by the court to enforce the bargainee's recovery, and not as the grounds of the plaintiff's equity, which was made distinctly to rest upon the fraud of the bargainor; and it would be just as fraudulent and unconscionable for the bargainor to take profit by means of such fraud, if the bargainee was out of possession, as if

In a suit in chancery against the executors and heirs of the owner of lands, it appeared, the complainant being in the army, his wife was settled by her father, the testator, on a tract of land which he owned. After his return from the army complainant lived on the land some years with his wife, and, having made some improvements upon it, left it in possession of a tenant, and removed to another state. The wife having died, the testator sued the tenant in ejectment, and evicted him. This action was brought against the executors for compensation for the improvements. The bill alleged that the complainant was induced by the testator to settle upon and improve the land, in consequence of a parol gift of it to him and his wife, as an advancement by her father. The answer denied these allegations, and insisted that the use of the land had been worth more than the improvements. There was proof that the testator had stated that he had settled complainant on the land to which he was to be entitled by paying \$20, the state price. The circuit court decreed that complainant was entitled to the value of all lasting and useful improvements made by him, before service of the notice in ejectment, and should account for waste if any had been committed, and for rents from the notice, until the possession of the land had been surrendered to the testator. The court of appeals, in reversing a judgment for the amount of the improvements less the rent after the notice, said that the testator should not be charged with the cost, or abstract value of all the improvements which complainant may have made on the land, but only as they increased the value of the land,—in other words, that the complainant was entitled to recover the value of the meliorations by him added to the land, but not the value of the improvements, unless the latter made the land more valuable than it would have been without them; and that it was doubtful whether the complainant had shown that he was entitled to any relief. *James v. McKinsey*, 4 J. J. Marsh. 625.

It is a question whether all that was said in this case was not *obiter*, as the decree was reversed for a defect of parties, and the cause remanded for further proceedings, the court saying: "It is not proper now to decide on the merits, except so far as may be useful in the further progress of the case in the circuit court." A father agreed with his son that if the latter would settle on and improve a tract of land he should have a portion of it as an advancement, unless the father, unable to pay for it, should be compelled to sell it, in which event the son, not chargeable with rent, should be reimbursed for his improvements. Afterward the

father mortgaged this tract of land, and subsequently conveyed all his land to a trustee for the benefit of his creditors. It was held that the enhanced value of the land was the measure of his son's right; ameliorations, and not the cost of his improvements or their value in themselves, should be defined as his equity. *Glass v. Abbott*, 6 Bush, 622.

### III. When vendor unable to make title.

On a bill filed for the purpose of having a rescission of a parol contract for the sale of the land, the purchase money paid refunded and declared a lien on the land, with an account of the rents and profits against complainant, he being in possession, and also the enhanced value of the land by reason of the improvements with taxes paid, in favor of the complainant, the reason for the rescission being that the vendor had become a lunatic after the sale, a decree was made allowing improvements to the full extent they enhanced the value of the land without regard to the amount of the rents or the costs of the improvement. *Smoot v. Smoot*, 12 Lea, 274.

A vendee who rescinds a verbal contract for the purchase of land by a bill in equity filed by him for that purpose, upon the ground that the vendor at the time of filing the bill was unable to make title, is entitled to recover the value of permanent improvements so far as they enhanced the value of the land, less the rents. *Winters v. Elliott*, 1 Lea, 676.

Defendant bargained for land by parol, went into possession, and made valuable improvements. He paid nothing on the purchase. The vendor brought ejectment. The defendant pleaded that the vendor did not have a complete chain of title, and that there were unsatisfied judgments against a former vendor, which constituted an encumbrance upon the property. The vendor was perfectly solvent; worth from \$5,000 to \$11,000. The agreed price for the premises was \$600. The vendor's title was paper color supported by more than seven years adverse possession. Though there were unsatisfied judgments against the former vendor, no steps had been taken to enforce them against this property. Defendant had erected improvements costing \$2,800. The jury found, specially, that on receipt of the purchase money and interest, in thirty days, the vendor should convey with warranty of title; and that if the money was not paid, the premises were to revert to, and be the property of, the vendor. A motion for a new trial was overruled. The vendor filed in the clerk's office for the vendee's acceptance a warranty deed, conformably to the verdict and

he was still in possession. It is the fraud that gives the right of action, and not the possession. But the cases of *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Thomas v. Kyles*, 54 N. C. (1 Jones Eq.) 302, and other cases, seem to settle this contention against the defendant. It is true that it is said in *Pass v. Brooks* that the contract is admitted, and, defendants being in possession, the case of *Albea v. Griffin* was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks* that con-

flicts with what is said in this opinion. The doctrines announced in this case, or many of them, are held in the recent case of *North v. Bunn*, 122 N. C. 766, 29 S. E. 776, in which case it is held that the bargainee was entitled to an account, and that, if anything should be found in her favor, it should be a lien on the land. It may be that this judgment was given owing to the peculiar circumstances of that case. But from the authorities cited, and the strong equitable reasons appealing to our consciences for redress against a fraud, we are of the opinion that the evidence should have been admitted; and if it shall be found on the trial that the plaintiff's in-

decree. The supreme court, in affirming the judgment, said: "According to the view that a court of equity takes of such things, some of the money that went into the improvements would have been more equitably applied if it had been appropriated to paying for the land. Expensive improvements cannot be encouraged consistently with sound equitable principles, when every dollar of the purchase money is left unpaid." *Cherry v. Davis*, 59 Ga. 454.

#### IV. Particular and peculiar cases.

In an action to partition lands of the ancestor of the parties, it appeared that the ancestor had put a son in possession of a house and lot thirty-five years before, which he had occupied ever since, and on which, with the knowledge of his father, he had made large improvements at his own expense. The court held that whether this was to be considered as an advancement or not, might not be material. It would not be material if the value of the house and lot, without the improvements, would not be equal to the value of what would be the share of the son in the whole real estate to be divided, including the house and lot; for the court, under the circumstances, would direct the house and lot to be assigned to the son at its value without improvements. If its value without the improvements was greater than his share as aforesaid, then it would be necessary to determine whether it was an advancement. If it was, then he could not be compelled to pay anything to the other heirs on account of it; but if it was not, the court would direct the house and lot to be assigned to him on his paying the excess of its value over a share. *Gordon v. Barkeley*, 6 N. J. Eq. 94.

A party who had purchased land under a parol contract from the owner, entered into possession and erected a frame house upon the land. The vendor thereafter refused to perform the contract, and took possession of the land and house. It was held that the purchaser might maintain replevin for the house. *Waters v. Reuber*, 16 Neb. 99, 49 Am. Rep. 710, 19 N. W. 487.

A father, intending to donate a parcel of land to his son, executed a deed therefor to him expressing a nominal consideration, but nothing was ever paid, or intended to be paid. The grantee went upon the land and made valuable improvements thereon. The deed according to the statute of Louisiana was null for want of form. The father having deceased and his estate being insolvent, the administrator applied for an order to sell the land to pay debts, to which the son filed an opposition claiming the value of the improvements. The court *a quo* rejected the demand of the opponent and dismissed his opposition. On review the supreme court reversed this order and sustained the opposition to the provisional account and supple-

mental tableau and ordered his claim allowed and paid by preference out of funds in the hands of the administrator. *White's Succession*, 51 La. Ann. 1702, 26 So. 428.

A parol license to enter upon mineral lands and mine the same, for a specified share of the mineral raised, for an indefinite time, and entry under such license, and an expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and other preparations for mining under such license, gives to the licensee a valid subsisting interest in the real estate, which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to the possession against the licensor, or his subsequent lessee with notice, by ejectment. *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546.

Under a parol license to work upon and prove mineral land for a share of the mineral raised, where the occupant has made expenditures in sinking a shaft and running drifts, the license cannot be revoked without refunding the expenditure, or giving the party at least six months' notice. And although such parol license is within the statute of frauds, still, when connected with such improvements to prove the ground, it is voidable only upon such compensation or notice. *Bush v. Sullivan*, 3 G. Greene, 344, 54 Am. Dec. 506.

Plaintiff went into possession, under a verbal contract, of a vacant lot worth about \$400, erected a brick business house thereon, costing over \$2,000, and thereby improved the property in that sum. Defendant claimed the agreement to be that plaintiff was to have the rent of the property during her life as compensation for putting the building upon it. The plaintiff, on the other hand, claimed, in addition to the use of it for life, the privilege of selling it at any time if she desired, and paying the owner \$400 of the proceeds. She afterwards assumed to sell the property to another, who paid her a portion of the purchase money, and gave her notes for the remainder. Action was brought by the plaintiff upon those notes, the owner of the property being also made a defendant. The latter objected to the sale, and, he being the title holder, the sale was rescinded with a reference to the master to ascertain the value of the rents and improvements by the would-be purchaser, and how much purchase money he had paid to the plaintiff. The defendant, the owner objected to any sale of the property, and insisted upon the fulfilment of the contract between him and the plaintiff as he understood it. It was held that there was no binding contract between them; that the property should be sold and the proceeds divided between the defendant owner and the plaintiff in the proportion of \$400 to \$2,130, the value of the lot and the improvements being thus fixed respectively by the court,

testate was induced to go upon the lot and put valuable permanent improvements upon the same, by reason of the promise of the defendant that he would convey the lot to him, the plaintiff will be entitled to have an account to ascertain the value of the improvements, subject to the rents and profits, while the plaintiff and intestate were in possession, and, if a balance be found in her favor, the judgment shall constitute a charge on the rents and profits of said lot until it is paid, and a receiver may be appointed if it shall be deemed necessary.

*Error.* New trial.

the claims of the purchaser to be satisfied out of what might be coming to the plaintiff. *Dean v. Cassiday*, 88 Ky. 572, 11 S. W. 601.

Land belonging to an infant was by the will under which he became the owner, placed in the care of one of the defendants until the infant should come of age "though not to use it in any other way than for the support of the family." The general guardian of the infant assumed to lease the land by parol to the plaintiff until the infant became of age, in consideration of improvements which plaintiff agreed to make thereon. The person who by the will was to have the care of the land did not in fact contract with plaintiff for the lease, but he was fraudulently instrumental in inducing the plaintiff to enter upon and improve the land. Plaintiff afterwards sold his interest to another, who was expelled in a proceeding for a forcible entry and detainer instituted by the defendant, who by the will had the care of the infant's land. The circuit court decreed that the defendant, who had the care of the infant's land, should pay out of the latter's estate the amount of the improvements, provided so much remained in his hands, and, if not, the plaintiff should recover the amount from the estate of the infant. The court of appeals reversed this judgment and remanded the cause, directing that a decree be entered dismissing plaintiff's bill with costs, as to the infant, and giving him relief against the other defendant, who had the care of the estate, for the improvements upon the land, on the ground that while he did not in fact contract with plaintiff for the lease, he was fraudulently instrumental in inducing him to enter upon and improve the land. *Findley v. Wilson*, 3 Litt. (Ky.) 391, 14 Am. Dec. 72.

The vendor and vendee under a verbal contract for the sale and purchase of land agreed to rescind the same, the vendee agreeing to surrender the possession and improvements, and the vendor agreeing to give the vendee a horse and certain notes. The horse was delivered and accepted, and the possession of the premises surrendered to the vendor, who afterwards refused to execute the notes. It was held, first, that the contract was not void for uncertainty, and second, that it was not void by the statute of frauds; and judgment was given for the plaintiff for the amount of the notes. *Sutton v. Sears*, 10 Ind. 223.

Where land is leased for a term of years, and the lessee places improvements thereon, and before the expiration of the lease sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. *Mitchell v. Printup*, 48 Ga. 465.

A person who sets up a resulting trust, but who has in fact paid no part of the consideration money, will not be allowed to show by parol proof that the purchase was made for his benefit.

*Douglas, J., dissenting:*

I cannot concur in the judgment of the court, because it seems to me to fly in the teeth of the statute of frauds. This statute, originally Stat. 29 Car. II. chap. 3, § 2, now § 1554 of the Code, reads as follows: "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them shall be void and of no effect, unless such contract or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized." The avowed

fit; and if part only of the consideration is paid by him the land will only be charged with the money advanced, *pro tanto*; and any payment or advance of money after such a purchase has been completed will not raise a resulting trust. But if the person in whose name the land was purchased had thereafter sold the same and the person claiming such resulting trust has after the purchase and before the subsequent sale, made beneficial improvements upon the land, and it appears that he was suffered to continue in possession under some indistinct encouragement held out by the party in whose name the conveyance was taken, that he might eventually become interested in the lands, it is equitable, under all the circumstances of such a case, that he should have a reasonable allowance made him for such beneficial and permanent improvements as he may have made on the lands at the time of the purchase and sale of the party in whose name the conveyance was taken, and who afterwards sold the same. *Botsford v. Burr*, 2 Johns. Ch. 405.

A father made a contract with his son to give him certain real property, and the son agreed, in consideration thereof, to maintain the father and his wife on the premises during the remainder of their lives. The property was conveyed to the son, who afterwards died, leaving him surviving his parents, and also his wife and an infant daughter. The widow being unable to carry out the agreement, with the consent of her deceased husband's father prevailed upon the plaintiff, who was another son, to take over the farm as owner and perform the agreement. No conveyance was executed of the farm to the plaintiff. The plaintiff, after entering into possession of the property, laid out from time to time a considerable sum of money in its improvement, and by his own labor greatly enhanced its value. He also faithfully performed the terms of his brother's agreement with his parents until their death. After the death of the parents, the plaintiff filed a bill against the widow and daughter of his brother, praying that they be decreed to execute a conveyance to him of the property, or, in alternative, that the money expended by him in maintaining the father and his wife, and improving the premises, be declared a lien thereon. After a full consideration of the question the court made a declaration that the plaintiff was entitled to a lien upon the land for the amount expended by him in permanent improvements thereon, and in the support and maintenance of the father and his wife, less a fair amount for rent. *Waters v. Waters*, 1 N. B. Eq. 167.

Most of the states have at the present time a statute ordinarily known as the "Occupying Claimant Act." As, however, they provide only for cases when the occupant claims to hold under "color of title in fee," it is not thought that they affect the subject under consideration.

P. H. V.

purpose of this statute, as originally expressed, was to prevent frauds and perjuries by doing away with the opportunities and inducements offered by certain parol contracts, those relating to sales of landed interests being perhaps the most important. It is similar in purpose to § 590 of the Code; and I regret to say that both sections, though founded on acknowledged principles of public policy and repeatedly affirmed and reaffirmed by legislative enactment, seem doomed to ultimate emasculation by the well-meaning but dangerous relaxations of the courts, based upon the extension of equitable principles. We have frequently seen how §§ 171 and 172 of the Code may be practically nullified by triennial payments of insignificant amounts or alleged promises not to plead the statute. A recent case, forcibly illustrating the former, is *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636. In the case at bar the plaintiff is not in possession of the property, and this, in my mind, distinguishes this case from all those cited by the court in support of its opinion. The plaintiff says that "she surrendered the possession to the defendant at his request and upon his promise to give her a part of the rent for the benefit of her said children." There was no allegation of force or fraud, further than a promise whose fulfillment rested entirely in the future. Under such circumstances, the "preventive" remedies of a court of equity have no place. The word "prevent" is derived from the Latin word *prævenire*,—to come before; to precede. This was its original meaning in English, as given by Webster, its present meaning being "to intercept, to hinder, to frustrate, to stop, to thwart." All its meanings are anticipative. To prevent an injury does not mean to redress an injury. By the very meaning of the words, the one necessarily comes after the injury, while the other must precede it. Hence the equities arising from a parol agreement for the sale of land were originally enforced only by enjoining the vendor from taking possession of the land. Even down to the present day, I am unable to find a single case in our Reports where the vendee in parol has recovered for improvements after his surrender of possession. On this point, the court cites *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; and *Thomas v. Kyles*, 54 N. C. (1 Jones, Eq.) 302. In the last-named case specific performance was decreed for the greater part of the land. The last clause of the opinion relating to the 5 acres is very short, and, while it does not specifically state that that portion of the land was in the possession of the plaintiff, there is nothing to the contrary. The natural inference is that the plaintiff was in possession, as the decree simply provides that an account of the improvements shall be taken without in any way making them a lien upon the land or the rents and profits thereof. Moreover, this case is distinguished and almost overruled in *Sain v. Dulin*, 59 N. C. (6 Jones, Eq.) 195, which is clearly against the contention of the plaintiff in the case at bar, as also is *Dunn* 53 L. R. A.

*v. Moore*, 38 N. C. (3 Ired. Eq.) 364. Both these latter cases have been repeatedly cited with approval. In *Pitt v. Moore*, also a suit for specific performance, the plaintiff and defendant appear to have been partners jointly in possession of the mill. The court says, on page 92, 99 N. C., page 393, 5 S. E.: "The action is substantially for the settlement of the partnership, and the plaintiff is entitled to have an account," etc. In *Tucker v. Markland* the court distinctly states the principle of its decision in the following words: "It would be inequitable and against conscience to allow the latter to turn him [the vendee] out of possession thereof without restoring his outlay in cash and for valuable improvements he put on the land while so in possession. . . . Shall the court allow the vendor to keep the money of the vendee, which he thus obtained, while it helps him to get possession of the land? Surely not. The court of equity will not enforce the contract because the statute pleaded renders it void, but it will not help the vendor to consummate a fraud." In *Albee v. Griffin*, 22 N. C. (2 Dev. & B. Eq.) 9, the leading case upon the subject, this court says: "If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property." To the same effect is *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228. In the very nature of things, what other remedy can be given without violating the letter and spirit of the statute? In the case at bar the court cannot say: "We will prevent the vendor from taking back his land without just compensation; we will not help him to commit a fraud." The vendor asks no help. His fraud is an accomplished fact. He is in possession of his land, and simply asks to be let alone. What then can we do? We cannot decree specific performance, nor can we put the plaintiff back in possession of the land which she voluntarily surrendered.

But it is said we can render an affirmative judgment for the amount of the improvements. In what way? Not in contract, for there was no agreement that the vendor would pay for the house. Not for breach of contract, for the only contract between them was one that lies under the ban of the law. Such a contract cannot even be proved, much less enforced. It is true the vendee in possession may prove a parol contract of sale as showing the nature of his possession, but not as the sole ground of affirmative relief. This seems to be clearly recognized in *North v. Bunn*, 122 N. C. 766, 29 S. E. 776, an action in the nature of ejectment. There the court says: "The contract for the conveyance of the land in dispute, being in parol and denied, cannot be enforced by reason of the statute of frauds. When the contract is denied, the court cannot hear proof of a void contract."—citing *Dunn v. Moore*, 38 N. C. (3 Ired. Eq.) 364. Further on the court, referring to compensation for improvements, says: "This relief is not founded upon the existence of any contract sought to be exe-



cuted, or for the breach of which compensation or damages were asked for. It is an appeal to the court to prevent fraud."

The only case I can find in our Reports where the vendee has even asked for compensation for improvements after his surrender of possession is *McCracken v. McCracken*, 88 N. C. 272, and there his right was absolutely denied by a majority of this court. Justice Ruffin, speaking for the court, says: "But neither in that case [*Albee v. Griffin*] nor in any other in which its principles have been adopted,—and there are many such,—is there even a suggestion to be found that an action can be sustained in any form, or in any court, whether at law or in equity, for damages for the nonperformance of such a contract; and that is simply what this action is,—nothing more nor less. To permit it to be done would be for the courts to act in the very teeth of the statute, in defiance of the declared will of the legislature." It is true in that case the vendor offered to let the vendee take his improvements, one of them being a mill race dug in the ground. A hole in the ground is not a very valuable piece of property when severed from the realty, and so the vendee asked the court to give him something else instead. The chief justice dissented from the opinion of the court in an able opinion, upon the reasoning of which the plaintiff's counsel, who has clearly presented every available point in his case, frankly stated he chiefly relied. There is much in the case at bar that appeals to our moral sensibilities, but not to our equitable jurisdiction. We must

remember that such jurisdiction attaches where there is no adequate remedy at law, but not where the contract is forbidden by law. There is a clear distinction between the illegality of a contract and the inadequacy of a legal remedy, as much so as there is between the statement of a defective cause of action and a defective statement of a cause of action. In one case the defect is in the substance; but in the other, merely in the accident.

That it is the policy of the law to regard the vendee's claim for improvements as purely a defensive remedy appears from § 473 of the Code, which provides that any defendant against whom a judgment shall be rendered for land may, at any time before the execution of such judgment, present a petition to be allowed for permanent improvements put upon the land in good faith. *Boyer v. Garner*, 116 N. C. 125, 130, 21 S. E. 180. It would seem that the decided current of authority in other states is to the effect that claims for improvements cannot be entertained after surrender of the premises, but so much depends upon local statutes that the value of such decisions is frequently doubtful, as applying to general principles of equity. 16 Am. & Eng. Enc. Law, pp. 103-105. In many states, perhaps in a majority, such parol contracts are enforced under the principle of part performance; but, as this doctrine has been distinctly repudiated in this state, we must decide the question in accordance with the tenor of our decisions and the policy of our laws.

## TEXAS COURT OF CRIMINAL APPEALS.

C. C. JANNIN, *Appt.*,

v.

STATE of Texas.

(.....Tex. Crim. App.....)

1. The sale of passage tickets on railroads may be confined by statute to agents of the railroad company, and a penalty imposed upon the sale by other persons.
2. Railroad tickets in the hands of passengers are not property within the constitutional meaning of that term.
3. Confining the sale of railroad tickets to the company's agents is not the grant of a monopoly.
4. A statute making the sale of a railroad ticket by other than an agent of the company a penal offense when it bears upon its face a statement that such sale is penal is invalid under a constitutional provision forbidding the legislature to suspend laws, as giving the railroad company an option as to

the creation of the offense; and it is immaterial that the statute requires the company to place such words on the ticket, if there is no penalty for refusal.

(*Brooks, J., dissents.*)

(June 21, 1899.)

**A** PPEAL by defendant from a judgment of the District Court for Bexar County convicting him of violating the statute against the sale of railroad tickets by others than agents of the company. *Reversed*. The facts are stated in the opinion.

*Messrs. R. L. Summerlin and E. Hal-tom*, for appellant:

Where the article proposed to be sold does not injuriously affect the public health or public morals, or is not calculated to impose a fraud on the public, legislative control must be denied by the courts.

Tiedeman, *Pol. Power*, p. 484.

This law does not prohibit ticket brokerage, nor is it aimed at "scalpers." It declares it to be a crime for any person not authorized by the railway company to sell for a consideration a ticket.

The legislative act has not for its purpose the protection of the public, for the public

NOTE.—For authorities in this series as to validity of statute against ticket brokerage or "scalping," see *Burdick v. People* (Ill.) 24 L. R. A. 152; and *State v. Corbett* (Minn.) 24 L. R. A. 493.

As to validity of ordinance forbidding sale or gift of street railway transfer, see *Ex parte Lorenzen* (Cal.) 50 L. R. A. 55.

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could not be injured by a person selling for value a ticket he had honestly acquired.

It is one of the absolute rights of the individual to be free from unreasonable restraint upon the sale or transfer of his personal property. The right to sell or transfer one's property is as much an inalienable right as that of the enjoyment of the property free from unnecessary restrictions.

Tiedeman, Pol. Power, § 136, p. 489.

The law does not propose to punish for the sale of a railway ticket, but says if a railway company chooses it may make the sale of a ticket issued by it a violation of the law. How? By having its tickets printed with a notice that it is a penal offense for the holder to sell, etc.

The company may determine whether the sale shall be lawful or unlawful.

*Owensboro & N. R. Co. v. Todd*, 91 Ky. 175, 11 L. R. A. 285, 15 S. W. 56.

A railway transportation ticket is property, and a law which punishes a citizen for disposing of his lawfully acquired property for a consideration is unconstitutional.

*Overly v. State*, 34 Tex. Crim. Rep. 500, 31 S. W. 377; Tiedeman, Pol. Power, § 102, pp. 292, 293.

The ticket is the title to transportation, and where a person buys a ticket, and it is lost, he cannot insist upon transportation. He has lost his property, and he must suffer his loss.

25 Am. & Eng. Enc. Law, p. 1076.

The ordinary railway ticket, issued without limitations or restrictions, is transferable, passing by delivery, and the holder is entitled to ride upon it.

Hutchinson, Carr. 2d ed. § 580d; *Carsen v. Northern R. Co.* 44 Minn. 454, 9 L. R. A. 688, 47 N. W. 49; *Hoffman v. Northern P. R. Co.* 45 Minn. 53, 47 N. W. 312.

*Messrs. Upson, Bergstrom, & Newton*, for appellee:

A railroad ticket containing no stipulation or condition restricting its assignability may be assigned, but it is within the province of the legislature to take from it by statute the negotiable character with which the common law has endowed it.

In the exercise of its police power it is entirely competent for the legislature to declare railway tickets non-negotiable, for it is a familiar and elementary principle that the legislature may exercise police powers over all property or any business affected with public interest.

*Cooley*, Const. Lim. 5th ed. p. 734; *Com. v. Wilson*, 14 Phila. 384; *Fry v. State*, 63 Ind. 560, 30 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, 24 L. R. A. 152, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441.

The act is not in conflict with, and in violation of, §§ 3 and 27, art. 1. of the Constitution of Texas, in that it gives the railroad companies or the receivers thereof the exclusive privilege of designating and selecting persons who shall have the power to sell and transfer railroad tickets in this state, 53 L. R. A.

and establish a monopoly in said business of selling railroad tickets, or in that it is an attempt to confer upon the railroad companies or the receivers thereof the licensing power of the state, because the act does not empower the railroad companies to designate any persons, or confer upon any persons the privilege of buying and selling railroad tickets.

The act complained of is not a delegation by the state to railway companies of its power to enforce the penal laws of the state against the sale and barter of railway tickets by unlicensed agents.

The act is not contrary to cl. 2, § 1, 14th Amendment to the Constitution of the United States, and is not contrary to § 19, art. 1, of the Constitution of the state of Texas, as an attempt to abridge the citizen's privilege and deprive him of his property without due process of law, because a railroad ticket is not property in the strict sense of the word, but only an evidence of the holder's right to travel on such ticket, and under the act he is simply prevented from assigning that contract to another, but he is enabled to recover for such ticket, immediately, the first cost.

*Munn v. People*, 69 Ill. 80, 94 U. S. 113, 24 L. ed. 77; *Thomp. Carr. of Pass.* 65; *Angell*, Carr. 5th ed. § 609; *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 663; 2 Beach, Railways, § 869; *Gulf, C. & S. F. R. Co. v. Daniels* (Tex. Civ. App.) 29 S. W. 427; 4 *Elliott, Railroads*, §§ 1593, 1594; *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 392; *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. 769; *Lewis v. New York Sleeping Car Co.* 143 Mass. 272, 58 Am. Rep. 135, 9 N. E. 615; *Frank v. Ingalls*, 41 Ohio St. 563; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 435, 10 Am. Rep. 711; *Elmore v. Sands*, 54 N. Y. 515, 13 Am. Rep. 617.

*Messrs. W. W. Walling and Mann* Trice also for appellee.

*Henderson, J.*, delivered the opinion of the court:

Appellant was convicted of selling a railroad ticket, not being the agent of any railroad company, and authorized thereto, under the act of the 23d legislature (Laws 1893, p. 97), and his punishment assessed at a fine of \$5, and he appeals.

The indictment sets out by exhibit the ticket alleged to have been sold, which is as follows:

Issued by Galveston, Harrisburg & San Antonio Ry. Co. Excursion Ticket. 5/4. Good for one first-class passage San Antonio to Houston (Depot).

This ticket is not good for stop-over privilege, and will not be honored for any part of the trip after midnight of May 7th, 1894.

Notice. It is a penal offense for the purchaser or holder of this ticket to sell, barter, or transfer the same for a consideration, and this ticket, or any unused part thereof, is redeemable by the company at any ticket office of the company when presented for redemption within ten days after the right to

use the same has expired by limitation of time, as stipulated herein.

L. J. Parks, Asst. G. P. & T. A.

One-way rate, \$6.30; round-trip rate, \$——. Form S. B.

It is alleged substantially, that appellant, without lawful authority, sold said railroad ticket to one E. A. Metcalfe, he, the said Jannin, not being the agent of the said Galveston, Harrisburg, & San Antonio Railway Company for the purpose of selling tickets, and having no certificate of authority to make the sale of the same, etc. No objection was urged to the indictment, but it is insisted that the law of the 23d legislature, making it a penal offense for any other person than the agent of a railroad company to sell passage tickets, is unconstitutional (1) because the law prohibiting the selling of tickets by persons not having a certificate of authority to sell is not a police regulation adopted by the legislature in the legitimate exercise of the police power; (2) the law is invalid, in this: it delegates to railway companies the power to make the sale of tickets lawful or unlawful; (3) a railroad transportation ticket is property. In this connection, appellant contends that said act is violative "of § 19 of the Bill of Rights, as follows: No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, . . . except by the due course of the law of the land." Section 26: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." These questions have all been so thoroughly discussed under similar laws of other states that it would appear to be a work of supererogation to reiterate what other courts have said on this subject, and, in the face of a number of able decisions of other states, we would not undertake to add anything new to the discussion of the questions here involved. See *Com. v. Wilson*, 14 Phila. 384; *Fry v. State*, 63 Ind. 560, 30 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, 24 L. R. A. 152, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *State v. Bernheim*, 19 Mont. 572, 49 Pac. 441; *People ex rel. Turoler v. Warden of City Prison*, 28 App. Div. 228, 50 N. Y. Supp. 56, and reported in the court of appeals of New York, 157 N. Y. 116, 43 L. R. A. 284, 51 N. E. 1006. By reference to the above cases, it will be seen that this constitutional question with reference to scalpers' tickets, in one shape or another, has been before the courts of the several states mentioned, and the holding was in favor of the constitutionality of the law in all of said states except New York. In *Tyroler's Case*, from that state, it was held, on a proceeding in habeas corpus to the appellate division of the supreme court, by a unanimous court, that the scalpers' law of that state was constitutional, in that it did not deprive a citizen of his property without due course of the law of the land, nor did it confer an exclusive privilege upon any class of persons so as to be a monopoly, and it was within the police power of the 53 L. R. A.

state legislature to pass such a law. It was, moreover, held that it was not violative of any provision of the Constitution or laws of the United States with reference to interstate commerce. This case was taken to the court of appeals of said state, and there, by a divided court of four to three, the law was held to be unconstitutional. In that case the learned chief justice appears to consider that the passage ticket of a railway company is property, and any law which attempts to restrain or inhibit the disposition and sale of same is *pro tanto* a violation of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law. Again, that opinion holds that the attempt of the legislature to confine the sale of railroad passage tickets to the agents named in the act was the creation of a monopoly, and that the legislation in question inhibited by said provisions of the Constitution of New York did not come within the police power of the legislature. A number of cases are cited in favor of the opinion. It will be observed, however, that there is a marked distinction between the New York law and our statute on this subject, in that the New York statute, by the construction placed on it by Judge Parker, authorized, not only the agents of the particular corporation to make sales of such tickets, but the agents of all other transportation companies, and in the opinion the learned judge lays stress on this construction of the statute as class legislation and creating a monopoly. As stated before, the opinion of the New York court of appeals on this subject runs counter to all of the authorities that have come under our observation. That court itself was divided on the subject, and, in our opinion, the very able discussion by Judge Parker is more than answered by the dissenting opinions of Justices Bartlett and Martin. These treat a passage ticket on a railroad company, not as property, in its general sense, but as a token of the purchaser's right to be transported on the railroad between the points named in the ticket. We quote as follows: "The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger, to be held by him temporarily for a special purpose, and he to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: It is evidence in the passenger's hands that he has paid his fare, and has a right within the cars; it insures the payment of the passage money by all who take seats; and, when it is redelivered to the company, it becomes a voucher in its hands against the office or agent who issued it in the adjustment of its accounts. It thus appears that the original and legitimate function of the ticket is to carry out a transaction between the carrier and the passenger. The ticket being the property of the carrier, while the passenger is entitled to retain it in his possession until the completion of his journey." And again: "Rail-

road and steamboat tickets can, in no proper sense, be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation, in which even the traveler who has purchased one has but a special interest, and to which the companies have title and the ultimate right of possession." They hold, in accordance with the views of other courts, that the act of the legislature, restricting the right of sale to the agents prescribed in the act, was within the police power of the state, and not violative of any provision of the Constitution; that, in the exercise of its police power, the state was authorized to prevent the pursuit of the occupation of ticket brokers, upon the ground that it was harmful to the public, and the difficulty in circumventing the fraud was so great that no other efficient means could be found.

We hold, in accordance with what we conceive to be the current of authority and the sounder view on this subject, that the legislature was authorized, as was done in this act, to confine the sale of passage tickets on railroad companies to the agents of such companies, and to make it penal for any other person to make a sale of same; that the ticket of a railroad company is not "property," in the general acceptance of the term, but the purchaser has only a special property in the ticket, as evidencing his right to passage on the road; that common carriers within this state are peculiarly subject to regulation; and that to preserve and protect both the passenger and the company itself against fraud is within the province of the police power of the state, and not violative of any provisions of the Constitution, nor can it be said that such regulation is any wise the creation of a monopoly. Unlike the New York statute, our act confines the sale of passage tickets to the agents of the railroad company itself, and does not authorize the agents of other companies to make the sale of the same, unless such agents be also the agents of the company in question. This is simply authorizing the railroad company to conduct its own business. And again, it cannot be urged that the act in question deprives the citizen of his property without due course of law. It does not seek to confiscate his property. It says to the citizen, if he desires to be transported on any railroad, he can go to one of the agents and buy a ticket for that purpose, and pursue his journey. If, from any cause, he should fail to pursue his journey in whole or in part, it authorizes him to call on an agent of the company and have his money refunded. It occurs to us as absurd to say that a regulation of this character cannot be adopted, both on behalf of the railroad companies and of the general public, under the police power of the state, without violating some sacred provision of the Constitution.

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However, appellant raises what we consider a more serious question. He contends that the act leaves it optional with railroad companies as to whether or not they will make the sale of passage tickets a penal offense, inasmuch as it is left optional with each railroad company in the sale of tickets whether or not they will indorse on same the following provision of the act: "Provided, that the provisions of this act shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter, or transfer said ticket for a consideration." Laws 1893, p. 97, § 3. In reply to this, it is urged that the act makes it the duty of each railroad company to print said proviso conspicuously across the face of every ticket sold by its duly-authorized agent. While it is true the act in this section requires this, yet is it a sufficient answer to the proposition that it is still optional with the railroad company to make the sale of passage tickets a penal offense. It will be observed that no penalty is attached to the failure of the railroad company to print across the face of its ticket said proviso. It is merely made a duty, which they may comply with or not as they see fit. It would have been a very easy matter for the legislature to have confined the sale of all passage tickets to the agents of the railroad companies, without any requirement as to the form of the ticket. But this course was not pursued. As it is, every railroad company has the option to issue a passage ticket with this proviso or not, as it may see proper. If it issues a ticket without this proviso, it is not a penal offense, and in every such case scalpers and all others may deal in such passage tickets without any violation of the law. We accordingly hold that because the legislature left it optional with the railroad companies whether or not, in the issuance of tickets, they would create a penal offense, the act of the legislature is without authority of law; is violative of the law, in that it does not define with certainty an offense; does not itself create an offense, but delegates its authority to another agency to make the sale of railroad tickets a violation of the law. In this respect it would appear to be violative of § 28 of our Bill of Rights, which says: "No power of suspending laws in this state shall be exercised except by the legislature." See Sutherland, Stat. Constr. § 69. We therefore hold that the sale of railroad passage tickets in this case is not a violation of law.

*The judgment is reversed, and the prosecution ordered dismissed.*

**Brooks, J.**, dissents from the conclusion reached by the majority of the court.

**Rehearing denied.**

## KENTUCKY COURT OF APPEALS.

TRIMBLE, Assignee of H. S. Holloway,  
Appt.,  
v.

Mary C. RUDY.

(.....Ky.....)

1. A promise by a widow to pay a surety on her husband's debt is without consideration, where it is merely the renewal of a void promise made before his death.
2. Payment of notes by a surety does not constitute a new consideration which will sustain a promise made by the wife of the principal debtor to indemnify him, where she was not previously obligated to do so.

(February 5, 1901.)

NOTE.—Moral obligation as a consideration for a promise.

- I. The general doctrine.
  - a. History and abstract statement of doctrine.
  - b. Concrete application of doctrine.
    1. Promise to pay for past support of relative.
    2. Cohabitation.
    3. Promise to pay for past support of pauper.
    4. Promise to remedy mistake or hardships, or to supplement past agreement.
    5. Miscellaneous instances.
  - c. Summary.
- II. The exceptions.
  - a. Generally.
  - b. Concrete application of exceptions.
    1. New promise after bar of limitation.
    2. New promise after discharge by operation of law.
    3. New promise after voluntary discharge.
    4. New promise after majority.
    5. New promise by party to negotiable paper.
    6. New promise after judgment.
    7. New promise after discovery.
      - (a) Generally.
      - (b) When original debt due from husband.
      - (c) When original promise binding in equity.
    8. New promise when original promise in violation of statute of frauds.
    9. New promise when original promise illegal.
    10. Past legal consideration.
      - (a) Generally.
      - (b) Promise to repay one who voluntarily pays another's debt.
      - (c) Promise to pay for past services.
      - (d) Promise to pay for improvements on property.
  - c. Conclusion.

I. The general doctrine.

a. History and abstract statement of doctrine.

There are expressions by the judges in some of the earlier English cases that lend color to 53 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for Henderson County in favor of defendant in an action to enforce a promise by defendant to reimburse plaintiff's assignee for the amount which he had paid as surety for defendant's husband. *Affirmed.*

The facts are stated in the opinion.

Mr. R. H. Cunningham, for appellant:

The contract sued on is sustained by a valuable, legal, and adequate consideration.

If C requests A to become bound to B for C's benefit and advantage, promising himself to discharge the obligation, it does not then lie in his mouth to say that A, being under a legal duty, cannot look to him (C) to perform his promise.

The obligation of the surety is wholly legal. He is bound by the letter of his con-

the view that seems formerly to have prevailed, that a mere moral obligation is a sufficient consideration to support an express promise. Thus, Lord Mansfield remarked in *Atkins v. Hill*, 1 Cowp. 284 (in which case it was held that assumpsit would lie against an executor personally upon his promise to pay a legacy in consideration of there being sufficient assets): "It is the case of a promise made upon a good and valuable consideration which in all cases is a sufficient ground to support an action. It is so in cases of obligations, which would otherwise only bind a man's conscience, and which without such promise he could not be compelled to pay." Again, he remarked in *Hawkes v. Saunders*, 1 Cowp. 290 (a similar case): "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court or law of equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances, after his certificate, promises to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing, by the statute of frauds.—In such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or equity; yet, as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind is a sufficient consideration."

"If, in consideration of a thing already done without my request, not for my benefit, and where I am under no moral obligation to do it, I promise to pay money, that is *nudum pactum* and void. But if I am under a moral obligation to do a thing and another person does it without my request, and I afterwards promise to pay, that is good." *Watson v. Turner*, Bull. N. P. 129.

A moral obligation is a good consideration for an express promise; but it has never been carried further, so as to raise an implied promise in law. *Atkins v. Banwell*, 2 East, 505.

This view in its broad scope was, however, challenged and practically overthrown by a note to the case of *Wennall v. Adney*, 3 Bos. & P. 249. The writer of the note points out

he was still in possession. It is the fraud that gives the right of action, and not the possession. But the cases of *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Thomas v. Kyles*, 54 N. C. (1 Jones Eq.) 302, and other cases, seem to settle this contention against the defendant. It is true that it is said in *Pass v. Brooks* that the contract is admitted, and, defendants being in possession, the case of *Albee v. Griffin* was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks* that con-

flicts with what is said in this opinion. The doctrines announced in this case, or many of them, are held in the recent case of *North v. Bunn*, 122 N. C. 766, 29 S. E. 776, in which case it is held that the bargainee was entitled to an account, and that, if anything should be found in her favor, it should be a lien on the land. It may be that this judgment was given owing to the peculiar circumstances of that case. But from the authorities cited, and the strong equitable reasons appealing to our consciences for redress against a fraud, we are of the opinion that the evidence should have been admitted; and if it shall be found on the trial that the plaintiff's in-

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#### IV. Particular and peculiar cases.

In an action to partition lands of the ancestor of the parties, it appeared that the ancestor had put a son in possession of a house and lot thirty-five years before, which he had occupied ever since, and on which, with the knowledge of his father, he had made large improvements at his own expense. The court held that whether this was to be considered as an advancement or not, might not be material. It would not be material if the value of the house and lot, without the improvements, would not be equal to the value of what would be the share of the son in the whole real estate to be divided, including the house and lot; for the court, under the circumstances, would direct the house and lot to be assigned to the son at its value without improvements. If its value without the improvements was greater than his share as aforesaid, then it would be necessary to determine whether it was an advancement. If it was, then he could not be compelled to pay anything to the other heirs on account of it; but if it was not, the court would direct the house and lot to be assigned to him on his paying the excess of its value over a share. *Gordon v. Barkelew*, 6 N. J. Eq. 94.

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mental tableau and ordered his claim allowed and paid by preference out of funds in the hands of the administrator. *White's Succession*, 51 La. Ann. 1702, 26 So. 428.

A perol license to enter upon mineral lands and mine the same, for a specified share of the mineral raised, for an indefinite time, and entry under such license, and an expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and other preparations for mining under such license, gives to the licensee a valid subsisting interest in the real estate, which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to the possession against the licensor, or his subsequent lessee with notice, by ejectment. *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546.

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Plaintiff went into possession, under a verbal contract, of a vacant lot worth about \$400, erected a brick business house thereon, costing over \$2,000, and thereby improved the property in that sum. Defendant claimed the agreement to be that plaintiff was to have the rent of the property during her life as compensation for putting the building upon it. The plaintiff, on the other hand, claimed, in addition to the use of it for life, the privilege of selling it at any time if she desired, and paying the owner \$400 of the proceeds. She afterwards assumed to sell the property to another, who paid her a portion of the purchase money, and gave her notes for the remainder. Action was brought by the plaintiff upon those notes, the owner of the property being also made a defendant. The latter objected to the sale, and, he being the title holder, the sale was rescinded with a reference to the master to ascertain the value of the rents and improvements by the would-be purchaser, and how much purchase money he had paid to the plaintiff. The defendant, the owner objected to any sale of the property, and insisted upon the fulfillment of the contract between him and the plaintiff as he understood it. It was held that there was no binding contract between them; that the property should be sold and the proceeds divided between the defendant owner and the plaintiff in the proportion of \$400 to \$2,130, the value of the lot and the improvements being thus fixed respectively by the court.

testate was induced to go upon the lot and put valuable permanent improvements upon the same, by reason of the promise of the defendant that he would convey the lot to him, the plaintiff will be entitled to have an account to ascertain the value of the improvements, subject to the rents and profits, while the plaintiff and intestate were in possession, and, if a balance be found in her favor, the judgment shall constitute a charge on the rents and profits of said lot until it is paid, and a receiver may be appointed if it shall be deemed necessary.

*Error.* New trial.

the claims of the purchaser to be satisfied out of what might be coming to the plaintiff. *Dean v. Cassidy*, 88 Ky. 572, 11 S. W. 601.

Land belonging to an infant was by the will under which he became the owner, placed in the care of one of the defendants until the infant should come of age "though not to use it in any other way than for the support of the family." The general guardian of the infant assumed to lease the land by parol to the plaintiff until the infant became of age, in consideration of improvements which plaintiff agreed to make thereon. The person who by the will was to have the care of the land did not in fact contract with plaintiff for the lease, but he was fraudulently instrumental in inducing the plaintiff to enter upon and improve the land. Plaintiff afterwards sold his interest to another, who was expelled in a proceeding for a forcible entry and detainer instituted by the defendant, who by the will had the care of the infant's land. The circuit court decreed that the defendant, who had the care of the infant's land, should pay out of the latter's estate the amount of the improvements, provided so much remained in his hands, and, if not, the plaintiff should recover the amount from the estate of the infant. The court of appeals reversed this judgment and remanded the cause, directing that a decree be entered dismissing plaintiff's bill with costs, as to the infant, and giving him relief against the other defendant, who had the care of the estate, for the improvements upon the land, on the ground that while he did not in fact contract with plaintiff for the lease, he was fraudulently instrumental in inducing him to enter upon and improve the land. *Findley v. Wilson*, 3 Litt. (Ky.) 391, 14 Am. Dec. 72.

The vendor and vendee under a verbal contract for the sale and purchase of land agreed to rescind the same, the vendee agreeing to surrender the possession and improvements, and the vendor agreeing to give the vendee a horse and certain notes. The horse was delivered and accepted, and the possession of the premises surrendered to the vendor, who afterwards refused to execute the notes. It was held, first, that the contract was not void for uncertainty, and second, that it was not void by the statute of frauds; and judgment was given for the plaintiff for the amount of the notes. *Sutton v. Sears*, 10 Ind. 223.

Where land is leased for a term of years, and the lessee places improvements thereon, and before the expiration of the lease sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. *Mitchell v. Printup*, 48 Ga. 465.

A person who sets up a resulting trust, but who has in fact paid no part of the consideration money, will not be allowed to show by parol proof that the purchase was made for his bene-

*Douglas, J.*, dissenting:

I cannot concur in the judgment of the court, because it seems to me to fly in the teeth of the statute of frauds. This statute, originally Stat. 29 Car. II. chap. 3, § 2, now § 1554 of the Code, reads as follows: "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them shall be void and of no effect, unless such contract or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized." The avowed

fit; and if part only of the consideration is paid by him the land will only be charged with the money advanced, *pro tanto*; and any payment or advance of money after such a purchase has been completed will not raise a resulting trust. But if the person in whose name the land was purchased had thereafter sold the same and the person claiming such resulting trust has after the purchase and before the subsequent sale, made beneficial improvements upon the land, and it appears that he was suffered to continue in possession under some indistinct encouragement held out by the party in whose name the conveyance was taken, that he might eventually become interested in the lands, it is equitable, under all the circumstances of such a case, that he should have a reasonable allowance made him for such beneficial and permanent improvements as he may have made on the lands at the time of the purchase and sale of the party in whose name the conveyance was taken, and who afterwards sold the same. *Botsford v. Burr*, 2 Johns. Ch. 403.

A father made a contract with his son to give him certain real property, and the son agreed, in consideration thereof, to maintain the father and his wife on the premises during the remainder of their lives. The property was conveyed to the son, who afterwards died, leaving him surviving his parents, and also his wife and an infant daughter. The widow being unable to carry out the agreement, with the consent of her deceased husband's father prevailed upon the plaintiff, who was another son, to take over the farm as owner and perform the agreement. No conveyance was executed of the farm to the plaintiff. The plaintiff, after entering into possession of the property, laid out from time to time a considerable sum of money in its improvement, and by his own labor greatly enhanced its value. He also faithfully performed the terms of his brother's agreement with his parents until their death. After the death of the parents, the plaintiff filed a bill against the widow and daughter of his brother, praying that they be decreed to execute a conveyance to him of the property, or, in alternative, that the money expended by him in maintaining the father and his wife, and improving the premises, be declared a lien thereon. After a full consideration of the question the court made a declaration that the plaintiff was entitled to a lien upon the land for the amount expended by him in permanent improvements thereon, and in the support and maintenance of the father and his wife, less a fair amount for rent. *Waters v. Waters*, 1 N. B. Eq. 187.

Most of the states have at the present time a statute ordinarily known as the "Occupying Claimant Act." As, however, they provide only for cases when the occupant claims to hold under "color of title in fee," it is not thought that they affect the subject under consideration.

pellant's liability had been assumed, and left an estate totally insolvent. After the husband's death appellee wrote appellant asking him to pay off the notes in question, and again promising to indemnify him against loss. Appellant did pay off these notes, because, he says, of this solicitation and promise. Appellee declining to comply with her agreement to repay the surety these sums paid by him, he sued her on the last-named or written promise to pay. Other allegations were contained in the petition, but were denied, and, there being a total failure of proof as to those that were denied, we are to determine whether the trial court's peremptory instruction to the jury to find for the defendant was proper. The determination of that question involves the one whether the promise of a married woman, made while under the disability of coverture,

inducing another to become bound as the surety of her husband, is a sufficient consideration to support a promise of indemnity made to the surety after the removal of such disability.

It is argued for appellant that her original promise was based upon facts imposing upon her a moral obligation, and that although not legally binding, because the law prohibited her from legally binding herself, upon the law's restrictions being removed the original moral obligation was enough to support a new promise to pay. While formerly extensively held that a moral obligation was a sufficient consideration to uphold a contract between competent parties, it has lately come to be denied, until it may now be seriously doubted whether the ancient rule longer obtains. Bishop, Contr. 44, and cases cited; Parsons, Contr. 432, 435, and

past expenditures made by a third person for an indigent parent is not binding on the child, since the moral obligation is not a sufficient consideration for the promise, when a good or valuable consideration has not once existed. Dawson v. Dawson, 12 Iowa, 512.

The relationship between a father and his natural children, and the moral obligation resting upon him to support and educate them, do not constitute a sufficient consideration to uphold his agreement with their mother to provide a fund for their support and education, as a mere moral duty is insufficient of itself as a consideration for such a contract. Mercer v. Mercer, 87 Ky. 30, 7 S. W. 401.

It is well settled that neither natural affection nor the moral duty arising from the connection between a father and his illegitimate child is a sufficient consideration to support a promise by the father to contribute to the future support and comfort of the child; but the child may enforce such a promise made for its benefit between the father and mother if there was a sufficient consideration to uphold the promise as between the latter. Clarke v. McFarland, 5 Dana, 45.

The moral obligation which a party is under to support his child imposes upon him no liability to pay for its support furnished by a relative without his request; certainly not when there has been no culpable omission on his part to furnish such support in his own family. Chilcott v. Trimble, 13 Barb. 502.

Even if a father is under a moral obligation to pay for goods purchased on his credit by a minor child, such obligation is not sufficient to support a subsequent promise. Freeman v. Robinson, 35 N. J. L. 383, 20 Am. Rep. 399. The court said in this case that if services be rendered at the request of the promisor, which are for the benefit of a third party to whom the promisor owes only a moral duty, they can be recovered for. In such case the precedent request, and the services rendered in compliance therewith, afford a consideration from which a promise to pay would be implied such as is needed to uphold an express promise. But where the duty is one of moral obligation only, and the service is rendered without previous request, a subsequent promise to pay is without the consideration which is necessary to the validity of a contract.

In point of law a father who gives no authority and enters into no contract is no more liable for goods supplied to his son than a brother or an uncle or a mere stranger would be. If a father does any specific act from which it may reasonably be inferred that he has authorized his son to contract a debt he

may be liable in respect of the debt so contracted, but the mere moral obligation of the father to maintain his child affords no inference of a legal promise to pay his debts. Mortimore v. Wright, 6 Mees. & W. 482.

The Maryland court of appeals in *Ellicott v. Turner*, 4 Md. 476, held that a promise by a grandfather to pay for the maintenance of his grandchild was valid and enforceable. The court said: "We regard the moral obligation resting on the defendant's testator [the grandfather] as a sufficient consideration to support his promise to pay;" citing the language of Lord Mansfield in *Hawkes v. Saunders*, 1 Cowp. 289, to the effect that "where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."

It appears in this case, however, that the services were rendered after, and in reliance on, the promise; and the court admitted that if they had been rendered before the promise it would have been invalid, because it would have been a mere nude pact. This concession shows that the promise was not upheld because of the moral obligation, but because of the detriment to the promisee from furnishing the support in reliance on the promise, which would, of course, have been a good consideration for a promise by a mere stranger who was under no moral obligation whatever.

In *Hook v. Pratt*, 78 N. Y. 371, 34 Am. Rep. 539, it was held that an agreement by the father of an illegitimate child to pay the mother a certain sum in consideration of her supporting the child was valid and enforceable. The legality, rather than the existence, of the consideration seems to have been the point discussed; and it further appears that the agreement was for future, and not for past, support.

Provision for the mother of a bastard, and for her infant, is a sufficient consideration to support a bond or a deed of personal chattels, made by the father of the child for that purpose. *Bunn v. Winthrop*, 1 Johns. Ch. 329.

The agreement in this case was by a deed under seal which imports a consideration, but the court expressed the opinion that the moral obligation would have been sufficient if it had been necessary to show a consideration. It is apparent, however, that the dictum is contrary to the great weight of authority.

In *Nichole v. Allen*, 3 Car. & P. 36, it was held that assumpsit would lie for board and lodging furnished to defendant's illegitimate daughter, where he, knowing that she was boarded and clothed by the plaintiff, neither expressly dissented nor took her away. Lord Ten-terden, Ch. J., said that the obligation was not



notes. It has been held in this state that a moral obligation, where it has also been a legal one, might be the consideration of a new contract (*Montgomery v. Lampton*, 3 Met. 520; *Huir v. Gross*, 10 B. Mon. 282); but we are not aware that the rule has been extended further, and, in the light of the trend of the later cases, we are disinclined to so extend it.

We have repeatedly held that the contract of a married woman, not with reference to her separate estate, and where not especially allowed by statute, was void, and that her subsequent promise to pay such an obligation, made after discovery, was likewise void,—the first, because she was not competent to make the contract; the second, because there was no consideration to support it. *Robinson v. Robinson*, 11 Bush, 179;

only moral, but legal, apparently taking the view that under the circumstances there was an implied promise to recompense the plaintiff.

As already suggested, the application of the doctrine to this class of cases does not at all affect the validity of the promise where it precedes the support, as in that case there is no necessity of relying upon the moral obligation.

## 2. Cohabitation.

Where the promise is made wholly on account of past cohabitation, and not for the purpose of procuring its continuance, the rule against immoral contracts does not apply; and the question arises whether the moral obligation of the promisor in such a case is sufficient to support the promise.

This class of cases seems to come clearly within the principle under discussion; and, while there are a few cases that hold to the contrary, the better opinion is that such an agreement, not under seal, cannot rest upon the moral obligation alone.

In *Binnington v. Wallis*, 4 Barn. & Ald. 650, it was held that a declaration stating that the plaintiff had cohabited with defendant as his mistress; that she had been thereby greatly injured in her character and reputation and deprived of the means of honestly procuring a livelihood; and that after they had ceased to cohabit and had agreed that no immoral connection should ever take place between them again the defendant promised to allow her a specified sum quarterly,—was insufficient. The court said that it was not averred that the defendant was the seducer, and that there was no authority that past cohabitation alone or the ceasing of cohabiting in the future was a good consideration for such a promise.

A declaration in assumpsit averring that the defendant had seduced and debauched the plaintiff, thereby injuring her in character and reputation, and that after the two had agreed to discontinue the immoral connection and live apart the defendant, as a compensation for the injury and in consideration of the premises, undertook to pay plaintiff a yearly sum towards her maintenance, which he failed to do, discloses no legal consideration for the undertaking. *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. N. S. 141, 10 Jur. 284.

The suggestion in *Binnington v. Wallis*, 4 Barn. & Ald. 650, of a distinction in case the promisee was seduced was repudiated in *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. N. S. 141, 10 Jur. 284, Lord Denman saying that that circumstance was of no consequence; and in *Jennings v. Brown*, 9 Mees. & W. 496, 12 L. J. Exch. N. S. 86, where it was held that the main-

*Jennings v. Crider*, 2 Bush, 322, 92 Am. Dec. 487; *Russell v. Rice*, 19 Ky. L. Rep. 1613, 44 S. W. 110; *Chaney v. Flynn*, 2 Ky. L. Rep. 417; and others.

We think the fair deduction from the foregoing line of decisions is that, without reference to what may have been the merit of the consideration of the original promise, the new contract, to be binding, must be based upon a new consideration, legal and sufficient of itself, and independent of the original one. That the surety paid off these notes upon the faith of the appellee's letter was not such new consideration; for he assumed no new condition, and did nothing he was not already legally bound to do.

It follows that the giving of the peremptory instruction was proper, and the judgment is therefore affirmed.

tenance of the child is a sufficient consideration for a promise by the father of an illegitimate child to pay the mother an annuity if she will maintain the child and keep secret their connection, *Parke, B.* said during the argument that the fact that the woman was seduced would have made no difference if there had not been another consideration.

It will be observed that in the two cases next cited the agreements were by bond, and while the cases themselves do not base any distinction on that fact, they were distinguished in *Binnington v. Wallis*, 4 Barn. & Ald. 650, and *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. N. S. 141, 10 Jur. 284, upon the ground that bonds need no consideration.

In *Turner v. Vaughan*, 2 Wils. 339 (an action of debt upon a bond), it was held that a bond to a lady in consideration of past cohabitation was good in law, *Bathurst, J.*, saying: "Where a man is bound in honor and conscience, God forbid that a court of law should say the contrary; and wherever it appears that the man is the seducer the bond is good."

Equity will compel enforcement of a bond conditioned for the payment of a specified sum after the death of the obligor for the purpose of purchasing an annuity for the woman whom he had seduced and a bastard child whom he had by her. *Annandale v. Harris*, 2 P. Wms. 432.

In *Gibson v. Dickie*, 3 Maule & S. 463, it was held that assumpsit would lie upon an agreement by defendant to allow plaintiff, with whom he had cohabited, an annuity for her life provided she should continue single. In this case, however, no objection seems to have been made that there was no consideration, but the objection was that the consideration was immoral; and there also appears to have been in this case an independent consideration.

In *Shenk v. Mingle*, 13 Serg. & R. 29, *supra*, it was held that the seduction of a woman, and the begetting her with a bastard child, were a sufficient consideration for a promise to give bonds to the woman. The court in this case apparently takes the view that the moral obligation alone would be sufficient; but it states that, even taking the rule in the measured sense in which it is expressed in the note to 3 Bos. & P. 249, there is in the case a previous consideration, founded on a legal right, to support the promise, since the woman would, on the finding of an indictment for fornication and bastardy, be entitled to receive a reasonable allowance for lying-in expenses which she might release.

As already shown, the court in this case denied the general principle that a mere moral obligation is not a sufficient consideration to support a promise.

he was still in possession. It is the fraud that gives the right of action, and not the possession. But the cases of *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389; *Thomas v. Kyles*, 34 N. C. (1 Jones Eq.) 302, and other cases, seem to settle this contention against the defendant. It is true that it is said in *Pass v. Brooks* that the contract is admitted, and, defendants being in possession, the case of *Albea v. Griffin* was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks* that con-

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A perol license to enter upon mineral lands and mine the same, for a specified share of the mineral raised, for an indefinite time, and entry under such license, and an expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and other preparations for mining under such license, gives to the licensee a valid subsisting interest in the real estate, which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to the possession against the licensor, or his subsequent lessee with notice, by ejectment. *Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546.

Under a perol license to work upon and prove mineral land for a share of the mineral raised, where the occupant has made expenditures in sinking a shaft and running drifts, the license cannot be revoked without refunding the expenditure, or giving the party at least six months' notice. And although such perol license is within the statute of frauds, still, when connected with such improvements to prove the ground, it is voidable only upon such compensation or notice. *Bush v. Sullivan*, 3 G. Greene, 344, 54 Am. Dec. 506.

Plaintiff went into possession, under a verbal contract, of a vacant lot worth about \$400, erected a brick business house thereon, costing over \$2,000, and thereby improved the property in that sum. Defendant claimed the agreement to be that plaintiff was to have the rent of the property during her life as compensation for putting the building upon it. The plaintiff, on the other hand, claimed, in addition to the use of it for life, the privilege of selling it at any time if she desired, and paying the owner \$400 of the proceeds. She afterwards assumed to sell the property to another, who paid her a portion of the purchase money, and gave her notes for the remainder. Action was brought by the plaintiff upon those notes, the owner of the property being also made a defendant. The latter objected to the sale, and, he being the title holder, the sale was rescinded with a reference to the master to ascertain the value of the rents and improvements by the would-be purchaser, and how much purchase money he had paid to the plaintiff. The defendant, the owner objected to any sale of the property, and insisted upon the fulfillment of the contract between him and the plaintiff as he understood it. It was held that there was no binding contract between them; that the property should be sold and the proceeds divided between the defendant owner and the plaintiff in the proportion of \$400 to \$2,130, the value of the lot and the improvements being thus fixed respectively by the court.

testate was induced to go upon the lot and put valuable permanent improvements upon the same, by reason of the promise of the defendant that he would convey the lot to him, the plaintiff will be entitled to have an account to ascertain the value of the improvements, subject to the rents and profits, while the plaintiff and intestate were in possession, and, if a balance be found in her favor, the judgment shall constitute a charge on the rents and profits of said lot until it is paid, and a receiver may be appointed if it shall be deemed necessary.

*Error.* New trial.

the claims of the purchaser to be satisfied out of what might be coming to the plaintiff. *Dean v. Cassiday*, 88 Ky. 572, 11 S. W. 601.

Land belonging to an infant was by the will under which he became the owner, placed in the care of one of the defendants until the infant should come of age "though not to use it in any other way than for the support of the family." The general guardian of the infant assumed to lease the land by parol to the plaintiff until the infant became of age, in consideration of improvements which plaintiff agreed to make thereon. The person who by the will was to have the care of the land did not in fact contract with plaintiff for the lease, but he was fraudulently instrumental in inducing the plaintiff to enter upon and improve the land. Plaintiff afterwards sold his interest to another, who was expelled in a proceeding for a forcible entry and detainer instituted by the defendant, who by the will had the care of the infant's land. The circuit court decreed that the defendant, who had the care of the infant's land, should pay out of the latter's estate the amount of the improvements, provided so much remained in his hands, and, if not, the plaintiff should recover the amount from the estate of the infant. The court of appeals reversed this judgment and remanded the cause, directing that a decree be entered dismissing plaintiff's bill with costs, as to the infant, and giving him relief against the other defendant, who had the care of the estate, for the improvements upon the land, on the ground that while he did not in fact contract with plaintiff for the lease, he was fraudulently instrumental in inducing him to enter upon and improve the land. *Findley v. Wilson*, 3 Litt. (Ky.) 391, 14 Am. Dec. 72.

The vendor and vendee under a verbal contract for the sale and purchase of land agreed to rescind the same, the vendee agreeing to surrender the possession and improvements, and the vendor agreeing to give the vendee a horse and certain notes. The horse was delivered and accepted, and the possession of the premises surrendered to the vendor, who afterwards refused to execute the notes. It was held, first, that the contract was not void for uncertainty, and second, that it was not void by the statute of frauds; and judgment was given for the plaintiff for the amount of the notes. *Sutton v. Sears*, 10 Ind. 223.

Where land is leased for a term of years, and the lessee places improvements thereon, and before the expiration of the lease sells said improvements and his interest under the lease to the lessor, taking a note in part payment therefor, the lessee is not entitled to a vendor's lien upon the land for the amount of the note. *Mitchell v. Printup*, 48 Ga. 465.

A person who sets up a resulting trust, but who has in fact paid no part of the consideration money, will not be allowed to show by parol proof that the purchase was made for his bene-

*Douglas, J.*, dissenting:

I cannot concur in the judgment of the court, because it seems to me to fly in the teeth of the statute of frauds. This statute, originally Stat. 29 Car. II. chap. 3, § 2, now § 1554 of the Code, reads as follows: "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them shall be void and of no effect, unless such contract or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized." The avowed

fit; and if part only of the consideration is paid by him the land will only be charged with the money advanced, *pro tanto*; and any payment or advance of money after such a purchase has been completed will not raise a resulting trust. But if the person in whose name the land was purchased had thereafter sold the same and the person claiming such resulting trust has after the purchase and before the subsequent sale, made beneficial improvements upon the land, and it appears that he was suffered to continue in possession under some indistinct encouragement held out by the party in whose name the conveyance was taken, that he might eventually become interested in the lands, it is equitable, under all the circumstances of such a case, that he should have a reasonable allowance made him for such beneficial and permanent improvements as he may have made on the lands at the time of the purchase and sale of the party in whose name the conveyance was taken, and who afterwards sold the same. *Botsford v. Burr*, 2 Johns. Ch. 405.

A father made a contract with his son to give him certain real property, and the son agreed. In consideration thereof, to maintain the father and his wife on the premises during the remainder of their lives. The property was conveyed to the son, who afterwards died, leaving him surviving his parents, and also his wife and an infant daughter. The widow being unable to carry out the agreement, with the consent of her deceased husband's father prevailed upon the plaintiff, who was another son, to take over the farm as owner and perform the agreement. No conveyance was executed of the farm to the plaintiff. The plaintiff, after entering into possession of the property, laid out from time to time a considerable sum of money in its improvement, and by his own labor greatly enhanced its value. He also faithfully performed the terms of his brother's agreement with his parents until their death. After the death of the parents, the plaintiff filed a bill against the widow and daughter of his brother, praying that they be decreed to execute a conveyance to him of the property, or, in alternative, that the money expended by him in maintaining the father and his wife, and improving the premises, be declared a lien thereon. After a full consideration of the question the court made a declaration that the plaintiff was entitled to a lien upon the land for the amount expended by him in permanent improvements thereon, and in the support and maintenance of the father and his wife, less a fair amount for rent. *Waters v. Waters*, 1 N. B. Eq. 167.

Most of the states have at the present time a statute ordinarily known as the "Occupying Claimant Act." As, however, they provide only for cases when the occupant claims to hold under "color of title in fee," it is not thought that they affect the subject under consideration.

as the court held that the guardian was under a legal liability at the time he gave the note.

A note given for the consideration that the maker felt in honor bound to reimburse the payee for the loss the latter had suffered through brokers recommended by the former is not enforceable as between the parties, because the maker's sense of honor is not a valuable consideration. *Morris v. Norton*, 21 C. C. A. 553, 48 U. S. App. 739, 75 Fed. 912.

That one made an unfortunate bargain under the influence of advice honestly given by another does not furnish a consideration for a promise by the latter to forgive a debt due from the former. *Johnson v. Johnson*, 10 N. C. (3 Hawks) 556. The court held in this case that there was not even a moral obligation.

There is no moral obliquity in the statement of an honest belief respecting a business enterprise, and no legal or moral obligation is created which will constitute a sufficient consideration to support a promise to indemnify one from loss by reason of an unfortunate investment in reliance on such statement. *Martin's Estate*, 131 Pa. 683, 18 Atl. 987.

A promise by one who purchased tin for, and at the special request of, another, and delivered it to him in the same condition in which it was purchased, to pay a certain amount on account of defects in the tin, has neither a prior moral nor equitable obligation to support it. *Hawley v. Farrar*, 1 Vt. 420.

A promise by the husband, after default, under a mortgage of the homestead which was absolutely void because not executed by the wife in the manner required by law, to pay rent to the mortgagee, in the absence of any new consideration, is without consideration, and does not create the relation of landlord and tenant. *Strauss v. Harrison*, 79 Ala. 324.

The duty of surrendering a note after a settlement is a moral, and not a legal, one, and is not a good consideration for a promise, and will not sustain an action to recover the amount subsequently realized on a judgment taken by default upon the note. *Greenbaum v. Elliott*, 60 Mo. 23.

A promise by a wife to pay for grain previously furnished on her husband's credit, but used for horses owned by her, is not supported by a consideration. *Stevens v. Mayberry*, 82 Me. 65, 19 Atl. 92.

That goods were bought for and used by a certain person upon the credit of another does not afford such a moral obligation as will support a subsequent parol promise to the seller of the goods to pay for them. *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382, *supra*, 1. a.

Where defendant promised to pay to plaintiff a specified sum if the former should procure a college to be located on a certain tract, and after the college had been permanently located upon another tract the defendant made a new promise to pay the amount of his subscription notwithstanding the change of location, the new promise is not enforceable in the absence of any new consideration. *Schuler v. Myton*, 48 Kan. 282, 20 Pac. 163.

A promise by a party to an arbitration to allow the other party an additional credit above that allowed by the arbitrators is without consideration. *Patton v. Garrett*, 116 N. C. 847, 21 S. E. 679.

A promise by plaintiff in execution that defendant may redeem property sold thereunder, if it has no other consideration than kind feeling, is not enforceable. *Blackburn v. Collins*, 12 B. Mon. 16.

However the principal may be bound in honor, he is not bound in law, to pay his agent anything more than the amount agreed upon for his services, and a promise after performance 53 L. R. A.

to pay him more is void for want of consideration. *Fisher v. Harrisburg Gas Co.* 1 Pearson (Pa.) 118.

In *Glass v. Beach* (1833) 5 Vt. 172, the court said that the moral obligation of defendant to indemnify plaintiff for costs incurred in an action against the plaintiff upon a claim which the defendant had agreed to pay was a sufficient consideration for his express undertaking to do so, even if there were no other inducements.

If one person, without law and without right, makes use of another's name in a suit, by reason of which the latter becomes subject to the payment of a bill of costs, there can be no doubt that the former would be under a moral, if not a legal, obligation to indemnify him; and either is a sufficient consideration for a promise to do so. *Blodget v. Skinner* (1843) 15 Vt. 716.

### c. Summary.

While, as has been shown, the courts have frequently asserted the doctrine that a mere moral obligation is not a sufficient consideration for a promise, the phrase "moral obligation," as here used, is to be understood in a narrow, restricted sense; and, perhaps, all that can be asserted of the cases thus far cited is that they support the doctrine only as applied to a promise by one who, except as he may be benefited by the discharge of his moral obligations, does not at any time, either before, at the time of, or after, the promise, receive any benefit that has not already been exhausted by having constituted the consideration of a prior, enforceable promise, express or implied.

There is a sense in which the obligation resting upon one who has received a benefit, other than that resulting from the mere discharge of his moral obligations, under such circumstances as to impose no enforceable legal duty upon him, is a moral one only; but the doctrine cannot be broadly asserted to cover obligations of this class, though, as shown in division II., it has been extended to some of them.

The distinction here suggested is between what may be termed mere moral benefits, or legal benefits that have already been exhausted by having formed a consideration for a prior promise, express or implied, and legal benefits that have never been so exhausted because no enforceable contract has ever been based upon them. It will be observed that in some of the foregoing cases it is said that a moral consideration will not support a promise, not that a moral obligation is insufficient. Perhaps, for the purpose of a general principle, universally applicable, it would be more correct to say that a mere moral benefit will not constitute a consideration for a subsequent express promise, than to say that a moral obligation will not constitute such a consideration, since a moral obligation may spring from a legal benefit, and, as will be shown in division II., promises based on such moral obligations have often been upheld. This distinction between moral obligations arising from a legal benefit, and those arising from a moral benefit, may be what the South Carolina supreme court had in mind when it remarked in *Ferguson v. Harris*, 39 S. C. 323, 17 S. E. 782, which involved the validity of a subsequent promise to pay for lumber used without the promisor's consent in the construction of her house: "Whatever may be the rule elsewhere, the 'rule in South Carolina is that a moral obligation is a sufficient consideration to support an express assumption made after the obligation incurred. It is equivalent to a previous request. But it must be such an obligation as is denominated by moralists 'perfect,' an obligation of justice, and not of benevolence or piety merely."

The criterion which determines whether a benefit is legal or moral in the sense here intended is to be found in the answer to the question whether it would support a contemporaneous promise without reference to any element of detriment to the promisee. Of course, if that element appears, the question furnishes no criterion, for, assuming that the benefit to the promisor is purely moral, yet if that benefit has been conferred in reliance on a contemporaneous promise, and the promisee has suffered a detriment thereby, that detriment is a sufficient legal consideration, and would be even if the promisor received no benefit, legal or moral. This may be illustrated by a hypothetical case. If one should promise to pay for the past support of a mere stranger to whom he was under no obligation, the promise would, without doubt, be invalid for want of a consideration, as shown in the authorities previously cited; but if the promise preceded the services it would undoubtedly be valid, not because of any benefit, legal or moral, to the promisor, but because of a detriment to the promisee.

## II. The exceptions.

### a. Generally.

If the phrase "moral obligation" were to be confined to obligations which arise wholly from a moral benefit, excluding those arising from a legal benefit conferred under such circumstances as not to raise an enforceable legal obligation, it would seem that there would be no exception to the doctrine stated in division I.; but using that phrase in a broader sense, as the antithesis of an "enforceable legal obligation," there is a very comprehensive exception, though, as applied by the cases, it is not comprehensive enough to exclude from the doctrine all moral obligations arising from legal benefits conferred under such circumstances as not to create an enforceable legal obligation. The statement of the doctrine and exception in the note to *Wenham v. Adney*, 3 Bos. & P. 247, already alluded to, has been often approved, and is, perhaps, as accurate as any that has been made since. The objection to most, if not all, of the statements is that while they purport to furnish a general and universal test, they are framed with a particular class or classes of cases in view, and by failing to except other classes leave the general doctrine in too comprehensive a form.

Parke, B., in *Earle v. Oliver*, 2 Exch. 90, said: "The strict rule of common law was no doubt departed from by Lord Mansfield in *Hawkes v. Saunders*, 1 Cowp. 290, and *Atkins v. Hill*, 1 Cowp. 288. The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it."

It is true that a mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a contract (*Story, Promissory Notes*, § 185); but a moral obligation, in this sense, we understand to be one which, if connected with an express promise to pay at the time of its creation, could not have been enforced for the want of a sufficient consideration alone, and not from any defense which the law would allow, but not require, the party against whom it existed to assert. *Carr v. Wyley*, 23 Ala. 821.

A mere moral consideration will not support an express promise. A valid consideration must

have at one time existed creating a legal duty or obligation barred at the time of the promise by some positive rule of law. *Turlington v. Slaughter*, 54 Ala. 195.

A previous express promise which creates a moral obligation, and which could have been enforced by action but for some positive rule of law, or have been made available in a defense, may constitute a sufficient consideration, but when the original act or contract is void because prohibited by law it cannot be regarded as a sufficient consideration to support a ratification. *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156.

Daggett, J., in *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79, *supra*, I. b, 1, said that it could not be denied that many distinguished judges have laid down the principle that moral obligation alone is sufficient consideration to support a contract, but that the cases cited in illustration of those positions were all cases where a prior legal obligation had existed, but by reason of some statute, or stubborn rule of law, it could not be enforced, as a promise to pay a debt barred by bankruptcy, or the statute of limitations, or a promise of an adult to pay a debt contracted during minority. In all these instances a good consideration existed; for each had received a benefit.

When one person has voluntarily received a benefit from another, not gratuitously conferred, or has been the occasion, without sufficient excuse, of loss or injury to another, there rests a moral obligation to compensate him for the benefit received or the loss occasioned. And the law would enforce the performance of this duty, if some statute and rule of public policy providing for the general good, even at the expense of individual loss, did not interpose. In such cases the statute or rule of law would not be violated, if the person who had received the benefit, or occasioned the loss, should voluntarily make compensation. And when he has promised to make compensation, the moral obligation arising out of such benefit received, or loss occasioned, will be a sufficient consideration for it. *Farnham v. O'Brien*, 22 Me. 475, *infra*, II. b, 3.

A mere moral duty is not sufficient to support an express promise; but where there is a pre-existing obligation to pay, either legal or equitable, which cannot be enforced, and the party promises, notwithstanding he may be exempted from all liability by operation of law, the former liability, in connection with the honesty and rectitude of the thing, forms sufficient consideration to support the promise. *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322.

To constitute a moral obligation the consideration for an express promise which may be enforced in a court of law there must have been some pre-existing legal obligation. This legal obligation may have ceased to have force by reason of some statutory bar, as in the case of the statute of limitations, but, there having been once a legal obligation, the moral obligation is sufficient to revive the liability by means of a new promise. *Dodge v. Adams*, 19 Pick. 429.

This statement of the exception seems too restricted if it is intended to be limited to cases where there was at one time an enforceable legal obligation.

A moral obligation by itself is not a good consideration for a promise. To impart to it any binding character there must be some antecedent legal liability to which it can attach. *Greenbaum v. Elliott*, 60 Mo. 25.

A moral obligation is a sufficient consideration to support a promise if founded upon a prior legal or equitable claim. *Cameron v. Fowler*, 5 Hill, 309.

The court in *Hatchell v. Odom*, 19 N. C. (2 Dev. & B. L.) 302, *supra*, I., said: "Those du-

ties which are plain, definite, and positive, and which can be practically enforced in the business of life, are recognized as legal obligations, and an undertaking to perform them is raised through the fiction of an implied promise. There is, however, a class of cases where, although the moral obligation may be plain and perfect and ordinarily a subject for legal enforcement, yet its performance cannot be compelled, because of some rule of public policy, and where, therefore, the law will not imply a promise. If, however, in these cases a promise be afterwards made, when the interdiction shall have been removed, so that allowing legal validity to the promise will not conflict with the rule, there is no longer a difficulty in enforcing it." After citing, by way of illustration, the case of a new promise where the original promise was unenforceable because of infancy or coverture, the court continues: "In these cases, the express promise gives an original cause of action, although there never was an antecedent legal obligation; not merely because there was a former moral obligation, but because there was a former moral obligation which would have had legal efficacy, out for temporary causes removed before the new promise was made." Again: "But it is believed that a promise, however express, must be regarded as a nude pact, and not binding in law, if founded solely on considerations, which the law holds altogether insufficient to create a legal obligation; and from which, therefore, it refuses to raise the inference of a promise against any person."

A mere gratuity, which, without a special promise, would not in law imply a promise to pay, is not a good consideration to support an express promise to pay—or, in other words, a mere moral obligation, where a legal obligation never existed—is not a good consideration for an express promise. *Hamor v. Moore*, 8 Ohio St. 239.

A moral obligation will lay a foundation for an express promise only where, in the forum of conscience and in the forum of law, the party would have been bound to do the thing promised had he not been released, or rendered unable to contract by mere positive law. *Lewis v. Simons*, 1 Handy (Ohio) 82.

To constitute a moral obligation the consideration of an express contract which may be enforced by an action at law, there must have been some pre-existing legal obligation. This legal obligation may have ceased to have force by reason of the statute of limitations or the like; but, there having been a legal obligation, the moral obligation is sufficient to revive the liability by means of an express promise. *Nine v. Starr*, 8 Or. 49.

The court in *Smith v. Tripp*, 14 R. I. 112, says that the true doctrine has never been better stated than by Lord Denman in *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. N. S. 141, 10 Jur. 284: "An express promise cannot be supported by a consideration from which the law could not imply a promise, except when the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid."

In *Stebbins v. Crawford County*, 92 Pa. 289, 37 Am. Rep. 687, the court states the rule thus: "A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by positive law. Express promises, founded on pre-existing equitable obligations, may be enforced as founded on good consideration. They merely remove an impediment erected by law to the recovery of debts honestly due, but which the statute law and public policy protect the debtors from being compelled to pay."

Using the phrase "moral obligation" as the antithesis of an "enforceable legal obligation," 53 L. R. A.

it is apparent that there are many classes of promises which must be brought within the exception if they are to be sustained.

#### b. Concrete application of exceptions.

##### 1. New promise after bar of limitation.

Thus the familiar and uncontradicted rule that upholds a new promise after the bar of the statute of limitations has often been expressly put upon the ground that, though the debt is not legally enforceable, there is still a moral obligation which comes within the exception to the general rule, and is sufficient to sustain the new promise. It would be a work of supererogation to cite all the cases of this kind, as it seems never to have been denied that they come within the exception. Among others that might be mentioned which bring out clearly the moral obligation as the basis of the new promise are the following: *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Chabot v. Tucker*, 39 Cal. 434; *Emmons v. Overton*, 18 B. Mon. 643; *Head v. Manners*, 5 J. J. Marsh. 255; *Shreiner v. Cummings*, 63 Pa. 374; *Marshall v. Holmes*, 68 Wis. 555, 32 N. W. 685.

*Pittman v. Elder*, 76 Ga. 371, takes the view that the validity of such new promises is not placed on the consideration of moral obligation, but on the right of a party to waive the protection of a statute relieving him from indebtedness.

*Smith v. Tripp*, 14 R. I. 112, held that a promise by a city to pay for land taken for a public use, after the expiration of the period allowed by statute for the commencement of proceedings by the owner to recover compensation, was without consideration. The court distinguished the case from cases of new promise after a debt has been barred by the statute of limitations, or discharged in bankruptcy, upon the ground that there the old debt or obligation does not come to an end of itself, but is only barred or discharged by a statute operating on it from without; but that in the case at bar the liability comes to an end of itself—expires by its own limitation so that it no longer exists. The court had already held in this case that the remedy given by the statute was exclusive.

Here, however, the court, evidently, does not use the phrase "moral obligation" as the antithesis of "legal obligation."

##### 2. New promise after discharge by operation of law.

So, also, the rule that is established by a great number of cases, and is practically undisputed in the absence of a statute abrogating it, that a new promise to pay a debt discharged in bankruptcy or insolvency proceedings is valid without a new consideration, rests upon the ground that after the discharge there still remains a moral obligation that is sufficient to support the promise. Among the many cases that expressly put the rule upon that ground, the following may be mentioned: *Mutual Reserve Fund Life Assn. v. Beatty*, 35 C. C. A. 578, 93 Fed. 747; *Feeny v. Daly*, 8 Cal. 84; *Lambert v. Schmalz*, 118 Cal. 33, 50 Pac. 13; *Ross v. Jordan*, 62 Ga. 298; *Post v. Losey*, 111 Ind. 75, 88, 60 Am. Rep. 677, 12 N. E. 121; *Willis v. Cushman*, 115 Ind. 100, 17 N. E. 168; *Andrieu's Succession*, 44 La. Ann. 103, 10 So. 388; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Katz v. Moore*, 13 Md. 566; *Craig v. Seltz*, 63 Mich. 727, 30 N. W. 347; *Edwards v. Nelson*, 51 Mich. 121, 16 N. W. 261; *McWille v. Kirkpatrick*, 28 Miss. 802, 64 Am. Dec. 125; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837; *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec.

729; *Scanton v. Elslord*, 7 Johns. 36; *Ingersoll v. Rhoades*, Hill & D. Supp. 371; *Farmers & Mechanics v. Flint*, 17 Vt. 508, 44 Am. Dec. 351.

It is true that some of the courts take the view that the discharge merely bars the remedy and does not extinguish the debt; but in either case the obligation is a moral one in the broad sense in which that phrase is now being used, and therefore, to sustain the new promise, it must be brought within the exception. In the following cases it will be observed that the new promise was upheld, although it was expressly held that the discharge extinguished the debt, and did not merely bar the remedy.

A discharge in bankruptcy extinguishes a debt, and nothing remains of the legal liability; but as the debt has been discharged, not by payment nor act of the creditor, but by the operation of law, there remains a moral obligation sufficient to support a new promise to pay; but the new contract is the foundation of the act, and not the former indebtedness. *Stewart v. Reckless*, 24 N. J. L. 427.

Moral obligation is sufficient to support new promise after discharge in bankruptcy, although the effect of the discharge is to extinguish the existing debt. *Bolton v. King* (1884) 105 Pa. 78; *Hobough v. Murphy* (1886) 114 Pa. 358, 7 Atl. 139; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142.

In *Jones v. Phelps*, 20 Week. Rep. 92, Bacon, Ch. J., decided broadly that where a debtor was discharged in bankruptcy a subsequent promise by him to pay the debt "was a mere *nudum pactum*, and therefore, according to a well-known principle of our law, would not sustain an action."

The discharge in this case was made under the act of 1861, which expressly made promises to pay debts barred by bankruptcy void. The new promise was made after the passage of the bankruptcy act of 1869. Bacon, Ch. J., was inclined to think if it was necessary to decide the point that for the purpose of the case the provision of the act of 1861 was not repealed, but preferred to base his decision on broader ground. This decision, so far as it rests on the broad ground, is in conflict with the almost unbroken current of authority.

## 2. New promise after voluntary discharge.

While, as has been seen, the cases are nearly unanimous in upholding the validity of a new promise after a discharge by operation of law in bankruptcy or insolvency proceedings, they, with a few exceptions, which will be subsequently noted, unite in holding that a new promise, after a voluntary discharge by act of the parties, is invalid without a new consideration, even when the debt or a portion of it is unpaid.

Where a debtor has entered into a deed of composition with his creditors by which they release him from his debts, a promissory note subsequently given to a creditor for the remainder of the debt is a *nudum pactum*. *Ex parte Hall*, 1 Deacon, 171. Erskine, Ch. J., said: "I know of no case where it has been held, after a release by deed, by which the debt is extinguished, that a subsequent parol promise, made without consideration, can revive the debt. I think there is a marked distinction between a case where the remedy is only gone and the debt remains, and a case like this, where the debt itself is absolutely extinguished."

*Samuel v. Fairgrieve*, 21 Ont. App. Rep. 418, holds that a new consideration is necessary to support a new promise to pay a debt released by a composition agreement. The case of a voluntary release is distinguished from a case of a release in bankruptcy on the ground that in the former case the debt is absolutely extinguished and there remains nothing but a moral

obligation which is insufficient to constitute a consideration, while in the latter case the debt still exists though the remedy is barred.

In *Rasmussen v. State Nat. Bank*, 11 Colo. 301, 18 Pac. 28, it was held that there was no consideration for promissory notes given for the balance remaining on claims after the payment of a portion thereof pursuant to an agreement and composition with creditors. The court says: "After a claim has been extinguished by an accord and satisfaction, there is nothing left to form a consideration for a promise thereafter made to pay any portion of the claim that has been extinguished. An extinguished claim does not exist for any purpose. It is well settled that a mere moral obligation does not constitute a valid consideration for a promise, and the cases which seem to be exceptions to this rule are cases in which the provisions of some positive law had interposed to prevent the enforcement of the payment of a just and legal claim, and where the debtor has waived his right to the protection afforded him by the law, by making a contract for the payment of such legal claim, and which contract did not come within the provisions of the law protecting him against the enforcement of the original claim."

A claim so promised to be paid, having never been satisfied or extinguished by the voluntary act of the creditor or otherwise, may well be said to form a sufficient consideration for a promise to pay it: such promise being based upon an existing indebtedness."

Where a debtor has been discharged from a debt by provisions of the positive law, an express promise afterwards to pay the debt will be enforced; but where the discharge is the fair, voluntary act of the creditor, a subsequent promise to pay the debt will not be enforced. *Montgomery v. Lampton*, 3 Met. (Ky.) 519. The discharge in this case was by virtue of a voluntary composition agreement, and it was accordingly held that there was no consideration for the new promise.

*Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406, held that a new promise to pay a debt, after a voluntary discharge, was not within the rule stated in *Farnham v. O'Brien*, 22 Me. 475, that when a person has received a benefit from, or occasioned loss to, another, and a statute or rule of public policy protects him from making compensation, the moral obligation to do it remains, and it would constitute a legal consideration for a promise to do it.

A new promise to pay a debt after a voluntary discharge by the creditor for less than the amount due is not supported by a consideration. *Phelps v. Dennett*, 57 Me. 491. The court in this case said that whatever its own view of the propriety of the distinction between a discharge of operation by law and one by the voluntary act of the creditor, the question must be regarded as settled by *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406.

A promise to pay a debt after it has been voluntarily released by the creditor is not supported by a sufficient legal consideration. *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322.

The court in this case said that a distinction was taken in the decided cases between the case of a discharge from all pre-existing liability by operation of some positive provision of law, and the case of a release or discharge from liability by the voluntary act of the creditor himself; and while the distinction was not very broad, yet, as it has obtained the sanction of several courts of high authority, it would not be disregarded.

Where a release has been voluntarily executed and delivered by a creditor to his debtor, for the express purpose of discharging all interest and qualifying him as a witness for the creditor

or's own benefit, there remains no moral obligation to pay the debt which is sufficient to afford a consideration for a new promise upon which an action will lie. *Valentine v. Foster*, 1 Met. 520. The opinion in this case, without expressing any opinion whether there would be a sufficient consideration to support a new promise after a release given to enable an insolvent debtor to obtain his discharge under a general assignment, pointed out that in that case the release would be for the debtor's benefit, while in the present case it was for the creditor's benefit.

A debt discharged by the voluntary act of a creditor does not leave a moral obligation which is a sufficient consideration for a new promise. *Hale v. Rice*, 124 Mass. 292.

Where an original right of action is extinguished, not by the act of the law, but by the voluntary act of the parties, a new promise does not revive the original debt, and is without consideration. *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405.

Where a debt has been satisfied and extinguished by the voluntary act of the creditor upon a part payment, a new promise is not supported by a sufficient consideration. *Grant v. Porter*, 63 N. H. 229. The court distinguishes between a voluntary discharge and a discharge in bankruptcy.

There is no such moral obligation remaining after the discharge of a debtor by an accord and satisfaction as will support a subsequent promise to pay the balance remaining unpaid. *Stafford v. Bacon*, 1 Hill, 532, 37 Am. Dec. 366, 25 Wend. 384. In the report of this case in 25 Wend. 384, there is an opinion purporting to be by the court, per Nelson, Ch. J., which takes a directly opposite view from that here expressed; but it appears that the publication of that opinion as the opinion of the court was a mistake.

A new promise after the discharge of the debtor by the voluntary act of the creditor is invalid and without consideration. *Zoeblisch v. Von Minden*, 47 Hun, 213, *Reversed on other grounds* in 120 N. Y. 406, 24 N. E. 795.

A debt is voluntarily discharged by a composition among creditors, and it is wholly gone and leaves no obligation to pay, either legal or moral, which will support a new promise. *Lewis v. Simons*, 1 Handy (Ohio) 82.

A new promise after a voluntary release by the act of the parties is not founded on a sufficient consideration. *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573.

The court refuses to follow *Willing v. Peters*, 12 Serg. & R. 177, *infra*, and says that that case was overruled in *Snevely v. Read*, 9 Watts, 396.

A debt released upon an accord and satisfaction by a composition assented to by all the creditors is extinguished, and cannot form the consideration of a new promise. *Evans v. Beil*, 15 Lea, 569.

Of course, if a debt is once extinguished by the voluntary act of the party, it cannot be revived without a new consideration. It is otherwise where the remedy is lost, as by the bar of the statute of limitations, or a discharge in bankruptcy, leaving the debt itself unaffected. A moral obligation is not alone a sufficient consideration to sustain a promise. *Ibid*.

It will be observed that the denial of the application of the exception to this class of cases extends the general doctrine that a moral obligation will not support a promise beyond the point to which the cases cited in division I. carried it, and beyond the point up to which it can be asserted as a universal rule.

There are, however, a few decisions that uphold the validity of a new promise after a voluntary discharge by act of the parties.

In *McPherson v. Rees*, 2 Penr. & W. 521, Gibson, Ch. J., expressed the opinion that the 53 L. R. A.

morality which supports a promise after a discharge by operation of law rests on ground less secure in point of reason than when the discharge is by voluntary act of the creditor, and said a release in consideration of present embarrassment is necessarily on an implied condition in morals that advantage be not taken of it after the embarrassment has ceased.

In *Willing v. Peters*, 12 Serg. & R. 177, the court repudiated the distinction between a discharge by law and a discharge by the voluntary act of the creditor, holding that a promise by a debtor, after the execution by the creditor at the debtor's request of a voluntary release, to pay the balance of the debt, is founded on a sufficient consideration, and is binding.

In *Snevely v. Read*, 9 Watts, 396, the court held that the arrest of a debtor upon a *capias ad satisfaciendum*, and a discharge from the arrest by the consent of the creditor, extinguish the judgment, and it is not a good consideration for a subsequent promise to pay. The court says that the case of *Willing v. Peters*, 12 Serg. & R. 182, went a great way, but not so far as the case before it, since here there was a satisfaction received in the imprisonment of the person of the defendant.

The moral obligation remaining after a voluntary release, under seal, of a debt is sufficient to support a new promise to pay the same. *Baeder v. Barton*, 11 W. N. C. 165.

The court relies on *Willing v. Peters*, 12 Serg. & R. 177, and distinguishes *Snevely v. Read*, 9 Watts, 396, on the ground that there there was legal satisfaction by the arrest of the debtor, the court considering that after that the debt was extinguished, both legally and morally.

*Callahan v. Ackley*, 9 Phila. 99, however, held that a note given by a debtor immediately after his release by a deed of composition is without consideration.

*Jamison v. Ludlow*, 3 La. Ann. 492, holds that a new promise to pay the balance of a debt after a voluntary release of a portion thereof did not require a new pecuniary consideration, as there still subsists such a natural obligation on the part of the debtor, thus relieved by the mercy of the creditor, as would have estopped him from recovering back if he paid, or form a sufficient consideration for a new promise. The court expressed the opinion that the same rule that applies to a new promise after a discharge in bankruptcy applies to a voluntary release given upon a partial payment, citing *Willing v. Peters*, 12 Serg. & R. 177. *A fortiori*, where a release was induced by misrepresentation or fraud. In this case the fraud and the new promise were relied on as separate grounds.

*Re Merriman*, 44 Conn. 587, and *Higgins v. Dale*, 28 Minn. 126, 9 N. W. 583, hold that a new promise after a discharge by a composition in bankruptcy to which the creditor assented is sufficient to revive the debt; but these decisions are upon the ground that such a discharge is not the voluntary act of the creditor.

In *Trumbull v. Tilton*, 21 N. H. 128, the court recognized and stated the doctrine that the moral obligation remaining after a discharge of a debtor by operation of law is sufficient to support a new promise, and discussed some of the cases distinguishing between a discharge by operation of law and one by the voluntary act of the party, and intimated, without deciding the question, that the distinction was not sound.

*Stearns v. Tappin*, 5 Duer, 294, did not hold that the moral obligation remaining after a voluntary release of a debt is sufficient to support a new promise to pay, but conceded that point for the purpose of the argument, and held that the complaint should be dismissed in any case because it proceeded on the original debt, and not on the new promise.



#### 4. *New promise after majority.*

The well-established rule that a new promise by an infant after attaining majority needs no new consideration is an application of the exception.

In *Cockshott v. Bennett*, 2 T. R. 763, 1 Revised Rep. 617, in distinguishing the case before him, Ashhurst, J., said: "This is not like a security given by an infant which is only voidable, for that may be revived by a promise after he comes of age. In such case he is bound in equity and in conscience to discharge the debt, though the law would not compel him to do so, but he may waive the privilege of infancy, which the law gives him for the purpose of securing him against the impositions of designing persons. And if he choose to waive his privilege, the subsequent promise will operate upon the preceding consideration."

*Cooper v. Martin*, 4 East, 76, after holding that one who marries a widow who has children by her former husband is not bound to maintain them though they were maintained by her before her second marriage, further held that if the second husband maintained such children, it is a good consideration for a promise by them when they come of age to repay the expense of their maintenance,—especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to chancery for an allowance out of the fund as he might have done. Lord Ellenborough, Ch. J., said: "Having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury."

The principle on which the law allows a party who has attained the age of twenty-one to give validity of contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound, and there is nothing in the liability on an account stated to take that out of the general principle. *Williams v. Moor*, 11 Mees. & W. 263, 2 Dowl. N. S. 993, 12 L. J. Exch. N. S. 253, 7 Jur. 817.

The expenditure by a stranger, without obligation, of his own funds for the benefit of an infant bereaved of parents in maintaining and educating her, is a sufficient consideration to support an express promise, made after she comes of age, to repay the amount so expended, where during the continuance of such expenditure and of her infancy, she became entitled to a great estate out of which no allowance for her maintenance or education was applied for or made: and if such expenditure was made at the request of her brother-in-law, and in consequence thereof he became liable for the amount, the existence of such liability on his part would be a sufficient consideration to support an express promise made by her after she became of age to indemnify him against any loss he might thereby sustain. *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366.

These cases have been cited for the purpose of showing that the promises of this class rest upon a moral obligation in the broad sense of that term, and it is not intended to discuss the general question as to the validity of these promises.

Many of these cases do not expressly base the decision upholding the promise on the ground of a moral obligation coming within the exception to the general doctrine, but it is obvious L. R. A.

vious that the decision must rest on this ground.

#### 5. *New promise by party to negotiable paper.*

Another well-established rule that must be regarded as an application of the exception to the general doctrine is that which upholds the validity of a new promise by a party to negotiable paper after knowledge of laches discharging him from liability. The rule is not often expressly placed upon the ground of a moral obligation, but, treating the phrase "moral obligation" in the broad sense already referred to, this class of cases would come within the general doctrine were it not for the exception.

In the following case, it will be observed that the rule is expressly put on this ground.

A new promise by an assignor of a note, who has been discharged from liability, by failure to sue the maker, to pay the same, being founded on a moral obligation arising from his assignment of the notes for a valuable consideration, is legally obligatory upon him. *Mardis v. Tyler*, 10 B. Mon. 382.

#### 6. *New promise after judgment.*

Promises of this class have been held to come within the exception.

In *Turlington v. Slaughter*, 54 Ala. 195, *supra*, the court held that an express promise by a judgment creditor to repay to the judgment debtor the excess, if it should appear that the judgment was for too much, was supported by a sufficient consideration, upon the ground that the judgment creditor was under a moral obligation, either to abate the amount of the decree, or, if under mistake it was paid to him, to refund the excessive payment; and that such moral obligation originated from a positive legal duty which he could have enforced before the decree was entered, and therefore the case came within the exception to the general doctrine.

Where plaintiff in foreclosure has failed to credit the defendant with certain payments, and has taken a decree for the entire amount, a subsequent promise by him to refund the excess is sufficient without any new consideration. *Doyle v. Rellly*, 18 Iowa, 108, 85 Am. Dec. 582.

A promise by a judgment creditor after recovery of the judgment to allow the judgment debtor the amount of certain payments which he had made, but which were not allowed for in taking the judgment, is supported by a sufficient consideration. *Cameron v. Fowler*, 5 Hill, 309. In this case the court said that there existed a clear legal, as well as equitable, obligation to apply the payments in extinguishment of the debt against the defendant before it passed into judgment: and, though afterwards the obligation became incapable of being enforced still it constituted a good consideration for the subsequent promise.

Where one pays a debt and takes a receipt therefor, but subsequently, through his omission to produce the receipt in his defense, a judgment is taken against him for the same debt, which he again pays, there is such a moral obligation on the part of the creditor to refund the money as will be a good consideration to support an assumpsit or express promise to pay it. *Bentley v. Morse*, 14 Johns. 468. The court said that the moral obligation was as strong as in the case of a debt barred by statute, or some positive rule of law.

The moral obligation of a county treasurer, after his account has been settled and after the settlement has been confirmed by a judgment binding on all parties, to pay a specified sum on account of errors discovered in the account, is a sufficient consideration to support a prom-

ise to do so. *Stebbins v. Crawford County*, 92 Pa. 269, 37 Am. Rep. 687.

### 7. New promise after discovery.

#### (a) Generally.

The doctrine of the principal case that the contract of a married woman, not with reference to her separate estate and where not especially allowed by statute, is void and will not support a new promise after the removal of her disability to contract, has the support of the greater number of decisions, though it has been attacked and repudiated by a number of courts of high standing. The contrary doctrine was asserted by an early English case, *Lee v. Muggeridge* (1813) 5 Taunt. 36, which has been frequently cited and discussed in the later cases, both by those for, and those against, the doctrine it asserts. In that case it was held that the moral obligation of a widow to repay money advanced at her request to her son-in-law on security of her bond was a sufficient consideration for her promise, after her husband's decease, to pay the same. The case, however, is somewhat weakened as an authority by the fact that each of the four judges who expressed his opinion stated broadly and unqualifiedly the doctrine, which, as has been seen, cannot be sustained to its full extent, that a mere moral obligation is sufficient to support a subsequent promise, and seemed to base the decision on that ground. It is significant in this connection that no reference was made to the note to *Wenall v. Adney* before referred to. The next English case in which the question arose was *Littlefield v. Shee*, 2 Barn. & Ald. 811. The declaration in that case stated that the plaintiff's testator had, at the request of the defendant, a married woman, supplied her with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, she promised to pay therefor after her husband's death. The court held that the declaration was not supported by the proof, and that a nonsuit was properly granted because the declaration in substance alleged that the amount was due from her, and the plaintiff failed in proof of that allegation, since it appears that the goods were supplied to her while her husband was living, so that the price constituted a debt from him. The court said that in *Lee v. Muggeridge* all the circumstances which showed that the money was, in conscience, due from the defendant, were correctly set forth in the declaration.

This decision seems on its face clearly distinguishable from *Lee v. Muggeridge*, 5 Taunt. 36, *supra*, upon the ground pointed out in *Goulding v. Davidson*, 26 N. Y. 607, *infra*, that the price of the goods, although they were furnished to the wife, originally constituted a debt from the husband. *Tenterden*, Ch. J., however, remarked in this case: "The doctrine that a moral obligation is sufficient consideration for a subsequent promise is one which should be received with some limitation; and that remark was regarded by the court in *Eastwood v. Kenyon* (1840) 11 Ad. & El. 438, 3 Perry & D. 276, 4 Jur. 1081, *infra*, as amounting to a dissent from *Lee v. Muggeridge*."

A record which merely states that goods were supplied to a married woman, who after her husband's death promised to pay, is not sufficient. The debt was never owing from her, and if there was a moral obligation it should have been shown. *Meyer v. Haworth*, 8 Ad. & El. 467.

It will be observed that the foregoing opinion of Lord Denman, Ch. J., does not expressly repudiate the doctrine that a mere moral obligation is a good consideration for a promise. 53 L. R. A.

In *Eastwood v. Kenyon* it was held that an agreement by a husband with his wife's former guardian to pay a note given by the latter, the proceeds of which had been expended in improving the real estate of his ward before her marriage, was without consideration, notwithstanding that the wife, after attaining her majority and while sole, assented to the improvements and promised to pay the note, and the husband, in the right of his wife, had received all the benefit, and in consideration of the premises had promised to pay the note.

This case has been regarded as overruling *Lee v. Muggeridge*, and as establishing in England the doctrine adopted by the principal case. The opinion refers to the note in 3 Bos. & P. 249, and approves of the rule there laid down, "that an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action if the obligation on which it is founded never could have been enforced at law though not barred by any legal maxim or statutory provision." The court says that *Lee v. Muggeridge* is decidedly at variance with the doctrine of the note. If the reference here is to the assertion in that case of the broad doctrine that a moral obligation is a good consideration for a promise, the statement is undoubtedly true: but it is not so clear that the actual decision in that case is at variance with the note. Indeed, it is difficult to perceive why the consideration upon which a married woman's contract rests does not come within the definition here given of a consideration that may be revived. In subsequent cases the validity of the new promise has been denied upon the ground that the original promise was not merely voidable, as in the case of an infant's contract, but absolutely void; but there does not seem to be any suggestion of such a distinction in this statement of the rule. The doctrine of *Lee v. Muggeridge* is adopted, after a full discussion by *Goulding v. Davidson*, 26 N. Y. 604, in which the New York court of appeals held that where a married woman carrying on trade as an unmarried woman in her own name bought goods for her business on her own credit and responsibility and gave her notes for part of the price, her subsequent promise after her husband's death to pay the notes and the residue of the price of the goods had a sufficient support in the moral obligation founded upon the antecedent valuable consideration created for her own personal benefit.

*Littlefield v. Shee*, 2 Barn. & Ald. 811, as already shown, was distinguished upon the ground that the price of goods, although they were furnished to her, originally constituted a debt from the husband. *Emott, J.*, alluding to the distinction taken in some cases between obligations which are void and such as are only voidable, says that if the contract is wholly void it alone will not sustain a subsequent promise to fulfil it; but where there is, beyond or before the void security or agreement, a moral obligation or duty, arising from benefits received or otherwise, which would raise an implied promise, except for the disability to make a promise, which the law imposes, a promise made after the disability is removed can rest upon this benefit and duty as a sufficient consideration. He says that the statement in the note in *Wenall v. Adney*, 3 Bos. & P. 247, that, "if a contract between two persons be void and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has received a benefit from the contract," is strictly true as to a promise founded upon the contract alone; but the case of usuri-

ons loans which the borrower will be held to pay upon a subsequent promise shows that when, behind the void contract, there is a sufficient consideration, it will sustain a subsequent promise. Again, he says: "So, when the promisor was, at the time of the receipt of the benefit, under a mere disability to contract to make it good, arising from a rule or maxim of law, and although such a contract could neither be express nor implied at the time, yet a subsequent promise, after the disability is removed, will rest upon the original benefit, passing over any invalid contract or promise at the time." In two, at least, of the three opinions written in this case the new promise is regarded as coming within the rule as stated in the note to 3 Bos. & P. 249.

Nelson, Ch. J., in *Wilson v. Burr*, 25 Wend. 386, after holding that a *femme covert* who retains counsel in a divorce suit was not liable to him for his fees, said (*obiter*) that if a promise subsequent to divorce could be shown the defendant would be liable; that in that case the previous services for her benefit and at her request would constitute a moral obligation sufficient to uphold the promise made after the removal of the disability.

The Pennsylvania courts, also, have, in a number of cases, adopted the doctrine of *Lee v. Muggeridge* and *Goulding v. Davidson*.

Where a married woman with a considerable separate income of her own induces another to expend time and labor for her son by promising that she would pay therefor, her subsequent promise, after the dissolution of the marriage, to pay for the same, is supported by a consideration. *Hemphill v. McClimans*, 24 Pa. 367.

While it appears in this case that the defendant had a separate estate at the time of her marriage, it does not appear that the debt before the new promise was enforceable against such separate property in equity, and the court says that the plaintiff is bound to none, that her original contract was good for nothing, and that he trusted to her own justice.

The indebtedness of a married woman is a sufficient consideration to support a promise by a third person to pay it. *Leonard v. Duffin*, 94 Pa. 218.

The decision on this point was treated as a corollary of the proposition that the moral obligation is sufficient to support a promise by a married woman herself after discovery.

The moral obligation of a woman to pay notes given by a firm of which she is a member while covert is a sufficient consideration as to her for renewal notes given by the firm after her discovery. *Brooks v. Merchants' Nat. Bank*, 125 Pa. 304, 17 Atl. 418.

A promise by a married woman during coverture to secure the payment of loans made to her husband imposes a moral obligation upon her which is a sufficient consideration for a subsequent promise made after discovery. *Holden v. Baner* (1891) 140 Pa. 63, 21 Atl. 239.

The court, in *Brown v. Bennett*, 75 Pa. 420, held that a promise by a woman after discovery to ratify a contract for the sale of her real estate, made during coverture, was valid. The court, however, said that a naked ratification by a married woman after discovery would not avail, but that in the case at bar she received one of the instalments due upon the contract after the death of her husband, and that that was sufficient to support the promise, admitting a consideration to be necessary.

In *Trout v. McDonald*, 88 Pa. 144, the court held that a widow had, by receiving royalties, ratified the grant of a right to mine coal on her property made by her husband during his lifetime.

If the original debt for which a married woman gave a joint judgment note with her

husband was her own, though unrecoverable by reason of her coverture, the moral obligation to pay is a sufficient consideration to support a ratification or recreation of it after coverture ceased. If the original debt was that of her husband, which she during coverture had contracted to pay out of her separate estate, this fact creates a moral obligation which is a sufficient consideration to support an agreement to revive the judgment entered upon the note. *Geiselbrecht v. Geiselbrecht*, 8 Pa. Super. Ct. 183.

The moral obligation resting upon a married woman to pay a judgment note which was originally void because of her coverture is sufficient to support a revival of the judgment by agreement after the removal of her liabilities by the married woman's act. *Lyons v. Burns*, 8 Pa. Co. Ct. 359.

The moral obligation of a married woman to pay a note made by herself and husband, though on its face the debt of the latter, is sufficient to support a new promise to do so after the death of her husband. *Re Root*, 11 Lanc. L. Rev. 223.

*Lafitte v. Selogny*, 33 La. Ann. 659, and *Brownson v. Weeks*, 47 La. Ann. 1042, 17 So. 489, held that a wife may after the death of her husband ratify an act during his lifetime by which she bound herself and her property for his debt. These decisions are upon the ground that the nullity of the contract was not such as to make it absolutely nonexistent, but it simply remained during the marriage without effect.

The Mississippi high court of errors and appeals in *Franklin v. Beatty*, 27 Miss. 347, said: "The contract of a *femme covert* is void by the common law. But it is not void to all intents and purposes. It is neither *malum prohibitum* nor *malum in se*. It may be founded on a good and valid consideration entitling it, in all but its form, to the favorable consideration of a court of justice. In the form in which it stands it cannot be enforced, but the good and valuable consideration for which it was given creates a moral obligation which will support a new promise founded on it, made by her after she becomes a *femme sole*." Under the influence of the principle so stated the court upheld a mortgage executed by the husband and wife on her separate property to secure notes previously given by her. The decision, it will be observed, is not upon the ground that the notes were originally chargeable in equity against her separate property, since the joint deed of herself and her husband under the statute was necessary to charge her separate estate. The court relies for support of its proposition on *Lee v. Muggeridge*, 5 Taunt. 30.

This decision however, as pointed out by the court in *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382, was virtually overruled in *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329, in which the supreme court of the same state reviewed at length the question whether a promise by a married woman could be revived by her subsequent promise after discovery without any new consideration, and finally decided the question in the negative. The question is discussed from the point of view of the moral obligation involved, and the court refuses to follow *Lee v. Muggeridge*, saying that that case had been practically overruled by subsequent cases. It is somewhat surprising that the opinion makes no reference whatever to *Franklin v. Beatty*, although the decision announced is directly opposed to the decision in that case. The position of the court seems to be summarized in the following, from the opinion: "The contract sought to be revived and enforced is void *ab initio*, void at the common law, and void as unauthorized by statute, nor is there resting upon the defendant any moral

or conscientious obligation to perform the original undertaking. A *feme covert* can acquire property under our laws only for cash, and the purchase of a steamboat on credit [the original obligation was incurred for such purchase] is so entirely contrary to the spirit of recent legislation for the protection of married women, and so clearly unauthorized by the enabling acts of the last few years, that such a transaction falls to commend itself to the favor of the courts, or to impose a claim upon the conscience of the party."

The following cases support the doctrine of the principal case.

An advance of money to the son of a married woman upon her promise to repay the same does not create such a moral obligation upon her as is sufficient to support her subsequent promise when sole to repay the same. *Watson v. Dunlap*, 2 Cranch, C. C. 14, Fed. Cas. No. 17,282.

In *Lloyd v. Lee*, 1 Strange, 94, a married woman had given a promissory note and after her husband's death, in consideration of forbearance, promised to pay it, and, failing to do so, an action was brought against her; but it was held at  *nisi prius* that the note originally was not merely voidable but absolutely void, and that forbearance, where originally there is no cause of action, is no consideration to raise an assumption. The judge said it might have been otherwise if the contract was but voidable.

A contract made by a married woman which at the time it was made was void, imposing no personal liability either at law or in equity, will not support a subsequent promise after her disability to contract has been removed by statute or discovery. *Thompson v. Hudgins* (1890) 110 Ala. 93, 22 So. 632.

No mere moral duty disconnected from all legal or equitable charge upon the person or estate of a married woman will support her subsequent promise made after her disability to contract has been removed. *Ibid.*

An agreement by a wife before her divorce to pay her attorneys for procuring a divorce is void, and the services rendered in pursuance of the contract and a new promise after the divorce to pay the same cannot make it valid. *Putnam v. Tennyson*, 50 Ind. 456.

The contract of a married woman to repay money loaned to her is not voidable merely, but absolutely void, and incapable, without some new and valuable consideration, of having vitality or binding force given to it by promises to pay made by her after the death of her husband. *Maier v. Martin*, 43 Ind. 314.

*Thomas v. Passage*, 54 Ind. 106, after holding that a promise by a married woman to pay for medical treatment out of her separate estate was void and constituted no charge upon her separate estate, further held that a new promise by her after her husband's death to pay for such services was without consideration. The moral obligation in this case seems to have been very strong,—since the plaintiff refused to render his services upon the credit of the husband, as he was insolvent, and consented to render them only after the agreement of the wife to pay for the same out of her separate estate. The court said that if there ever was a cause in which the court would be justified in making a little law in order to uphold and enforce an invalid and void contract, in the interest of good conscience and fair dealing, the case at bar was one.

An agreement by a married woman to convey land is void, and cannot be ratified by her after her husband's death. Nothing short of a new valid and binding contract upon a new consideration can operate as a contract to deprive her of the interest in the land. *Long v. Brown*, 66 Ind. 160.

An executory contract by a married woman

to pay for services, which was void when made, cannot be ratified by her after discovery, and she cannot render herself liable for such service by a new promise made after she became a *feme sole* without a new consideration. *Davis v. Schmidt* (Ind. App.) 31 N. E. 840. In this case, however, there was no new contract.

In *Austin v. Davis*, 128 Ind. 472, 12 L. R. A. 120, 26 N. E. 890, it was held that a contract by a married woman to leave to an adopted child all her property at death, which is void because of her coverture, cannot be ratified after she becomes sole.

A void promise by a married woman to pay her husband's debts cannot be ratified by her after his death. *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539.

A pledge of stock by a married woman, as security for her husband, cannot be ratified by her after her husband's death. *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 156.

The moral obligation imposed by the contract of a married woman to pay her attorneys for procuring a divorce is not a sufficient consideration for a new promise after discovery. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780.

A promise by a married woman without a separate estate imposes no legal or equitable liability upon her, and is not sufficient to support a new promise after the death of her husband. *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614.

This case recognizes the distinction between a contract enforceable in equity and one not so enforceable, and implies that the former will be sufficient to support a new promise.

A promise by a widow to pay a note executed by her during her coverture, the consideration of which was not for the benefit of her sole and separate estate, is a *nudum pactum*. *Wilcox v. Arnold*, 110 N. C. 708, 21 S. E. 434.

A promise by a woman after her husband's death to pay debts contracted during coverture, but for which she is bound neither in law nor in equity, are not supported by any sufficient consideration. *Felton v. Reid*, 52 N. C. (7 Jones, L.) 269.

A contract by a married woman during coverture is insufficient to support a subsequent promise by her after discovery, unless it was of such a character as to have subjected her separate estate to an equitable charge during coverture. *Long v. Rankin*, 108 N. C. 333, 12 S. E. 987.

In *Parker v. Cowan*, 1 Helsk. 518, the court held that a promise by a woman, after discovery, to pay a note given while covert, but in consideration of a debt due from her before marriage, was valid. The court, however, said that if she had been under no previous liability to pay the debt for which the note was given, her simple promise to pay would have created no liability as it would have been a promise to pay a contract void *ab initio*, and therefore not capable of ratification.

A promise by a married woman while living apart from her husband to pay for goods purchased by her on her own credit and used by her in her own support being wholly void in law and not enforceable in any way, a subsequent promise to pay after her discovery is without consideration. *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762. The court says that the moral obligation spoken of in cases as being a sufficient consideration to maintain an express promise is always with reference to, and springing from, a transaction or a subject as to which the parties at the time have already made, or were capable of making, a contract that would not be void. *Glass v. Beach*, 5 Vt. 172, *supra*, I b. 5, is distinguished upon the ground that there was a legal consideration for the promise, which was continu...

operative at the time the promise was made, and therefore it was not even a case of a past consideration. *Rothe v. Fitzpatrick*, 36 Vt. 681, *infra*, II. b. 10 (c), is distinguished upon the ground that in that case there was a subject-matter and competent parties for the making of a valid contract at the time the consideration was accruing, and that the express promise in that case was held to be equivalent to a previous request, and that was the only point materially to be held in order to maintain the transaction as a contract to promise upon a legal consideration. The moral elements had no function in the case. There was a contract made up entirely and exclusively of legal elements.

A promise by a woman, having no separate estate or property, to pay one for caring for her child is entirely void, and a new promise, after the removal of her disability to contract, is *nudum pactum*. *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251.

A contract of a married woman, being void, creates no debt, and, hence, furnishes no consideration where a subsequent promise was made during widowhood. *Kent v. Rand*, 64 N. H. 45, 5 Atl. 780.

In *Dixie v. Worthy*, 11 U. C. Q. B. 328, the court of Queen's bench of Upper Canada held that where a married woman procured one to indorse for her a bill of exchange in order that she might negotiate the same for her proper use and benefit upon her promise to indemnify him therefor, and, after her husband's death, renewed the promise, such new promise was without consideration, and would not support an action, though it was averred that the bill was negotiated for her own use. The court admitted that if *Lee v. Muggeridge* could be considered as good authority an action on the new promise would lie, but considered that decision to have been overruled by the later cases, namely, *Littlefield v. Shee*, 2 Barn. & Ad. 811; *Eastwood v. Kenyon*, 11 Ad. & El. 448, 3 Perry & D. 276; *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. N. S. 141, 10 Jur. 284. The court said that the foundation of the alleged moral obligation set out in the declaration was the assertion that the money obtained for the bill which the plaintiff indorsed and was obliged afterwards to pay came to the defendant's hands for her own use and benefit; but pointed out that no implied promise would arise in law for money advanced to a married woman under such circumstances, and no express promise would be binding, distinguishing between such a case and the case of a ratification of an infant's contract, upon the ground that her original promise was void, while the infant's original promise was only voidable.

A promise by a married woman, after she has been declared a *feme sole* by an act of the legislature, to pay a debt previously contracted by her while covert, is not enforceable where no new consideration or previous moral obligation is shown. *Waters v. Bean*, 15 Ga. 358. *Lumpkin, J.*, who delivered the opinion of the court, said that it had been held that where a married woman was under a moral obligation to pay a bond executed by her when covert; and she, after her husband's death, promised to pay it, her executor was liable on the subsequent promise (5 Taunt. 87); and while he did not indorse such doctrine in the present case there was no moral obligation shown. There is an intimation in the opinion that if the wife had had a separate estate at the time she gave the note in question, the decision might have been otherwise.

(b) When original debt due from husband.

The distinction suggested in *Goulding v. Davidson*, 26 N. Y. 604, between cases where the

debt, although the consideration moved at the request of the wife, was nevertheless in legal effect originally the debt of the husband and not of the wife, and cases where the original debt, though not enforceable, was that of the wife, was applied in *Smith v. Allen* (1869) 1 Lans. 101, where it was held that a promise by a widow to pay a note given by her before the death of her husband, for goods purchased by her for family use, was unenforceable.

And the next case, although decided before *Goulding v. Davidson*, recognizes the same distinction.

A void promise by a married woman to pay for goods purchased by her during coverture is not sufficient to support a new promise to pay for the goods after a divorce from her husband. *Watkins v. Halstead*, 2 Sandf. 311. The opinion in this case says that if anyone was liable when the debt was contracted it was the husband, and that nothing appeared to exempt him from liability.

A promise by a wife after the death of her husband to pay a bill for medical attendance upon her and upon slaves who were her separate property is not founded on a good consideration. *Kennerly v. Martin*, 8 Mo. 698. In this case, the court does not expressly deny that a moral obligation is sufficient to support an express promise, but points out that in the present case there is no moral obligation on the wife to pay a debt contracted during her husband's lifetime, since it was his debt and not hers, and distinguished the case from *Lee v. Muggeridge* upon that ground.

A note by a widow for a store account charged to her husband before his death is without consideration. *Stockton Bros. v. Reed*, 65 Mo. App. 605. The court in this case says that there was not even a moral obligation, but lays down the rule as follows: "A moral obligation to pay money or perform a duty is a good consideration to do so where there was originally an obligation to pay the money or do the duty which was enforceable at law but for the interference of some rule of law."

(c) When original promise binding in equity.

It will be observed that many of the foregoing cases that hold, in general, against the validity of the new promise after discovery, like the principal case imply that the rule is otherwise when the original promise, though not enforceable at law, might have been charged in equity upon the wife's separate estate.

The following cases expressly so hold:

In *Vance v. Wells*, 8 Ala. 399, goods were furnished during coverture to a married woman on the faith of her separate estate, and she executed a note for them as surety of her husband. An express promise to pay, made after the death of her husband, was held valid upon the ground that the promise during coverture, though void at law, in equity created a charge on her separate estate, and the moral consideration originated from an obligation capable of enforcement in equity.

A contract of a married woman for professional services in obtaining a divorce may be enforced upon her express promise to pay after she becomes discover without any new or further consideration for the promise. *Viser v. Bertrand*, 14 Ark. 267. The decision in this case is not upon the ground that a mere moral obligation is sufficient to support a promise; but it was held that while her promise to pay, made during coverture, was void at law, yet it was chargeable upon her separate estate in equity, and the court says: "If the agreement of a *feme covert* to contract is valid so as to be obligatory in equity, her promise after she becomes discover need not depend upon the moral

obligation, nor is the promise of one not under a liability aided by any moral obligation where there never was a precedent good consideration." It appears in this case that the wife had a separate estate.

A promise by a woman after the termination of her coverture to pay a debt for articles of comfort and support of the household for which her separate estate would have been liable under the statute then in force is supported by a sufficient consideration,—especially where she is granted a further indulgence in payment. *Doss v. Peterson*, 82 Ala. 253, 2 So. 644.

A married woman may contract debts and render her separate estate liable in equity for the payment; and if her separate estate is bound, she is under a moral and equitable obligation to pay the claim, which is a sufficient consideration for a subsequent promise to do so, made after her husband's abandonment of her. *Craft v. Rolland*, 37 Conn. 491. This was an action of assumpsit for provisions furnished wholly upon the wife's credit while the family were living on a farm bought with her money, she having other separate property.

A charge created by a married woman upon her separate estate, which may be enforced in equity, is a sufficient consideration to support her personal contract after she becomes a *feme sole*. *Cleland v. Low*, 32 Ga. 458.

*Hubbard v. Bugbee*, 55 Vt. 506, 45 Am. Rep. 689, was a demurrer to a declaration declaring upon a promise made by a widow to pay a note executed by her while married and alleged to have been given for money borrowed for the improvement of her separate real estate. The court held that the promise was supported by a sufficient consideration, if the facts alleged in the declaration were true, since her separate property would have been charged in equity with the note. The case came up before the court again in *Hubbard v. Bugbee* (1885) 58 Vt. 172, 2 Atl. 594, and it then appeared that the defendant had no separate estate when the note was given, and upon that state of facts the court held that the new promise was without consideration.

A promise by a married woman having a separate equitable estate to pay for goods needed in the family and sold to her upon the credit of such estate is sufficient to support a promise by her after discovery to pay the same. *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239.

#### 8. New promise, when original promise in violation of statute of frauds.

An agreement by one, to whom land has been conveyed upon an oral trust to sell the same and turn over the proceeds to the grantor, after selling the land and receiving the proceeds, to pay the same over to the grantor, is an admission that the money is held in trust, and the existence of the trust is a sufficient consideration to pay, and such promise will support an action, although without it the case would have been within the statute of frauds. *Harris v. Clark*, 94 Iowa, 327, 62 N. W. 854.

In *Farnham v. O'Brien*, 22 Me. 475, it was held that a promise by one who had orally agreed to lease a tavern stand, to reimburse the other party for expenses incurred in moving his goods in reliance on the agreement, was supported by a sufficient consideration, although the agreement to lease was within the statute of frauds; but intimated that there would be no consideration for a new lease.

One who verbally agrees to answer for the debt of another is in honor and conscience bound to perform the same, although his original agreement is unenforceable because within the statute of frauds; and such moral obligation, being  
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founded on a pre-existing debt, constitutes a sufficient consideration for a subsequent promise to pay. *Rogers v. Stevenson*, 16 Minn. 68, Gil. 56. The court in this case points out that the verbal contract was never illegal or void, and that the statute simply prescribes as a rule of evidence that oral proof of it cannot be received.

*Paul v. Stackhouse*, 38 Pa. 302, held that where defendant requested plaintiff to loan money to a third person promising to go security, and subsequently, but after the maturity of the note given by such third person, signed the same as surety, he was bound. The court took the position that the consideration for his signature, though past, was a continuing and valuable one, and his signature was a complete and full execution of the promise upon that consideration.

Where an original promise to pay for goods furnished to another is unenforceable because oral and therefore within the statute of frauds, a subsequent promise in writing to pay for the same is supported by a sufficient consideration. *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279. The court in this case recognizes the general rule that a moral obligation will not support a contract, but holds that the case is within the exception to the rule because the original promise could have been enforced but for the barrier erected by a positive statute, and because the statute of frauds affects, not the contract, but the evidence only.

In *Brown v. Latham*, 92 Ga. 280, 18 S. E. 421, where a father had conveyed land to his son upon the latter's agreement to reconvey it, it was held that even if the son was in a position to protect himself against reconveying to the father he could waive that protection, and his moral obligation to share the land with his sister in proportion to her interest as a coheir with himself was a sufficient consideration for his promise, after the father's death, to pay her her proportional part of the value of the land.

#### 9. New promise when original promise illegal.

Although a bill drawn by a prisoner of war in France upon a person resident in England in favor of an alien could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace to pay the principal and interest. *Duhammel v. Pickering*, 2 Starke, 90. Lord Ellenborough said that undoubtedly the bill was void in its original concoction, but was not so far void that it could not constitute the basis of the promise by which the party may bind himself on the return of peace.

A promise subsequent to the war of the rebellion to pay an obligation, evidenced by a note executed during the war and which was invalid because one of the parties resided within the Confederate, and the other within the Federal military lines, having a moral obligation as its basis, can be enforced in a suit thereon. *Ledoux v. Buhler*, 21 La. Ann. 130.

A sale of liquors in violation of the liquor law does not furnish a consideration which will support a new promise to pay for the same after the repeal of the law. *Ludlow v. Hardy*, 88 Mich. 690.

This decision is put upon the ground that the sale had no legal vitality originally, and nothing has occurred since to breathe life into it, and, hence, it has never been sufficient to afford any consideration for a promise.

A contract to pay for medical services rendered by one not duly licensed to practise being void at the time it was made, there is no consideration to support a new promise to pay after the passage of a statute dispensing with the necessity of a license. *Puckett v. Alexander*, 102 N. C. 95, 3 L. R. A. 43, 3 S. E. 767.

The moral obligation to pay a note that is

invalid because made on Sunday is a sufficient consideration to support a new promise to pay the same made on a week day. *Tucker v. West*, 29 Ark. 386.

Where a contract, otherwise valid, is void by reason of having been made on Sunday, as where property is sold and delivered on that day on credit, a subsequent promise to pay for the goods, made any day other than Sunday, is valid, and an action can be maintained on such new promise. *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605. The court in this case said that the rule above stated was an exception to the general rule that a promise to pay for a past consideration for which there is not, and never has been, any legal liability on the part of the party promising it does not make a contract binding in law.

*Reeves v. Butcher*, 31 N. J. L. 224, while intimating that a subsequent promise to pay a note void because given on Sunday would support an action, holds that payment of interest on such note does not amount to a new promise.

The moral obligation resting upon one to repay or in some way account for money loaned to him on Sunday is a sufficient consideration to support an express promise to repay the money, although neither the loan itself, nor the note given therefor, is enforceable, because in violation of the Sunday law. *Gwinn v. Simes*, 61 Mo. 335.

If a note is made on Sunday, in violation of law, and therefore is illegal, a subsequent promise to pay it will not make it any less illegal. *Pope v. Linn*, 50 Me. 83. It is to be observed that in this case the point was not the want of consideration, but the illegality of the subsequent promise.

Where all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of the insolvent's effects by a deed of trust to which they are all parties, and one of them, before he executes, obtains from the insolvent a promissory note for the residue of the demand, by refusing to execute until such note is made, the note is void in law as a fraud on the rest of the creditors, and a subsequent promise to pay it is a promise without consideration which will not maintain an action. *Cockshott v. Bennett*, 2 T. R. 763, 1 Revised Rep. 617.

So, also, the rule that where the usurious securities given for a loan have been abandoned a new promise to repay the principal with legal interest is valid, must be regarded as an application of the exception to the general doctrine, and seems to have been so treated in *Barnes v. Hedley*, 2 Taunt. 184; *Flight v. Reed*, 1 Hurlst. & C. 703, 32 L. J. Exch. N. S. 265, 9 Jur. N. S. 1016, 8 L. T. N. S. 638, 11 Week. Rep. 1019; *Kilbourn v. Bradley*, 3 Day, 356, 3 Am. Dec. 273; *Early v. Mahon*, 19 Johns. 147, 10 Am. Dec. 204; *Hammond v. Hopping*, 13 Wend. 505; *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 560.

These cases as to the sufficiency of the moral obligation to support a new promise in case the original promise is illegal are merely cited for the purpose of illustrating a particular application of the exception to the general doctrine that a moral obligation is not a sufficient consideration for a promise. It would not be feasible in this note to discuss the general question as to the ratification of illegal contracts, since that question involves matters other than those relating to the existence or nonexistence of a consideration.

#### 10. Past legal consideration.

##### (a) Generally.

The cases involving a moral obligation arise 53 L. R. A.

ing from what has been here termed a moral, as distinguished from a legal, benefit, having been cited in division I., and those involving a moral obligation springing from an imperfect legal obligation, under the foregoing headings in this division, it is the intention to consider under this heading the cases involving a moral obligation springing from a legal, as distinguished from a moral, benefit, which up to the time of the promise sought to be enforced has not formed the subject of a legal obligation, perfect or imperfect.

The general statement of the exception to the doctrine, made in the note to *Wennell v. Adney*, 3 Ros. & P. 247, and the other statements previously referred to, seem designed to cover moral obligations of the second class, though, as has been pointed out, it has not uniformly been applied to all cases within that class. Many of these statements, however, are so framed as not to include within the exception moral obligations of the third class, which, therefore, so far as these general statements are concerned, seem to be left under the general doctrine, but the cases do not, by any means, uniformly apply that doctrine to them.

It is often said that a past consideration will not, in the absence of a previous request, support a promise. Thus:

Where the servant of one person is arrested, and another person bailes him, and afterwards the master promises the latter, for his friendship, to save him harmless, it is not a good consideration; otherwise if the master had previously requested the bailing. *Hunt v. Bate*, 3 Dyer, 272.

A, in consideration that B has married his daughter at his request, promises to pay £20. This is a good consideration because the marriage ensued the request of the defendant. *Anonymous*, 3 Dyer, 272.

A mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if the courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. *Lampligh v. Brathwaite*, Hobart, 105.

This general statement as to the insufficiency of a past consideration is no doubt true where the past consideration consisted merely of detriment to the promisee without any benefit to the promisor (e. g. a promise to become surety for the repayment of a loan already made to a third person); and is also true where, though there was a benefit to the promisor, it was conferred under such circumstances as to raise no moral obligation on his part (e. g. where services or property are intended to be rendered or given gratuitously). So, also, it is undoubtedly true where, though there was a benefit to the promisor, that benefit has been exhausted by having already formed the consideration of a contract that has already been executed or may still be enforced (e. g. where one having sold a horse without a warranty subsequently warrants him).

When, however, the benefit, though not moved by a previous request, was legal, and not merely moral, was conferred under such circumstances as to create a moral obligation, and has not been exhausted by having formed the consideration of a previous executed or still enforceable promise, there is some authority, at least, for the proposition that a subsequent express promise is good.

A voluntary payment to a city of taxes illegally assessed does not constitute or confer a right of action to recover them back, but it does create a moral obligation on the part of the city

to repay them, and is a sufficient consideration to support a subsequent promise to do so. *State v. Butler*, 11 Lea, 418.

A past consideration beneficial to the promisor is a sufficient consideration to support a subsequent promise. *Parsons v. Robinson*, 27 Jones & S. 546, 15 N. Y. Supp. 138.

Where a person is under a legal obligation to pay money, and another pays it for him without request, the law raises an implied assumption to refund without any express promise on his part; but where he is not under any legal obligation, but receives the benefit of a payment made or labor done by another,—as if a person seeing the fence of my field decayed and out of kindness pay another to repair it, and I promise to reimburse him; or if he repairs it himself and I promise to pay him for his trouble,—here the express promise is good. *McMorris v. Herndon*, 2 Bail. L. 56, 21 Am. Dec. 515.

*Musser v. Ferguson Twp.* (1867) 55 Pa. 475, was an action of assumpsit by the plaintiff against a township to recover a bounty as a re-enlisted volunteer. The action was sought to be upheld upon the ground that, though the re-enlistment was in consideration of the benefits conferred by Congress, it was afterwards credited to the township which thereby received a benefit. It was held that the action would not lie, there not being any subsequent promise by the township; but it was intimated, if there had been a subsequent promise the action would lie. The court said: "A moral obligation has been held to be a sufficient consideration to support an express promise to pay, but is not a legal consideration from which the law itself will imply a promise."

A promise made by a town to pay a bounty to a person who had previously re-enlisted is valid where the re-enlistment is applicable to the quota of the town. *Seymour v. Marlboro*, 40 Vt. 171. The court said that the fact that the promise was made upon a past consideration did not affect its validity upon the facts. The consideration upon which it was made moved from the plaintiff, was meritorious and beneficial.

There is a moral or natural obligation to compensate one for the advantage derived from the use of his money and the past use of money is therefore a good consideration to support a promise to pay interest. *Garland v. Lockett*, 5 Mart. N. S. 40.

A note by a wife, given for labor and materials previously furnished at the request of the husband in building a barn upon land which was her separate estate, is invalid if the credit was originally given to the husband, since it would in that case fall within the rule of law that an executed and past consideration is not sufficient to support a subsequent promise; but if the husband contracted as the agent of the wife, and is her creditor, and the note was given with a knowledge of the facts, it would be a contract with reference to her separate estate, founded upon a sufficient consideration and binding upon her. *Morse v. Mason*, 103 Mass. 560.

In *Ferguson v. Harris*, 39 S. C. 323, 17 S. E. 782, it was sought to hold a married woman liable for lumber purchased by third persons, without previous authority from her, but upon her credit. The court said that when she accepted the lumber and allowed it to be used in the construction of the building she thereby assumed at least a moral obligation to pay for the same; and when by her express promise she agreed to pay she unquestionably became liable therefor.

In *Pillans v. Van Mierop*, 3 Burr. 1663, it was held that an agreement by defendants to accept bills of exchange for the credit of a third person was not a *nudum pactum*, although the only consideration was the previous honoring 53 L. R. A.

by the plaintiffs of a draft drawn upon them by such third person, who, to procure such acceptance, offered credit upon the defendants. It appears that the person on whose credit the last draft was drawn failed before the same had been drawn. Lord Mansfield remarked during the argument that a letter of credit may be given for money already advanced, as well as for money to be advanced in the future.

In *Suffield v. Bruce*, 2 Starkie, 175, Lord Ellenborough held that the receipt of an entire debt by a party who was entitled to only part of it was a sufficient moral consideration for a subsequent promise by him to indemnify the party against any claim by the person to whom part of the original sum was due.

(b) *Promise to repay one who voluntarily pays another's debt.*

So, the voluntary payment of another's debt without his request seems to be sufficient to support a subsequent express promise to reimburse the person making the payment, unless the payment was intended to be a gratuity.

It is well settled that money paid by one person for the use of another does not necessarily impose a liability upon the latter. Where, however, the consideration is beneficial to the party sought to be charged, and is actually adopted or taken advantage of by him, the person executing the consideration becomes the agent of the promisor by the adoption of his act by the latter. *Omnis ratihabito retrotrahitur et mandato aequiparatur*. *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162. In this case the plaintiff satisfied a judgment against the defendant, and it was claimed that the latter had subsequently promised to reimburse him. The court said that if the plaintiff satisfied the judgment gratuitously, the defendant would not become his debtor, and even an express promise subsequently made would not make her so, unless she derived benefit from the payment. A discharge from liability to satisfy a judgment under ordinary circumstances, if sanctioned and adopted by the defendant, would sustain a promise. The fact of ratification would warrant the implication of a previous request. The court denied relief to the plaintiff because she had not shown such a subsequent promise.

Where one does voluntarily, and without request, that which he is not compellable to do for another who is compelled to do it, as if one who is not surety or bound in any way pays a debt due from another, he has not the same claim and right as if he had been compelled to pay the debt; but if there be a subsequent promise to repay the money the law will imply a previous request, as, if there had been a previous request it would have implied a subsequent promise; but it will not imply both the promise and the request. *Bevan v. Tomlinson*, 25 Ind. 233.

The voluntary payment of another's debt does not of itself give the person paying the same a right of action against the debtor, but constitutes a sufficient consideration to uphold a subsequent agreement by the latter to repay the former, the subsequent promise being equivalent to a previous request. *Price v. Towsey*, 3 Litt. (Ky.) 423, 14 Am. Dec. 81.

*Doty v. Wilson*, 14 Johns. 378, held that where a judgment creditor had recovered the amount of the judgment from the sheriff because of the escape of the judgment debtor who had been taken on a *ca. sa.* the subsequent promise of the judgment debtor to reimburse the sheriff was supported by a sufficient consideration. The court said that there was, not only a moral obligation, but a real and substantial benefit resulting to the promisor from the payment.

The law, it is true, will not allow a party to



maintain an action for money paid to discharge the debt of another without his consent. But if the debtor assents to the payment the reason of the law falls; and whether consent be given before or after the payment is, as it seems to us, immaterial. *Gleason v. Dyke*, 22 Pick. 390. In this case the plaintiff, having purchased a mortgagor's equity of redemption at an execution sale and paid off the mortgage, which was then canceled, released to the mortgagor all rights acquired at the execution sale, upon the repayment to him of the amount paid by him on such sale. The mortgagor, subsequently, and without any new consideration, promised to repay him the amount he had paid to discharge the mortgage. It was held that the promise was good notwithstanding that the consideration was past, first, because the ratification of the payment was equivalent to a previous request to pay; and secondly, because, where a man is under a moral obligation to pay a debt, which cannot be enforced by a court of law or equity, yet, if he promises to pay, he will be bound.

In *Ingraham v. Gilbert*, 20 Barb. 152, the plaintiff had paid a debt due from the defendant to a third person. He did not seek to prove any previous express request, and, aside from the beneficial nature of the transaction, there was nothing from which a request could be implied; but he insisted that the defendant had made himself liable by his subsequent sanction and assumption of the payment and promise to repay. It appeared that there was no express, but at most an implied, promise, and the court, adopting the rule laid down in the note to *Winnall v. Adney*, 3 Bos. & P. 249, held that there was no consideration to support an implied promise. The court distinguished *Doty v. Wilson*, 14 Johns. 378, upon the ground that there the subsequent promise was express, and admitted that, if the promise in the case at bar had been express, the action could have been sustained, saying: "The reasons why a debtor is not liable to repay to another a debt which that other has voluntarily paid entirely fall when such debtor afterward agrees to the payment, and promises to remunerate him for what he has done."

A payment made by plaintiff for the benefit of, and in discharge of, a liability of defendant is a sufficient consideration for a subsequent promise to repay the amount so paid. *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. 450.

A payment by mistake of taxes on another's land is sufficient to support a subsequent promise by the owner to reimburse the person making the payment. The fact that the owner derived a benefit from the payment, coupled with his subsequent promise, is equivalent to a previous request. *Nixon v. Jenkins*, 1 Hilt. 318.

In *McMorris v. Herndon*, 2 Ball. L. 56, 21 Am. Dec. 515, it was held that where the plaintiff, as administrator, had paid debts which the decedent had incurred for the benefit of her children, in excess of the assets, a note by one of the children for his proportional share of the excess was good. The court in this case quotes with approval the remark of Lord Mansfield in *Hawkes v. Saunders*, 1 Cowp. 290, *supra*, to the effect that where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. The judge writing the opinion says: "I suppose the moral obligation spoken of must be what moralists call a perfect obligation—an obligation of justice, and not of benevolence or piety."

(c) *Promise to pay for past services.*

The authorities are not quite so clear as to 53 L. R. A.

the sufficiency of past services rendered, without a previous request, to support an express promise, but when proper distinctions are made the cases as a whole seem to warrant the statement that such a promise is supported by a sufficient consideration if the services were beneficial and were not intended to be gratuitous.

A benefit derived from unsolicited services creates a moral obligation, which is a sufficient consideration for an express assumption, but will not raise an implied promise. *Landis v. Royer*, 59 Pa. 95.

In *Viley v. Pettit*, 96 Ky. 578, 29 S. W. 438, the Kentucky supreme court, after holding that an agreement to pay for services of a real-estate agent in procuring a customer for property could not be implied from the fact that the owner availed himself of the service and consummated the trade, held that an action would lie upon a subsequent promise to pay for the services.

In *Goldsby v. Robertson*, 1 Blackf. 247, it was held that a special verdict finding that the defendant promised to pay the plaintiff for past work and labor, without showing any circumstances from which the court could presume that the defendant was under any obligation, either moral or legal, to make the promise, or that previously to the promise he was bound in conscience or in law to pay for the labor, is insufficient to support a judgment for plaintiff.

*Oakes v. Cushing*, 24 Me. 313, held that the fact, which would be presumed, that the labor on a vessel would increase the value of the security furnished by a lien thereon, would be a sufficient consideration for a subsequent promise in writing by the lienor to pay for the labor, if no other existed.

In *Drake v. Bell*, 26 Misc. 237, 55 N. Y. Supp. 945, a mechanic under contract to repair a vacant house, by mistake repaired the house next door which belonged to the defendant. The repairing was a benefit to the latter, and he agreed to pay a certain amount therefor. It was held that the promise rested upon a sufficient consideration. *Gaynor, J.*, says: "The rule seems to be that a subsequent promise founded on a former enforceable obligation, or on value previously had from the promisee, is binding."

An act done for the benefit of another without his request is deemed a voluntary act of courtesy for which no action can be sustained, unless after knowing of the service the person benefited promises to pay for it. *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442.

In *Greeves v. M'Allister*, 2 Binn. 592, it was held that the taking and surrendering by plaintiff of a person for whom he was bail, in consequence of which the defendant also surrendered such person in a suit in which he was bail, was a good consideration to support a promise by the defendant after the surrender to pay a portion of the expenses maintaining it, although there was no previous request on the part of the defendant.

The court in this case says in broad terms: "Though the service has been rendered prior to the promise, yet if the party be under either a legal or moral obligation to pay, the promise will bind him." The court further says that the inquiry whether the plaintiff intended to confer a benefit on the defendant was immaterial. *Cooper v. Martin*, 4 East, 76, is cited as a strong case in support of the action. The note to *Winnall v. Adney*, 3 Bos. & P. 249, though cited in the brief of counsel, is not referred to in the opinion.

The procuring by an uncle without compulsion of law or request of his nephew of a patent for land devised to the latter, lays the latter under a moral obligation which, though sufficient

or's own benefit, there remains no moral obligation to pay the debt which is sufficient to afford a consideration for a new promise upon which an action will lie. *Valentine v. Foster*, 1 Met. 520. The opinion in this case, without expressing any opinion whether there would be a sufficient consideration to support a new promise after a release given to enable an insolvent debtor to obtain his discharge under a general assignment, pointed out that in that case the release would be for the debtor's benefit, while in the present case it was for the creditor's benefit.

A debt discharged by the voluntary act of a creditor does not leave a moral obligation which is a sufficient consideration for a new promise. *Hale v. Rice*, 124 Mass. 292.

Where an original right of action is extinguished, not by the act of the law, but by the voluntary act of the parties, a new promise does not revive the original debt, and is without consideration. *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405.

Where a debt has been satisfied and extinguished by the voluntary act of the creditor upon a part payment, a new promise is not supported by a sufficient consideration. *Grant v. Porter*, 63 N. H. 229. The court distinguishes between a voluntary discharge and a discharge in bankruptcy.

There is no such moral obligation remaining after the discharge of a debtor by an accord and satisfaction as will support a subsequent promise to pay the balance remaining unpaid. *Stafford v. Bacon*, 1 Hill, 582, 37 Am. Dec. 366, 25 Wend. 384. In the report of this case in 25 Wend. 384, there is an opinion purporting to be by the court, per Nelson, Ch. J., which takes a directly opposite view from that here expressed; but it appears that the publication of that opinion as the opinion of the court was a mistake.

A new promise after the discharge of the debtor by the voluntary act of the creditor is invalid and without consideration. *Zoeblisch v. Von Minden*, 47 Hun, 213, Reversed on other grounds in 120 N. Y. 406, 24 N. E. 795.

A debt is voluntarily discharged by a composition among creditors, and it is wholly gone and leaves no obligation to pay, either legal or moral, which will support a new promise. *Lewis v. Simons*, 1 Handy (Ohio) 82.

A new promise after a voluntary release by the act of the parties is not founded on a sufficient consideration. *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 578.

The court refuses to follow *Willing v. Peters*, 12 Serg. & R. 177, *infra*, and says that that case was overruled in *Sneevly v. Read*, 9 Watts, 396.

A debt released upon an accord and satisfaction by a composition assented to by all the creditors is extinguished, and cannot form the consideration of a new promise. *Evans v. Bell*, 15 Lea, 509.

Of course, if a debt is once extinguished by the voluntary act of the party, it cannot be revived without a new consideration. It is otherwise where the remedy is lost, as by the bar of the statute of limitations, or a discharge in bankruptcy, leaving the debt itself unaffected. A moral obligation is not alone a sufficient consideration to sustain a promise. *Ibid.*

It will be observed that the denial of the application of the exception to this class of cases extends the general doctrine that a moral obligation will not support a promise beyond the point to which the cases cited in division I. carried it, and beyond the point up to which it can be asserted as a universal rule.

There are, however, a few decisions that uphold the validity of a new promise after a voluntary discharge by act of the parties.

In *McPherson v. Rees*, 2 Penr. & W. 521, Gibson, Ch. J., expressed the opinion that the 53 L. R. A.

morality which supports a promise after a discharge by operation of law rests on ground less secure in point of reason than when the discharge is by voluntary act of the creditor, and said a release in consideration of present embarrassment is necessarily on an implied condition in morals that advantage be not taken of it after the embarrassment has ceased.

In *Willing v. Peters*, 12 Serg. & R. 177, the court repudiated the distinction between a discharge by law and a discharge by the voluntary act of the creditor, holding that a promise by a debtor, after the execution by the creditor at the debtor's request of a voluntary release, to pay the balance of the debt, is founded on a sufficient consideration, and is binding.

In *Sneevly v. Read*, 9 Watts, 396, the court held that the arrest of a debtor upon a *capias ad satisfaciendum*, and a discharge from the arrest by the consent of the creditor, extinguish the judgment, and it is not a good consideration for a subsequent promise to pay. The court says that the case of *Willing v. Peters*, 12 Serg. & R. 182, went a great way, but not so far as the case before it, since here there was a satisfaction received in the imprisonment of the person of the defendant.

The moral obligation remaining after a voluntary release, under seal, of a debt is sufficient to support a new promise to pay the same. *Baeder v. Barton*, 11 W. N. C. 165.

The court relies on *Willing v. Peters*, 12 Serg. & R. 177, and distinguishes *Sneevly v. Read*, 9 Watts, 396, on the ground that there there was legal satisfaction by the arrest of the debtor, the court considering that after that the debt was extinguished, both legally and morally.

*Callahan v. Ackley*, 9 Phila. 99, however, held that a note given by a debtor immediately after his release by a deed of composition is without consideration.

*Jamison v. Ludlow*, 3 La. Ann. 492, holds that a new promise to pay the balance of a debt after a voluntary release of a portion thereof did not require a new pecuniary consideration, as there still subsists such a natural obligation on the part of the debtor, thus relieved by the mercy of the creditor, as would have estopped him from recovering back if he paid, or form a sufficient consideration for a new promise. The court expressed the opinion that the same rule that applies to a new promise after a discharge in bankruptcy applies to a voluntary release given upon a partial payment, citing *Willing v. Peters*, 12 Serg. & R. 177. *A fortiori*, where a release was induced by misrepresentation or fraud. In this case the fraud and the new promise were relied on as separate grounds.

*Re Merriman*, 44 Conn. 587, and *Higgins v. Dale*, 28 Minn. 120, 9 N. W. 583, hold that a new promise after a discharge by a composition in bankruptcy to which the creditor assented is sufficient to revive the debt; but these decisions are upon the ground that such a discharge is not the voluntary act of the creditor.

In *Trumbull v. Tilton*, 21 N. H. 128, the court recognized and stated the doctrine that the moral obligation remaining after a discharge of a debtor by operation of law is sufficient to support a new promise, and discussed some of the cases distinguishing between a discharge by operation of law and one by the voluntary act of the party, and intimated, without deciding the question, that the distinction was not sound.

*Stearns v. Tappin*, 5 Duer, 294, did not hold that the moral obligation remaining after a voluntary release of a debt is sufficient to support a new promise to pay, but conceded that point for the purpose of the argument, and held that the complaint should be dismissed in any case because it proceeded on the original debt, and not on the new promise.

#### 4. *New promise after majority.*

The well-established rule that a new promise by an infant after attaining majority needs no new consideration is an application of the exception.

In *Cockshott v. Bennett*, 2 T. R. 763, 1 Revised Rep. 617, in distinguishing the case before him, Ashhurst, J., said: "This is not like a security given by an infant which is only voidable, for that may be revived by a promise after he comes of age. In such case he is bound in equity and in conscience to discharge the debt, though the law would not compel him to do so, but he may waive the privilege of infancy, which the law gives him for the purpose of securing him against the impositions of designing persons. And if he choose to waive his privilege, the subsequent promise will operate upon the preceding consideration."

*Cooper v. Martin*, 4 East, 76, after holding that one who marries a widow who has children by her former husband is not bound to maintain them though they were maintained by her before her second marriage, further held that if the second husband maintained such children, it is a good consideration for a promise by them when they come of age to repay the expense of their maintenance,—especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made no application to chancery for an allowance out of the fund as he might have done. Lord Ellenborough, Ch. J., said: "Having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury."

The principle on which the law allows a party who has attained the age of twenty-one to give validity of contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound, and there is nothing in the liability on an account stated to take that out of the general principle. *Williams v. Moor*, 11 Mees. & W. 263, 2 Dowl. N. S. 993, 12 L. J. Exch. N. S. 253, 7 Jur. 817.

The expenditure by a stranger, without obligation, of his own funds for the benefit of an infant bereaved of parents in maintaining and educating her, is a sufficient consideration to support an express promise, made after she comes of age, to repay the amount so expended, where during the continuance of such expenditure and of her infancy, she became entitled to a great estate out of which no allowance for her maintenance or education was applied for or made; and if such expenditure was made at the request of her brother-in-law, and in consequence thereof he became liable for the amount, the existence of such liability on his part would be a sufficient consideration to support an express promise made by her after she became of age to indemnify him against any loss he might thereby sustain. *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 360.

These cases have been cited for the purpose of showing that the promises of this class rest upon a moral obligation in the broad sense of that term, and it is not intended to discuss the general question as to the validity of these promises.

Many of these cases do not expressly base the decision upholding the promise on the ground of a moral obligation coming within the exception to the general doctrine, but it is obvious

that the decision must rest on this ground.

#### 5. *New promise by party to negotiable paper.*

Another well-established rule that must be regarded as an application of the exception to the general doctrine is that which upholds the validity of a new promise by a party to negotiable paper after knowledge of laches discharging him from liability. The rule is not often expressly placed upon the ground of a moral obligation, but, treating the phrase "moral obligation" in the broad sense already referred to, this class of cases would come within the general doctrine were it not for the exception.

In the following case, it will be observed that the rule is expressly put on this ground.

A new promise by an assignor of a note, who has been discharged from liability, by failure to sue the maker, to pay the same, being founded on a moral obligation arising from his assignment of the notes for a valuable consideration, is legally obligatory upon him. *Mardis v. Tyler*, 10 B. Mon. 382.

#### 6. *New promise after judgment.*

Promises of this class have been held to come within the exception.

In *Turlington v. Slaughter*, 54 Ala. 195, *supra*, the court held that an express promise by a judgment creditor to repay to the judgment debtor the excess, if it should appear that the judgment was for too much, was supported by a sufficient consideration, upon the ground that the judgment creditor was under a moral obligation, either to abate the amount of the decree, or, if under mistake, it was paid to him, to refund the excessive payment; and that such moral obligation originated from a positive legal duty which he could have enforced before the decree was entered, and therefore the case came within the exception to the general doctrine.

Where plaintiff in foreclosure has failed to credit the defendant with certain payments, and has taken a decree for the entire amount, a subsequent promise by him to refund the excess is sufficient without any new consideration. *Doyle v. Reilly*, 18 Iowa, 108, 85 Am. Dec. 582.

A promise by a judgment creditor after recovery of the judgment to allow the judgment debtor the amount of certain payments which he had made, but which were not allowed for in taking the judgment, is supported by a sufficient consideration. *Cameron v. Fowler*, 5 Hill, 309. In this case the court said that there existed a clear legal, as well as equitable, obligation to apply the payments in extinguishment of the debt against the defendant before it passed into judgment; and, though afterwards the obligation became incapable of being enforced still it constituted a good consideration for the subsequent promise.

Where one pays a debt and takes a receipt therefor, but subsequently, through his omission to produce the receipt in his defense, a judgment is taken against him for the same debt, which he again pays, there is such a moral obligation on the part of the creditor to refund the money as will be a good consideration to support an assumpsit or express promise to pay it. *Bentley v. Morse*, 14 Johns. 468. The court said that the moral obligation was as strong as in the case of a debt barred by statute, or some positive rule of law.

The moral obligation of a county treasurer, after his account has been settled and after the settlement has been confirmed by a judgment binding on all parties, to pay a specified sum on account of errors discovered in the account, is a sufficient consideration to support a prom-

ise to do so. *Stebbins v. Crawford County*, 92 Pa. 280, 37 Am. Rep. 687.

### 7. New promise after discovery.

#### (a) Generally.

The doctrine of the principal case that the contract of a married woman, not with reference to her separate estate and where not especially allowed by statute, is void and will not support a new promise after the removal of her disability to contract, has the support of the greater number of decisions, though it has been attacked and repudiated by a number of courts of high standing. The contrary doctrine was asserted by an early English case, *Lee v. Muggeridge* (1813) 5 Taunt. 36, which has been frequently cited and discussed in the later cases, both by those for, and those against, the doctrine it asserts. In that case it was held that the moral obligation of a widow to repay money advanced at her request to her son-in-law on security of her bond was a sufficient consideration for her promise, after her husband's decease, to pay the same. The case, however, is somewhat weakened as an authority by the fact that each of the four judges who expressed his opinion stated broadly and unqualifiedly the doctrine, which, as has been seen, cannot be sustained to its full extent, that a mere moral obligation is sufficient to support a subsequent promise, and seemed to base the decision on that ground. It is significant in this connection that no reference was made to the note to *Wennall v. Adney* before referred to. The next English case in which the question arose was *Littlefield v. Shee*, 2 Barn. & Ald. 811. The declaration in that case stated that the plaintiff's testator had, at the request of the defendant, a married woman, supplied her with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, she promised to pay therefor after her husband's death. The court held that the declaration was not supported by the proof, and that a nonsuit was properly granted because the declaration in substance alleged that the amount was due from her, and the plaintiff failed in proof of that allegation, since it appears that the goods were supplied to her while her husband was living, so that the price constituted a debt from him. The court said that in *Lee v. Muggeridge* all the circumstances which showed that the money was, in conscience, due from the defendant, were correctly set forth in the declaration.

This decision seems on its face clearly distinguishable from *Lee v. Muggeridge*, 5 Taunt. 36, *supra*, upon the ground pointed out in *Goulding v. Davidson*, 26 N. Y. 607, *infra*, that the price of the goods, although they were furnished to the wife, originally constituted a debt from the husband. *Tenterden, Ch. J.*, however, remarked in this case: "The doctrine that a moral obligation is sufficient consideration for a subsequent promise is one which should be received with some limitation; and that remark was regarded by the court in *Eastwood v. Kenyon* (1840) 11 Ad. & El. 438, 3 Perry & D. 276, 4 Jur. 1081, *infra*, as amounting to a dissent from *Lee v. Muggeridge*."

A record which merely states that goods were supplied to a married woman, who after her husband's death promised to pay, is not sufficient. The debt was never owing from her, and if there was a moral obligation it should have been shown. *Meyer v. Haworth*, 8 Ad. & El. 467.

It will be observed that the foregoing opinion of *Lord Denman, Ch. J.*, does not expressly repudiate the doctrine that a mere moral obligation is a good consideration for a promise.

In *Eastwood v. Kenyon* it was held that an agreement by a husband with his wife's former guardian to pay a note given by the latter, the proceeds of which had been expended in improving the real estate of his ward before her marriage, was without consideration, notwithstanding that the wife, after attaining her majority and while sole, assented to the improvements and promised to pay the note, and the husband, in the right of his wife, had received all the benefit, and in consideration of the premises had promised to pay the note.

This case has been regarded as overruling *Lee v. Muggeridge*, and as establishing in England the doctrine adopted by the principal case. The opinion refers to the note in 3 Bos. & P. 249, and approves of the rule there laid down, "that an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action if the obligation on which it is founded never could have been enforced at law though not barred by any legal maxim or statutory provision." The court says that *Lee v. Muggeridge* is decidedly at variance with the doctrine of the note. If the reference here is to the assertion in that case of the broad doctrine that a moral obligation is a good consideration for a promise, the statement is undoubtedly true; but it is not so clear that the actual decision in that case is at variance with the note. Indeed, it is difficult to perceive why the consideration upon which a married woman's contract rests does not come within the definition here given of a consideration that may be revived. In subsequent cases the validity of the new promise has been denied upon the ground that the original promise was not merely voidable, as in the case of an infant's contract, but absolutely void; but there does not seem to be any suggestion of such a distinction in this statement of the rule. The doctrine of *Lee v. Muggeridge* is adopted, after a full discussion by *Goulding v. Davidson*, 26 N. Y. 604, in which the New York court of appeals held that where a married woman carrying on trade as an unmarried woman in her own name bought goods for her business on her own credit and responsibility and gave her notes for part of the price, her subsequent promise after her husband's death to pay the notes and the residue of the price of the goods had a sufficient support in the moral obligation founded upon the antecedent valuable consideration created for her own personal benefit.

*Littlefield v. Shee*, 2 Barn. & Ad. 811, as already shown, was distinguished upon the ground that the price of goods, although they were furnished to her, originally constituted a debt from the husband. *Emott, J.*, alluding to the distinction taken in some cases between obligations which are void and such as are only voidable, says that if the contract is wholly void it alone will not sustain a subsequent promise to fulfil it: but where there is, beyond or before the void security or agreement, a moral obligation or duty, arising from benefits received or otherwise, which would raise an implied promise, except for the disability to make a promise, which the law imposes, a promise made after the disability is removed can rest upon this benefit and duty as a sufficient consideration. He says that the statement in the note in *Wennall v. Adney*, 3 Bos. & P. 247, that, "if a contract between two persons be void and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has received a benefit from the contract," is strictly true as to a promise founded upon the contract alone; but the case of usuri-

ous loans which the borrower will be held to pay upon a subsequent promise shows that when, behind the void contract, there is a sufficient consideration, it will sustain a subsequent promise. Again, he says: "So, when the promisor was, at the time of the receipt of the benefit, under a mere disability to contract to make it good, arising from a rule or maxim of law, and although such a contract could neither be express nor implied at the time, yet a subsequent promise, after the disability is removed, will rest upon the original benefit, passing over any invalid contract or promise at the time." In two, at least, of the three opinions written in this case the new promise is regarded as coming within the rule as stated in the note to 3 Bos. & P. 249.

Nelson, Ch. J., in *Wilson v. Burr*, 25 Wend. 386, after holding that a *femme covert* who retains counsel in a divorce suit was not liable to him for his fees, said (*obiter*) that if a promise subsequent to divorce could be shown the defendant would be liable: that in that case the previous services for her benefit and at her request would constitute a moral obligation sufficient to uphold the promise made after the removal of the disability.

The Pennsylvania courts, also, have, in a number of cases, adopted the doctrine of Lee v. Muggeridge and Goulding v. Davidson.

Where a married woman with a considerable separate income of her own induces another to expend time and labor for her son by promising that she would pay therefor, her subsequent promise, after the dissolution of the marriage, to pay for the same, is supported by a consideration. *Hemphill v. McClimans*, 24 Pa. 367.

While it appears in this case that the defendant had a separate estate at the time of her marriage, it does not appear that the debt before the new promise was enforceable against such separate property in equity, and the court says that the plaintiff is bound to prove that her original contract was good for nothing, and that he trusted to her own justice.

The indebtedness of a married woman is a sufficient consideration to support a promise by a third person to pay it. *Leonard v. Duffin*, 94 Pa. 218.

The decision on this point was treated as a corollary of the proposition that the moral obligation is sufficient to support a promise by a married woman herself after discovery.

The moral obligation of a woman to pay notes given by a firm of which she is a member while covert is a sufficient consideration as to her for renewal notes given by the firm after her discovery. *Brooks v. Merchants' Nat. Bank*, 125 Pa. 394, 17 Atl. 418.

A promise by a married woman during coverture to secure the payment of loans made to her husband imposes a moral obligation upon her which is a sufficient consideration for a subsequent promise made after discovery. *Holden v. Banes* (1891) 140 Pa. 63, 21 Atl. 239.

The court, in *Brown v. Bennett*, 75 Pa. 420, held that a promise by a woman after discovery to ratify a contract for the sale of her real estate, made during coverture, was valid. The court, however, said that a naked ratification by a married woman after discovery would not avail, but that in the case at bar she received one of the instalments due upon the contract after the death of her husband, and that that was sufficient to support the promise, admitting a consideration to be necessary.

In *Trout v. McDonald*, 83 Pa. 144, the court held that a widow had, by receiving royalties, ratified the grant of a right to mine coal on her property made by her husband during his lifetime.

If the original debt for which a married woman gave a joint judgment note with her 53 L. R. A.

husband was her own, though unrecoverable by reason of her coverture, the moral obligation to pay is a sufficient consideration to support a ratification or recreation of it after coverture ceased. If the original debt was that of her husband, which she during coverture had contracted to pay out of her separate estate, this fact creates a moral obligation which is a sufficient consideration to support an agreement to revive the judgment entered upon the note. *Gelselbrecht v. Gelselbrecht*, 8 Pa. Super. Ct. 183.

The moral obligation resting upon a married woman to pay a judgment note which was originally void because of her coverture is sufficient to support a revival of the judgment by agreement after the removal of her liabilities by the married woman's act. *Lyons v. Burns*, 8 Pa. Co. Ct. 359.

The moral obligation of a married woman to pay a note made by herself and husband, though on its face the debt of the latter, is sufficient to support a new promise to do so after the death of her husband. *Ke Root*, 11 Lanc. L. Rev. 225.

*Lafitte v. Selogny*, 33 La. Ann. 659, and *Brownson v. Weeks*, 47 La. Ann. 1042, 17 So. 489, held that a wife may after the death of her husband ratify an act during his lifetime by which she bound herself and her property for his debt. These decisions are upon the ground that the nullity of the contract was not such as to make it absolutely nonexistent, but it simply remained during the marriage without effect.

The Mississippi high court of errors and appeals in *Franklin v. Beatty*, 27 Miss. 347, said: "The contract of a *femme covert* is void by the common law. But it is not void to all intents and purposes. It is neither *malum prohibitum* nor *malum in se*. It may be founded on a good and valid consideration entitling it, in all but its form, to the favorable consideration of a court of justice. In the form in which it stands it cannot be enforced, but the good and valuable consideration for which it was given creates a moral obligation which will support a new promise founded on it, made by her after she becomes a *femme sole*." Under the influence of the principle so stated the court upheld a mortgage executed by the husband and wife on her separate property to secure notes previously given by her. The decision, it will be observed, is not upon the ground that the notes were originally chargeable in equity against her separate property, since the joint deed of herself and her husband under the statute was necessary to charge her separate estate. The court relies for support of its proposition on *Lee v. Muggeridge*, 5 Taunt. 36.

This decision however, as pointed out by the court in *Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382, was virtually overruled in *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329, in which the supreme court of the same state reviewed at length the question whether a promise by a married woman could be revived by her subsequent promise after discovery without any new consideration, and finally decided the question in the negative. The question is discussed from the point of view of the moral obligation involved, and the court refuses to follow *Lee v. Muggeridge*, saying that that case had been practically overruled by subsequent cases. It is somewhat surprising that the opinion makes no reference whatever to *Franklin v. Beatty*, although the decision announced is directly opposed to the decision in that case. The position of the court seems to be summarized in the following, from the opinion: "The contract sought to be revived and enforced is void *ab initio*, void at the common law, and void as unauthorized by statute, nor is there resting upon the defendant any moral

or conscientious obligation to perform the original undertaking. A *feme covert* can acquire property under our laws only for cash, and the purchase of a steamboat on credit [the original obligation was incurred for such purchase] is so entirely contrary to the spirit of recent legislation for the protection of married women, and so clearly unauthorized by the enabling acts of the last few years, that such a transaction falls to commend itself to the favor of the courts, or to impose a claim upon the conscience of the party."

The following cases support the doctrine of the principal case.

An advance of money to the son of a married woman upon her promise to repay the same does not create such a moral obligation upon her as is sufficient to support her subsequent promise when sole to repay the same. *Watson v. Dunlap*, 2 Cranch, C. C. 14, Fed. Cas. No. 17,282.

In *Loyd v. Lee*, 1 Strange, 94, a married woman had given a promissory note and after her husband's death, in consideration of forbearance, promised to pay it, and, failing to do so, an action was brought against her; but it was held at  *nisi prius* that the note originally was not merely voidable but absolutely void, and that forbearance, where originally there is no cause of action, is no consideration to raise an assumption. The judge said it might have been otherwise if the contract was but voidable.

A contract made by a married woman which at the time it was made was void, imposing no personal liability either at law or in equity, will not support a subsequent promise after her disability to contract has been removed by statute or discovery. *Thompson v. Hudgins* (1890) 116 Ala. 93, 22 So. 632.

No mere moral duty disconnected from all legal or equitable charge upon the person or estate of a married woman will support her subsequent promise made after her disability to contract has been removed. *Ibid*.

An agreement by a wife before her divorce to pay her attorneys for procuring a divorce is void, and the services rendered in pursuance of the contract and a new promise after the divorce to pay the same cannot make it valid. *Putnam v. Tennyson*, 50 Ind. 458.

The contract of a married woman to repay money loaned to her is not voidable merely, but absolutely void, and incapable, without some new and valuable consideration, of having vitality or binding force given to it by promises to pay made by her after the death of her husband. *Maher v. Martin*, 48 Ind. 314.

*Thomas v. Passage*, 54 Ind. 106, after holding that a promise by a married woman to pay for medical treatment out of her separate estate was void and constituted no charge upon her separate estate, further held that a new promise by her after her husband's death to pay for such services was without consideration. The moral obligation in this case seems to have been very strong,—since the plaintiff refused to render his services upon the credit of the husband, as he was insolvent, and consented to render them only after the agreement of the wife to pay for the same out of her separate estate. The court said that if there ever was a cause in which the court would be justified in making a little law in order to uphold and enforce an invalid and void contract, in the interest of good conscience and fair dealing, the case at bar was one.

An agreement by a married woman to convey land is void, and cannot be ratified by her after her husband's death. Nothing short of a new valid and binding contract upon a new consideration can operate as a contract to deprive her of the interest in the land. *Long v. Brown*, 66 Ind. 160.

An executory contract by a married woman

to pay for services, which was void when made, cannot be ratified by her after discovery, and she cannot render herself liable for such service by a new promise made after she became a *feme sole* without a new consideration. *Davis v. Schmidt* (Ind. App.) 31 N. E. 840. In this case, however, there was no new contract.

In *Austin v. Davis*, 128 Ind. 472, 12 L. R. A. 120, 26 N. E. 890, it was held that a contract by a married woman to leave to an adopted child all her property at death, which is void because of her coverture, cannot be ratified after she becomes sole.

A void promise by a married woman to pay her husband's debts cannot be ratified by her after his death. *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539.

A pledge of stock by a married woman, as security for her husband, cannot be ratified by her after her husband's death. *Union Nat. Bank v. Hartwell*, 84 Ala. 379, 4 So. 158.

The moral obligation imposed by the contract of a married woman to pay her attorneys for procuring a divorce is not a sufficient consideration for a new promise after discovery. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780.

A promise by a married woman without a separate estate imposes no legal or equitable liability upon her, and is not sufficient to support a new promise after the death of her husband. *Condon v. Barr*, 49 N. J. L. 53, 6 Atl. 614.

This case recognizes the distinction between a contract enforceable in equity and one not so enforceable, and implies that the former will be sufficient to support a new promise.

A promise by a widow to pay a note executed by her during her coverture, the consideration of which was not for the benefit of her sole and separate estate, is a *nudum pactum*. *Wilcox v. Arnold*, 116 N. C. 708, 21 S. E. 434.

A promise by a woman after her husband's death to pay debts contracted during coverture, but for which she is bound neither in law nor in equity, are not supported by any sufficient consideration. *Felton v. Reid*, 52 N. C. (7 Jones, L.) 269.

A contract by a married woman during coverture is insufficient to support a subsequent promise by her after discovery, unless it was of such a character as to have subjected her separate estate to an equitable charge during coverture. *Long v. Rankin*, 108 N. C. 333, 12 S. E. 987.

In *Parker v. Cowan*, 1 Heisk. 518, the court held that a promise by a woman, after discovery, to pay a note given while covert, but in consideration of a debt due from her before marriage, was valid. The court, however, said that if she had been under no previous liability to pay the debt for which the note was given, her simple promise to pay would have created no liability as it would have been a promise to pay a contract void *ab initio*, and therefore not capable of ratification.

A promise by a married woman while living apart from her husband to pay for goods purchased by her on her own credit and used by her in her own support being wholly void in law and not enforceable in any way, a subsequent promise to pay after her discovery is without consideration. *Hayward v. Barker*, 52 Vt. 429, 36 Am. Rep. 762. The court says that the moral obligation spoken of in cases as being a sufficient consideration to maintain an express promise is always with reference to, and springing from, a transaction or a subject as to which the parties at the time have already made, or were capable of making, a contract that would not be void. *Glass v. Beach*, 5 Vt. 172, *supra*, 1 b. 5, is distinguished upon the ground that there there was a legal consideration for the promise, which was continuing, and

operative at the time the promise was made, and therefore it was not even a case of a past consideration. *Boothe v. Fitzpatrick*, 36 Vt. 681, *infra*, II. b. 10 (c), is distinguished upon the ground that in that case there was a subject-matter and competent parties for the making of a valid contract at the time the consideration was accruing, and that the express promise in that case was held to be equivalent to a previous request, and that was the only point materially to be held in order to maintain the transaction as a contract to promise upon a legal consideration. The moral elements had no function in the case. There was a contract made up entirely and exclusively of legal elements.

A promise by a woman, having no separate estate or property, to pay one for caring for her child is entirely void, and a new promise, after the removal of her disability to contract, is *nudum pactum*. *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251.

A contract of a married woman, being void, creates no debt, and, hence, furnishes no consideration where a subsequent promise was made during widowhood. *Kent v. Rand*, 64 N. H. 45, 5 Atl. 760.

In *Dixie v. Worthy*, 11 U. C. Q. B. 328, the court of Queen's bench of Upper Canada held that where a married woman procured one to indorse for her a bill of exchange in order that she might negotiate the same for her proper use and benefit upon her promise to indemnify him therefor, and, after her husband's death, renewed the promise, such new promise was without consideration, and would not support an action, though it was averred that the bill was negotiated for her own use. The court admitted that if *Lee v. Muggeridge* could be considered as good authority an action on the new promise would lie, but considered that decision to have been overruled by the later cases, namely, *Littlefield v. Shee*, 2 Barn. & Ad. 811; *Eastwood v. Kenyon*, 11 Ad. & El. 448, 3 Perry & D. 276; *Beaumont v. Reeve*, 8 Q. B. 483, 15 L. J. Q. B. N. S. 141, 10 Jur. 284. The court said that the foundation of the alleged moral obligation set out in the declaration was the assertion that the money obtained for the bill which the plaintiff indorsed and was obliged afterwards to pay came to the defendant's hands for her own use and benefit; but pointed out that no implied promise would arise in law for money advanced to a married woman under such circumstances, and no express promise would be binding, distinguishing between such a case and the case of a ratification of an infant's contract, upon the ground that her original promise was void, while the infant's original promise was only voidable.

A promise by a married woman, after she has been declared a *feme sole* by an act of the legislature, to pay a debt previously contracted by her while covert, is not enforceable where no new consideration or previous moral obligation is shown. *Waters v. Bean*, 15 Ga. 358. *Lumpkin, J.*, who delivered the opinion of the court, said that it had been held that where a married woman was under a moral obligation to pay a bond executed by her when covert; and she, after her husband's death, promised to pay it, her executor was liable on the subsequent promise (5 Taunt. 87); and while he did not indorse such doctrine in the present case there was no moral obligation shown. There is an intimation in the opinion that if the wife had had a separate estate at the time she gave the note in question, the decision might have been otherwise.

(b) *When original debt due from husband.*

The distinction suggested in *Goulding v. Davidson*, 26 N. Y. 604, between cases where the 63 L. R. A.

debt, although the consideration moved at the request of the wife, was nevertheless in legal effect originally the debt of the husband and not of the wife, and cases where the original debt, though not enforceable, was that of the wife, was applied in *Smith v. Allen* (1869) 1 Lans. 101, where it was held that a promise by a widow to pay a note given by her before the death of her husband, for goods purchased by her for family use, was unenforceable.

And the next case, although decided before *Goulding v. Davidson*, recognizes the same distinction.

A void promise by a married woman to pay for goods purchased by her during coverture is not sufficient to support a new promise to pay for the goods after a divorce from her husband. *Watkins v. Halstead*, 2 Sandf. 311. The opinion in this case says that if anyone was liable when the debt was contracted it was the husband, and that nothing appeared to exempt him from liability.

A promise by a wife after the death of her husband to pay a bill for medical attendance upon her and upon slaves who were her separate property is not founded on a good consideration. *Kennerly v. Martin*, 8 Mo. 698. In this case, the court does not expressly deny that a moral obligation is sufficient to support an express promise, but points out that in the present case there is no moral obligation on the wife to pay a debt contracted during her husband's lifetime, since it was his debt and not hers, and distinguished the case from *Lee v. Muggeridge* upon that ground.

A note by a widow for a store account charged to her husband before his death is without consideration. *Stockton Bros. v. Reed*, 65 Mo. App. 605. The court in this case says that there was not even a moral obligation, but lays down the rule as follows: "A moral obligation to pay money or perform a duty is a good consideration to do so where there was originally an obligation to pay the money or do the duty which was enforceable at law but for the interference of some rule of law."

(c) *When original promise binding in equity.*

It will be observed that many of the foregoing cases that hold, in general, against the validity of the new promise after discovery, like the principal case imply that the rule is otherwise when the original promise, though not enforceable at law, might have been charged in equity upon the wife's separate estate.

The following cases expressly so hold:

In *Vance v. Wells*, 8 Ala. 399, goods were furnished during coverture to a married woman on the faith of her separate estate, and she executed a note for them as surety of her husband. An express promise to pay, made after the death of her husband, was held valid upon the ground that the promise during coverture, though void at law, in equity created a charge on her separate estate, and the moral consideration originated from an obligation capable of enforcement in equity.

A contract of a married woman for professional services in obtaining a divorce may be enforced upon her express promise to pay after she becomes discover without any new or further consideration for the promise. *Vlser v. Bertrand*, 14 Ark. 267. The decision in this case is not upon the ground that a mere moral obligation is sufficient to support a promise; but it was held that while her promise to pay, made during coverture, was void at law, yet it was chargeable upon her separate estate in equity, and the court says: "If the agreement of a *feme covert* to contract is valid so as to be obligatory in equity, her promise after she becomes discover need not depend upon the moral

obligation, nor is the promise of one not under a liability aided by any moral obligation where there never was a precedent good consideration." It appears in this case that the wife had a separate estate.

A promise by a woman after the termination of her coverture to pay a debt for articles of comfort and support of the household for which her separate estate would have been liable under the statute then in force is supported by a sufficient consideration,—especially where she is granted a further indulgence in payment. *Doss v. Peterson*, 82 Ala. 253, 2 So. 644.

A married woman may contract debts and render her separate estate liable in equity for the payment; and if her separate estate is bound, she is under a moral and equitable obligation to pay the claim, which is a sufficient consideration for a subsequent promise to do so, made after her husband's abandonment of her. *Craft v. Rolland*, 37 Conn. 491. This was an action of assumpsit for provisions furnished wholly upon the wife's credit while the family were living on a farm bought with her money, she having other separate property.

A charge created by a married woman upon her separate estate, which may be enforced in equity, is a sufficient consideration to support her personal contract after she becomes a *feme sole*. *Cleland v. Low*, 32 Ga. 458.

*Hubbard v. Bugbee*, 55 Vt. 506, 45 Am. Rep. 639, was a demurrer to a declaration declaring upon a promise made by a widow to pay a note executed by her while married and alleged to have been given for money borrowed for the improvement of her separate real estate. The court held that the promise was supported by a sufficient consideration, if the facts alleged in the declaration were true, since her separate property would have been charged in equity with the note. The case came up before the court again in *Hubbard v. Bugbee* (1885) 58 Vt. 172, 2 Atl. 594, and it then appeared that the defendant had no separate estate when the note was given, and upon that state of facts the court held that the new promise was without consideration.

A promise by a married woman having a separate equitable estate to pay for goods needed in the family and sold to her upon the credit of such estate is sufficient to support a promise by her after discovery to pay the same. *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750, 9 Atl. 239.

#### 8. New promise, when original promise in violation of statute of frauds.

An agreement by one, to whom land has been conveyed upon an oral trust to sell the same and turn over the proceeds to the grantor, after selling the land and receiving the proceeds, to pay the same over to the grantor, is an admission that the money is held in trust, and the existence of the trust is a sufficient consideration to pay, and such promise will support an action, although without it the case would have been within the statute of frauds. *Harris v. Clark*, 94 Iowa, 327, 62 N. W. 854.

In *Farnham v. O'Brien*, 22 Me. 475, it was held that a promise by one who had orally agreed to lease a tavern stand, to reimburse the other party for expenses incurred in moving his goods in reliance on the agreement, was supported by a sufficient consideration, although the agreement to lease was within the statute of frauds; but intimated that there would be no consideration for a new lease.

One who verbally agrees to answer for the debt of another is in honor and conscience bound to perform the same, although his original agreement is unenforceable because within the statute of frauds; and such moral obligation, being §3 L. R. A.

founded on a pre-existing debt, constitutes a sufficient consideration for a subsequent promise to pay. *Rogers v. Stevenson*, 16 Minn. 68, 6 Gl. 56. The court in this case points out that the verbal contract was never illegal or void, and that the statute simply prescribes as a rule of evidence that oral proof of it cannot be received.

*Paul v. Stackhouse*, 38 Pa. 302, held that where defendant requested plaintiff to loan money to a third person promising to go security, and subsequently, but after the maturity of the note given by such third person, signed the same as surety, he was bound. The court took the position that the consideration for his signature, though past, was a continuing and valuable one, and his signature was a complete and full execution of the promise upon that consideration.

Where an original promise to pay for goods furnished to another is unenforceable because oral and therefore within the statute of frauds, a subsequent promise in writing to pay for the same is supported by a sufficient consideration. *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279. The court in this case recognizes the general rule that a moral obligation will not support a contract, but holds that the case is within the exception to the rule because the original promise could have been enforced but for the barrier erected by a positive statute, and because the statute of frauds affects, not the contract, but the evidence only.

In *Brown v. Latham*, 92 Ga. 280, 18 S. E. 421, where a father had conveyed land to his son upon the latter's agreement to reconvey it, it was held that even if the son was in a position to protect himself against reconveying to the father he could waive that protection, and his moral obligation to share the land with his sister in proportion to her interest as a coheir with himself was a sufficient consideration for his promise, after the father's death, to pay her her proportional part of the value of the land.

#### 9. New promise when original promise illegal.

Although a bill drawn by a prisoner of war in France upon a person resident in England in favor of an alien could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace to pay the principal and interest. *Duhammel v. Pickering*, 2 Starkie, 90. Lord Ellenborough said that undoubtedly the bill was void in its original concoction, but was not so far void that it could not constitute the basis of the promise by which the party may bind himself on the return of peace.

A promise subsequent to the war of the rebellion to pay an obligation, evidenced by a note executed during the war and which was invalid because one of the parties resided within the Confederate, and the other within the Federal military lines, having a moral obligation as its basis, can be enforced in a suit thereon. *Ledoux v. Buhler*, 21 Ia. Ann. 130.

A sale of liquors in violation of the liquor law does not furnish a consideration which will support a new promise to pay for the same after the repeal of the law. *Ludlow v. Hardy*, 38 Mich. 690.

This decision is put upon the ground that the sale had no legal vitality originally, and nothing has occurred since to breathe life into it, and, hence, it has never been sufficient to afford any consideration for a promise.

A contract to pay for medical services rendered by one not duly licensed to practise being void at the time it was made, there is no consideration to support a new promise to pay after the passage of a statute dispensing with the necessity of a license. *Puckett v. Alexander*, 102 N. C. 95, 3 L. R. A. 43, 8 S. E. 767.

The moral obligation to pay a note that is



invalid because made on Sunday is a sufficient consideration to support a new promise to pay the same made on a week day. *Tucker v. West*, 29 Ark. 386.

Where a contract, otherwise valid, is void by reason of having been made on Sunday, as where property is sold and delivered on that day on credit, a subsequent promise to pay for the goods, made any day other than Sunday, is valid, and an action can be maintained on such new promise. *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605. The court in this case said that the rule above stated was an exception to the general rule that a promise to pay for a past consideration for which there is not, and never has been, any legal liability on the part of the party promising it does not make a contract binding in law.

*Reeves v. Butcher*, 31 N. J. L. 224, while intimating that a subsequent promise to pay a note void because given on Sunday would support an action, holds that payment of interest on such note does not amount to a new promise.

The moral obligation resting upon one to repay or in some way account for money loaned to him on Sunday is a sufficient consideration to support an express promise to repay the money, although neither the loan itself, nor the note given therefor, is enforceable, because in violation of the Sunday law. *Gwinn v. Simes*, 61 Mo. 335.

If a note is made on Sunday, in violation of law, and therefore is illegal, a subsequent promise to pay it will not make it any less illegal. *Pope v. Linn*, 50 Me. 83. It is to be observed that in this case the point was not the want of consideration, but the illegality of the subsequent promise.

Where all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of the insolvent's effects by a deed of trust to which they are all parties, and one of them, before he executes, obtains from the insolvent a promissory note for the residue of the demand, by refusing to execute until such note is made, the note is void in law as a fraud on the rest of the creditors, and a subsequent promise to pay it is a promise without consideration which will not maintain an action. *Cockshott v. Bennett*, 2 T. R. 763, 1 Revised Rep. 617.

So, also, the rule that where the usurious securities given for a loan have been abandoned a new promise to repay the principal with legal interest is valid, must be regarded as an application of the exception to the general doctrine, and seems to have been so treated in *Barnes v. Hedley*, 2 Taunt. 184; *Flight v. Reed*, 1 Hurlst. & C. 703, 32 L. J. Exch. N. S. 265, 9 Jur. N. S. 1016, 8 L. T. N. S. 638, 11 Week. Rep. 1019; *Kilbourn v. Bradley*, 3 Day, 356, 3 Am. Dec. 273; *Early v. Mahon*, 19 Johns. 147, 10 Am. Dec. 204; *Hammond v. Hopping*, 13 Wend. 505; *Garvin v. Linton*, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569.

These cases as to the sufficiency of the moral obligation to support a new promise in case the original promise is illegal are merely cited for the purpose of illustrating a particular application of the exception to the general doctrine that a moral obligation is not a sufficient consideration for a promise. It would not be feasible in this note to discuss the general question as to the ratification of illegal contracts, since that question involves matters other than those relating to the existence or nonexistence of a consideration.

## 10. Past legal consideration.

### (a) Generally.

The cases involving a moral obligation arise 53 L. R. A.

ing from what has been here termed a moral, as distinguished from a legal, benefit, having been cited in division I., and those involving a moral obligation springing from an imperfect legal obligation, under the foregoing headings in this division, it is the intention to consider under this heading the cases involving a moral obligation springing from a legal, as distinguished from a moral, benefit, which up to the time of the promise sought to be enforced has not formed the subject of a legal obligation, perfect or imperfect.

The general statement of the exception to the doctrine, made in the note to *Wennall v. Adney*, 3 Ros. & P. 247, and the other statements previously referred to, seem designed to cover moral obligations of the second class, though, as has been pointed out, it has not uniformly been applied to all cases within that class. Many of these statements, however, are so framed as not to include within the exception moral obligations of the third class, which, therefore, so far as these general statements are concerned, seem to be left under the general doctrine, but the cases do not, by any means, uniformly apply that doctrine to them.

It is often said that a past consideration will not, in the absence of a previous request, support a promise. Thus:

Where the servant of one person is arrested, and another person bails him, and afterwards the master promises the latter, for his friendship, to save him harmless, it is not a good consideration; otherwise if the master had previously requested the bailing. *Hunt v. Bate*, 3 Dyer, 272.

A, in consideration that B has married his daughter at his request, promises to pay £20. This is a good consideration because the marriage ensued the request of the defendant. *Anonymous*, 3 Dyer, 272.

A mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if the courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. *Lampligh v. Brathwaite*, Hobart, 105.

This general statement as to the insufficiency of a past consideration is no doubt true where the past consideration consisted merely of detriment to the promisee without any benefit to the promisor (e. g. a promise to become surety for the repayment of a loan already made to a third person); and is also true where, though there was a benefit to the promisor, it was conferred under such circumstances as to raise no moral obligation on his part (e. g. where services or property are intended to be rendered or given gratuitously). So, also, it is undoubtedly true where, though there was a benefit to the promisor, that benefit has been exhausted by having already formed the consideration of a contract that has already been executed or may still be enforced (e. g. where one having sold a horse without a warranty subsequently warrants him).

When, however, the benefit, though not moved by a previous request, was legal, and not merely moral, was conferred under such circumstances as to create a moral obligation, and has not been exhausted by having formed the consideration of a previous executed or still enforceable promise, there is some authority, at least, for the proposition that a subsequent express promise is good.

A voluntary payment to a city of taxes illegally assessed does not constitute or confer a right of action to recover them back, but it does create a moral obligation on the part of the city

to repay them, and is a sufficient consideration to support a subsequent promise to do so. *State v. Butler*, 11 Lea, 418.

A past consideration beneficial to the promisor is a sufficient consideration to support a subsequent promise. *Parsons v. Robinson*, 27 Jones & S. 546, 15 N. Y. Supp. 138.

Where a person is under a legal obligation to pay money, and another pays it for him without request, the law raises an implied assumpsit to refund without any express promise on his part; but where he is not under any legal obligation, but receives the benefit of a payment made or labor done by another,—as if a person seeing the fence of my field decayed and out of kindness pay another to repair it, and I promise to reimburse him; or if he repairs it himself and I promise to pay him for his trouble,—here the express promise is good. *McMorris v. Herndon*, 2 Bail. L. 56, 21 Am. Dec. 515.

*Musser v. Ferguson Twp.* (1867) 55 Pa. 475, was an action of assumpsit by the plaintiff against a township to recover a bounty as a re-enlisted volunteer. The action was sought to be upheld upon the ground that, though the re-enlistment was in consideration of the benefits conferred by Congress, it was afterwards credited to the township which thereby received a benefit. It was held that the action would not lie, there not being any subsequent promise by the township; but it was intimated, if there had been a subsequent promise the action would lie. The court said: "A moral obligation has been held to be a sufficient consideration to support an express promise to pay, but is not a legal consideration from which the law itself will imply a promise."

A promise made by a town to pay a bounty to a person who had previously re-enlisted is valid where the re-enlistment is applicable to the quota of the town. *Seymour v. Mariboro*, 40 Vt. 171. The court said that the fact that the promise was made upon a past consideration did not affect its validity upon the facts. The consideration upon which it was made moved from the plaintiff, was meritorious and beneficial.

There is a moral or natural obligation to compensate one for the advantage derived from the use of his money and the past use of money is therefore a good consideration to support a promise to pay interest. *Garland v. Lockett*, 5 Mart. N. S. 40.

A note by a wife, given for labor and materials previously furnished at the request of the husband in building a barn upon land which was her separate estate, is invalid if the credit was originally given to the husband, since it would in that case fall within the rule of law that an executed and past consideration is not sufficient to support a subsequent promise; but if the husband contracted as the agent of the wife, and is her creditor, and the note was given with a knowledge of the facts, it would be a contract with reference to her separate estate, founded upon a sufficient consideration and binding upon her. *Morse v. Mason*, 103 Mass. 560.

In *Ferguson v. Harris*, 39 S. C. 323, 17 S. E. 782, it was sought to hold a married woman liable for lumber purchased by third persons, without previous authority from her, but upon her credit. The court said that when she accepted the lumber and allowed it to be used in the construction of the building she thereby assumed at least a moral obligation to pay for the same; and when by her express promise she agreed to pay she unquestionably became liable therefor.

In *Pillans v. Van Mierop*, 3 Burr. 1663, it was held that an agreement by defendants to accept bills of exchange for the credit of a third person was not a *nudum pactum*, although the only consideration was the previous honoring 53 L. R. A.

by the plaintiffs of a draft drawn upon them by such third person, who, to procure such acceptance, offered credit upon the defendants. It appears that the person on whose credit the last draft was drawn failed before the same had been drawn. Lord Mansfield remarked during the argument that a letter of credit may be given for money already advanced, as well as for money to be advanced in the future.

In *Suffield v. Bruce*, 2 Starkle, 175, Lord Ellenborough held that the receipt of an entire debt by a party who was entitled to only part of it was a sufficient moral consideration for a subsequent promise by him to indemnify the party against any claim by the person to whom part of the original sum was due.

(b) *Promise to repay one who voluntarily pays another's debt.*

So, the voluntary payment of another's debt without his request seems to be sufficient to support a subsequent express promise to reimburse the person making the payment, unless the payment was intended to be a gratuity.

It is well settled that money paid by one person for the use of another does not necessarily impose a liability upon the latter. Where, however, the consideration is beneficial to the party sought to be charged, and is actually adopted or taken advantage of by him, the person executing the consideration becomes the agent of the promisor by the adoption of his act by the latter. *Omnia ratihabito retrotrahitur et mandato aequiparatur*. *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162. In this case the plaintiff satisfied a judgment against the defendant, and it was claimed that the latter had subsequently promised to reimburse him. The court said that if the plaintiff satisfied the judgment gratuitously, the defendant would not become his debtor, and even an express promise subsequently made would not make her so, unless she derived benefit from the payment. A discharge from liability to satisfy a judgment under ordinary circumstances, if sanctioned and adopted by the defendant, would sustain a promise. The fact of ratification would warrant the implication of a previous request. The court denied relief to the plaintiff because she had not shown such a subsequent promise.

Where one does voluntarily, and without request, that which he is not compellable to do for another who is compelled to do it, as if one who is not surety or bound in any way pays a debt due from another, he has not the same claim and right as if he had been compelled to pay the debt; but if there be a subsequent promise to repay the money the law will imply a previous request, as, if there had been a previous request it would have implied a subsequent promise; but it will not imply both the promise and the request. *Bevan v. Tomlinson*, 25 Ind. 253.

The voluntary payment of another's debt does not of itself give the person paying the same a right of action against the debtor, but constitutes a sufficient consideration to uphold a subsequent agreement by the latter to repay the former, the subsequent promise being equivalent to a previous request. *Price v. Towsey*, 3 Litt. (Ky.) 423, 14 Am. Dec. 81.

*Doty v. Wilson*, 14 Johns. 378, held that where a judgment creditor had recovered the amount of the judgment from the sheriff because of the escape of the judgment debtor who had been taken on a *ca. sa.* the subsequent promise of the judgment debtor to reimburse the sheriff was supported by a sufficient consideration. The court said that there was, not only a moral obligation, but a real and substantial benefit resulting to the promisor from the payment.

The law, it is true, will not allow a party to

maintain an action for money paid to discharge the debt of another without his consent. But if the debtor assents to the payment the reason of the law falls; and whether consent be given before or after the payment is, as it seems to us, immaterial. *Gleason v. Dyke*, 22 Pick. 390. In this case the plaintiff, having purchased a mortgagor's equity of redemption at an execution sale and paid off the mortgage, which was then canceled, released to the mortgagor all rights acquired at the execution sale, upon the repayment to him of the amount paid by him on such sale. The mortgagor, subsequently, and without any new consideration, promised to repay him the amount he had paid to discharge the mortgage. It was held that the promise was good notwithstanding that the consideration was past, first, because the ratification of the payment was equivalent to a previous request to pay; and secondly, because, where a man is under a moral obligation to pay a debt, which cannot be enforced by a court of law or equity, yet, if he promises to pay, he will be bound.

In *Ingraham v. Gilbert*, 20 Barb. 152, the plaintiff had paid a debt due from the defendant to a third person. He did not seek to prove any previous express request, and, aside from the beneficial nature of the transaction, there was nothing from which a request could be implied; but he insisted that the defendant had made himself liable by his subsequent sanction and assumption of the payment and promise to repay. It appeared that there was no express, but at most an implied, promise, and the court, adopting the rule laid down in the note to *Wennall v. Adney*, 3 Bos. & P. 249, held that there was no consideration to support an implied promise. The court distinguished *Doty v. Wilson*, 14 Johns. 378, upon the ground that there the subsequent promise was express, and admitted that, if the promise in the case at bar had been express, the action could have been sustained, saying: "The reasons why a debtor is not liable to repay to another a debt which that other has voluntarily paid entirely fall when such debtor afterward agrees to the payment, and promises to remunerate him for what he has done."

A payment made by plaintiff for the benefit of, and in discharge of, a liability of defendant is a sufficient consideration for a subsequent promise to repay the amount so paid. *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. 450.

A payment by mistake of taxes on another's land is sufficient to support a subsequent promise by the owner to reimburse the person making the payment. The fact that the owner derived a benefit from the payment, coupled with his subsequent promise, is equivalent to a previous request. *Nixon v. Jenkins*, 1 Hilt. 318.

In *McMorris v. Herndon*, 2 Ball. L. 56, 21 Am. Dec. 515, it was held that where the plaintiff, as administrator, had paid debts which the decedent had incurred for the benefit of her children, in excess of the assets, a note by one of the children for his proportional share of the excess was good. The court in this case quotes with approval the remark of Lord Mansfield in *Hawkes v. Saunders*, 1 Cowp. 200, *supra*, to the effect that where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. The judge writing the opinion says: "I suppose the moral obligation spoken of must be what moralists call a perfect obligation—an obligation of justice, and not of benevolence or piety."

(c) *Promise to pay for past services.*

The authorities are not quite so clear as to 53 L. R. A.

the sufficiency of past services rendered, without a previous request, to support an express promise, but when proper distinctions are made the cases as a whole seem to warrant the statement that such a promise is supported by a sufficient consideration if the services were beneficial and were not intended to be gratuitous.

A benefit derived from unsolicited services creates a moral obligation, which is a sufficient consideration for an express assumption, but will not raise an implied promise. *Landis v. Royer*, 59 Pa. 95.

In *Viley v. Pettit*, 96 Ky. 578, 29 S. W. 438, the Kentucky supreme court, after holding that an agreement to pay for services of a real-estate agent in procuring a customer for property could not be implied from the fact that the owner availed himself of the service and consummated the trade, held that an action would lie upon a subsequent promise to pay for the services.

In *Goldsby v. Robertson*, 1 Blackf. 247, it was held that a special verdict finding that the defendant promised to pay the plaintiff for past work and labor, without showing any circumstances from which the court could presume that the defendant was under any obligation, either moral or legal, to make the promise, or that previously to the promise he was bound in conscience or in law to pay for the labor, is insufficient to support a judgment for plaintiff.

*Oakes v. Cushing*, 24 Me. 313, held that the fact, which would be presumed, that the labor on a vessel would increase the value of the security furnished by a lien thereon, would be a sufficient consideration for a subsequent promise in writing by the lienor to pay for the labor, if no other existed.

In *Drake v. Bell*, 26 Misc. 237, 55 N. Y. Supp. 945, a mechanic under contract to repair a vacant house, by mistake repaired the house next door which belonged to the defendant. The repairing was a benefit to the latter, and he agreed to pay a certain amount therefor. It was held that the promise rested upon a sufficient consideration. *Gaynor, J.*, says: "The rule seems to be that a subsequent promise founded on a former enforceable obligation, or on value previously had from the promisee, is binding."

An act done for the benefit of another without his request is deemed a voluntary act of courtesy for which no action can be sustained, unless after knowing of the service the person benefited promises to pay for it. *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442.

In *Greeves v. M'Allister*, 2 Binn. 592, it was held that the taking and surrendering by plaintiff of a person for whom he was bail, in consequence of which the defendant also surrendered such person in a suit in which he was bail, was a good consideration to support a promise by the defendant after the surrender to pay a portion of the expenses maintaining it, although there was no previous request on the part of the defendant.

The court in this case says in broad terms: "Though the service has been rendered prior to the promise, yet if the party be under either a legal or moral obligation to pay, the promise will bind him." The court further says that the inquiry whether the plaintiff intended to confer a benefit on the defendant was immaterial. *Cooper v. Martin*, 4 East, 76, is cited as a strong case in support of the action. The note to *Wennall v. Adney*, 3 Bos. & P. 249, though cited in the brief of counsel, is not referred to in the opinion.

The procuring by an uncle without compulsion of law or request of his nephew of a patent for land devised to the latter, lays the latter under a moral obligation which, though sufficient

as a consideration for an express promise, raises no promise by implication of law. *Turner v. Partridge*, 3 Penn. & W. 172.

If the consideration, even without request, moves directly from the plaintiff to the defendant, and inures directly to the defendant's benefit, the promise is binding though made upon a past consideration. *Boothe v. Fitzpatrick*, 36 Vt. 681. In this case the court held that a promise by the defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by the plaintiff was valid although there was no previous request. The court said that but for the promise the plaintiff could not recover for want of a request, but that the promise obviated that objection, it being equivalent to a previous request.

*Gray v. Hamill*, 82 Ga. 375, 6 L. R. A. 72, 10 S. E. 205, held that a promise by one partner after dissolution to allow the other partner a certain sum on account of the latter having been obliged, owing to the former's intemperance, to perform more than his due share of the labor, was within a Code provision expressly recognizing a strong moral obligation as a consideration for a contract.

In *Re Casey's Patents* [1892] 1 Ch. 104, 115, there was a question as to the effect, as an assignment, of a letter from the owner of certain patents agreeing, in consideration of his services, to give him one-third share of the patents. It was urged that the promise was in recognition of past services, and that past services are not a consideration for anything. *Bowen, L. J.*, said: "Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and if it was a service which was to be paid for, when you get, in a subsequent document, a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that, here, for past services there is ample justification for the promise to give the third share."

In *Townsend v. Hunt*, Cro. Car. 408, it was held that a promise to pay the residue of a legacy, in consideration of the plaintiff having previously, at the defendant's request, executed a general release, was supported by a sufficient consideration. The ground of the decision is that the release was made at the defendant's request, and that the defendant had the continuance of the benefit thereof. Referring to the case in 3 *Dyer*, 272, *supra*, the court said: "If the bail had been entered into at the master's request, and afterwards he had made the promise, it had been well enough."

Services gratuitously rendered will not support a subsequent promise by the parties thereby benefited to pay for the same. *Allen v. Bryson*, 67 Iowa, 591, 56 Am. Rep. 358, 25 N. W. 820. In this case, however, the court said that the services having been rendered gratuitously and with no expectation of being paid for, there was no obligation, legal or moral, to pay for them.

Some of the cases, while upholding the subsequent promise, do so upon the ground that from the subsequent promise, in connection with the beneficial nature of the services, the court will imply a previous request: thus:

A consideration wholly past and executed before a promise is made is not sufficient unless the consideration arose at the instance or request of the party promising; and that request

must have been expressly made or necessarily implied from the moral obligation. *Shaw v. Boyd*, 1 Stew. & P. (Ala.) 83.

Past services are a sufficient consideration to support a promise to pay for them. It is immaterial whether the promise be made before or after the services. A subsequent promise to pay implies that the services were rendered upon previous request. *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100; *Snyder v. Castor*, 4 Yeates, 353.

A promise to pay for past services implies that they were rendered upon a previous request, and such services are good consideration for the promise. *Silverthorn v. Wylie*, 96 Wis. 69, 71 N. W. 107.

It would seem that these cases regard the implication as one of law dispensing with the necessity of an actual previous request, and not one of fact, merely dispensing with the necessity of proving such a request in the first instance, but rebuttable by proof negating a request. The four cases next cited, however, seem to take the view that the implication is a rebuttable one.

A vote by the parish after the dissolution of the ministerial relation to pay the minister the expense of repairs made by him upon the parsonage, without the above request, is without consideration. *Greene v. First Parish*, 10 Pick. 500. The court said that, under the circumstances in the case, a request to make the repairs might have been inferred by a jury; but for the fact that the parish committee had actually refused to furnish repairs.

It is the general rule that a past consideration is not a valid foundation of a contract or promise, unless the act has been done at the request of the party benefited and of whom payment is claimed. *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 829. The promise in this case was to pay for services previously rendered in procuring a pardon for a convict. The court said that there was no direct evidence of any request to perform the services, but that the promise was competent evidence of a previous assent or agreement.

A promise made upon a past and executed consideration is in general not binding; but when the labor performed or the services rendered are beneficial to the promisor, and there is nothing in the evidence negating a request, a jury may, from the circumstances of the case, infer a request. *Wilson v. Edmonds*, 24 N. H. 517.

In *Ehle v. Judson*, 24 Wend. 97, it was held that where the plaintiff, having negotiated for the purchase of land for himself, and having procured an offer from the owner to sell for a certain amount but without having made any contract, consented to the defendant's becoming the purchaser on condition that the latter would give him a note for \$100 to pay him for his time and trouble in negotiating the purchase, the note was not supported by a sufficient consideration. The court said that services voluntarily rendered, though they may be beneficial to another, impose no legal obligation upon him, but the services must be rendered upon request. It was admitted that the request may be established by presumptive evidence, and that the beneficial nature of the services, though not enough when standing alone, may be very important in a chain of circumstances tending to establish the presumption. In the case at bar, however, it was said the services were not beneficial to the defendant, and, besides, they were not, and could not have been, rendered upon his request, as it appeared that the plaintiff, in negotiating for the purchase, was acting for himself, and not for the defendant.

The rule is now well settled that the past performance of services constitutes no consid-

eration, even for an express promise, unless they were performed at the express or implied request of the promisor, or unless they were done in performance of some duty or obligation resting upon him. *Dearborn v. Bowman*, 3 Met. 156. In this case a note was given by a candidate in payment of services previously rendered in promoting his election, and it appeared that they were not rendered at the request of the candidate, but at the request of the county committee.

This case is perhaps distinguishable upon the ground that since the services were rendered at the request of the committee, there was no moral obligation on the part of the defendant to pay therefor, though that distinction is not suggested by the case itself.

In *Shepherd v. Young*, 8 Gray, 152, 69 Am. Dec. 242, it was held that a promise by the administrator of a deceased grandchild to pay the grandmother out of assets in his hands a certain sum for supporting the deceased while the latter was destitute is a *nudum pactum*. This decision, however, is upon the ground that the board was furnished as a gratuity from motives of affection, without any expectation of remuneration.

Board and services furnished by one relative to another under circumstances in which the law would not imply an agreement to pay will not support a subsequent promise to pay therefor. *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364. This case, however, is unlike those in which an implied promise is denied because the services were rendered without a previous request. Here the implied promise is denied upon the theory that the mutual services of the parties offset one another, and upon this theory there could have been no expectation that the services were to be paid for otherwise.

It is not enough to show that a service has been rendered, and that it was beneficial to the parties sought to be charged, unless it was rendered at his express request or under such circumstances that the law would imply a request. A mere volunteer cannot make himself creditor of another. Even an express promise, subsequently made, and depending wholly on past consideration, would not be sufficient to create a legal liability. *Chamberlin v. Whitford*, 102 Mass. 448. This statement, however, so far as it concerns an express promise, is obiter.

In *Myers v. Dean*, 11 Misc. 368, 32 N. Y. Supp. 237, the court said: "An express promise to pay for past services rendered without a request is void for want of consideration;" and held that a promise to pay brokerage for services previously rendered without request was invalid. The cases cited in support of this proposition, however, afford but little support for it. In some of them the consideration claimed consisted merely of detriment to the promisee without benefit, present or past, to the promisor; and others merely held that the circumstances under which the services were rendered raised no implied promise to pay for them.

Labor or service voluntarily done and performed by the plaintiff for the defendant without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no ground of action. *Bartholomew v. Jackson*, 20 Johns. 28, 11 Am. Dec. 237. But there was no subsequent promise in this case.

In *Chilcott v. Trimble*, 13 Barb. 502, the plaintiff relied upon an express promise, after the services were performed, to pay for the board, etc., of an infant child of the defendant and the court denied relief on such promise upon the ground that a past and executed consideration is not sufficient to maintain an assumpsit unless moved by a present request.

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The court admitted that there were some cases, *e. g.*, *Doty v. Wilson*, 14 Johns. 378, and *Oatfield v. Waring*, 14 Johns. 188,—in which it has been held that an action can be maintained upon an express assumpsit founded on a past consideration beneficial to the party, and when he was under moral obligation to do what he promised. He says that the ground of the decision in *Doty v. Wilson* was that the benefit to the defendant, connected with his express promise to pay, must be deemed equivalent to a previous request, and that *Oatfield v. Waring* was decided upon the principle that a request may be implied from the beneficial nature of the services. The opinion says that these cases must be taken with some qualification. The exact point on which the case is distinguished is not indicated; but the court held that the circumstances under which the services were rendered did not raise an implied promise to pay for them, it appearing that the defendant was willing to take the child to his own house and support her; and that being so, it would seem that the circumstances raised no moral obligation to pay for them.

In *Monkman v. Shepherdson*, 11 Ad. & El. 411, it was held that where a contract of an employment provided if the servant should be drunk during service he should forfeit all wages then due, and the servant had incurred such a forfeiture, the past service prior to the forfeiture did not constitute a consideration for a new promise to pay for them.

The court in the case, however, took the view that even upon the principle that a moral obligation is a sufficient consideration for a promise, there was not even a moral obligation resting upon the employer in this case; and said: "The facts of this case not rendering it necessary to express any general opinion on the doctrine of moral consideration, we shall say no more than this,—that we agree with what fell from Lord Tenterden in *Littlefield v. Shee*, 2 Barn. & Ad. 811, that it is a doctrine to be received with some limitation. But whether the cases stand on a solid foundation or not, this is clear, that in all of them it is required, not merely that the debt should be in fact unpaid, but that there should be an obligation in conscience to pay it."

In *Pourtales Gorgier v. Morris*, 7 C. B. N. S. 588, 29 L. J. C. P. N. S. 208, 6 Jur. N. S. 706, the defendant had agreed that if the plaintiff would procure for him a concession of a grant of the right of constructing a railroad, a certain number of free shares of the company to be formed should be remitted to the plaintiff for his trouble and expense; application was accordingly made for the concession, but, as a result of a compromise, a joint concession was granted to the defendant and rival aspirants for the same; a written agreement was then entered into by which a specified number of shares was to be allotted to the plaintiff for the care and trouble he had had up to that time, and which he might yet have to make up the complete organization of the company. It was held that there was no consideration for the last promise because the past services of the plaintiff were not rendered for any payment or allotment of shares stipulated to be made in the event which happened of a joint concession to the defendant and his rivals, and, as for the anticipated future services, the mere expectation of them was not a valid consideration, and he did not contract, and was not under any obligation to render any.

(d.) *Promise to pay for improvements on property.*

There are a number of decisions denying the validity of subsequent promises to pay for im-

improvements placed on property without the request of the promisor; but it will be observed that some of these cases hold that there was no existing moral obligation under the circumstances to pay for the improvements at the time of the promise.

A verbal promise by a purchaser of public land to compensate a squatter for improvements made prior to the purchase and without the purchaser's consent is without consideration though the improvements were beneficial. *Shaw v. Boyd*, 1 Stew. & P. (Ala.) 83.

A note given by a purchaser of public lands to compensate one who prior to the purchase, but without the purchaser's request, had settled upon and improved land, is not supported by a consideration which will authorize its recovery. *Duncan v. Hall*, 9 Ala. 128. The court in this case said that, the improvements not having been made at the purchaser's request, there was no consideration, founded either in legal or moral duty, which would sustain the promise.

A promise by the purchaser of land from the government to pay for improvements previously placed thereon by the promisee without the promisor's request is without consideration. *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79. The court in this case said that if a debt is due in conscience a promise to pay will be binding, but that if there is any moral obligation on the part of anyone to compensate the promisee for the value of his improvements it is on the part of the government, and such moral obligation does not pass to the purchaser.

*Hutson v. Overturf*, 2 Ill. 170; *Roberts v. Garen*, 2 Ill. 396; and *Townsend v. Briggs*, 2 Ill. 472,—are to the same effect as *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79.

The decision and reasoning of this case were adopted by *McFarland v. Mathis*, 10 Ark. 560.

A subsequent promise by a purchaser of public land to pay for improvements previously placed thereon without his request, by a person without any claim of right, is a *nudum pactum*. *Boston v. Dodge*, 1 Blackf. 19, 12 Am. Dec. 205.

A promise by the purchaser of public land to pay for improvements previously placed thereon without his request is a *nudum pactum*. *Carr v. Allison*, 5 Blackf. 63.

An agreement to purchase an improvement on public land before the land is entered will support an action, but a promise made after the land is entered is void for want of consideration. *Weich v. Bryan*, 28 Mo. 30.

A promise by the owner of land to pay one for improvements that another had, without his knowledge or authority, previously made thereon is a *nudum pactum*, and unenforceable. *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356. *Spencer, J.*, said in this case that he would not undertake to discriminate between moral obligations that will, and those that will not, afford a sufficient consideration, because there was not in the present case the least moral obligation on the part of the owner to pay for the improvements, since the plaintiff had knowingly entered on land not his own without any authority from the owner, and without the semblance of right.

*Story, J.*, in discussing, in *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 143, Fed. Cas. No. 13,156, the power of the legislature to enact a retrospective statute providing for compensating bona fide claimants of land for improvements placed thereon by themselves or their predecessors, as a condition of dispossessing them at the suit of the true owner, said that no equitable right to compensate under such circumstances was recognized in the law, and that it had been deemed so far destructive to moral obligation that even an express promise to pay for improvements made by a person com-

ing in under a defective title has been held a nude pact; citing *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356.

A promise by lessors to pay for improvements made on property at the request of the lessee, but upon the supposed credit of the lessor, is without consideration where the lessor did not authorize or sanction the work. *Bailey v. Rutjes*, 86 N. C. 517.

If a tenant makes repairs on premises with the knowledge and assent of the landlord, it creates a moral obligation which is a sufficient consideration for a subsequent promise to pay for the same. *Cornell v. Vanartsdalen*, 4 Pa. 364.

A promise by a lessor of premises to pay for the repairs which the lessee had made pursuant to an agreement which was omitted from the written lease, that she should make such repairs and that the lessor would pay her for them, is supported by a sufficient consideration. *Seago v. Deane*, 4 Bing. 459. 1 Moore & P. 227, 3 Car. & P. 170. The position of the lessor in this case was that the previous agreement, having been omitted from the lease, was ineffectual, and that there was no consideration for the subsequent promise. The court characterized the position as inequitable and purely technical, and said that there was a moral obligation and a distinct promise, and that there are many cases which show that a moral obligation, accompanied by a distinct promise, is binding in law.

A promise to pay the cost of one half of a party wall is sufficient without any new consideration where the wall was built by the adjoining proprietor at the request of the promisor under an agreement which was so indefinite in its terms that it is doubtful whether it could be enforced. *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748.

#### c. Conclusion.

While it is impossible to reconcile all the cases herein cited, the general tendency of legal opinion seems to be to deny the validity of a promise whose only consideration is a moral benefit conferred upon the promisor; and to uphold the promise, if there was at any time a legal benefit conferred upon the promisor, or, in other words, if the promisor has received value, with the expectation on the part of the person conferring the benefit that he would render an equivalent therefor, and under such circumstances as to create a moral obligation upon his part to do so, although there was originally no enforceable legal liability, or, if so, such liability has been barred by operation of law. The latter part of the statement, however, is subject to the exception that when the legal benefit has already been exhausted by having formed the consideration for a previous promise, fully performed or still enforceable, a subsequent promise is invalid; and, as has already been shown, the greater number of decisions, if not the better reasoning, make another exception, viz., when the legal benefit, or value, was conferred upon the promisor in reliance upon his or her contemporaneous promise which was absolutely void, e. g., a new promise after discovery based on a void promise during coverture. If, as a general rule, the receipt of value by the promisor under circumstances creating no legal, but merely a moral, liability is sufficient to support a subsequent express promise, it is not apparent why the fact that a void promise has intervened should make any difference. It would seem that the void promise might be eliminated altogether, and the new promise rest upon the moral obligation arising from the promisor's receipt of value, and this is apparently the ground taken in *Goulding v. Davidson*, 26 N. Y. 604, *supra*, II. b. 7 (a).

G. H. P.

Robert N. JEWELL, *Appt.*,

*v.*

LOUISVILLE TRUST COMPANY, Admr.,  
etc., of C. P. Barnes, Deceased, *et al.*

(.....Ky.....)

No precatory trust is created by a clause, "I desire that my friend," naming him, "be retained in the employ of the firm on such liberal terms as his long and faithful service entitle him to," in a will of a merchant, which contemplates the continuance of the business by his widow and partner, so as to be enforceable against the widow after she has purchased the partner's interest and is carrying on the business alone.

(March 19, 1901.)

**A** PPEAL by complainant from a decree of the Chancery Division of the Jefferson County Circuit Court in favor of defendants in a suit to enforce an alleged trust. *Affirmed.*

The facts are stated in the opinion.

*Mr. E. E. McKay* for appellant.

*Mr. Burwell K. Marshall*, for appellees:

In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the deposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner.

27 Am. & Eng. Enc. Law, p. 40.

It was not the intention of C. P. Barnes to create a trust for the benefit of Robert N. Jewell, but there was nothing more than a mere recommendation on the part of C. P. Barnes in reference to the employment of Jewell.

*Shaw v. Lawless*, 5 Clark & F. 129; *Foster v. Elsley*, L. R. 19 Ch. Div. 518; *Finden v. Stephens*, 2 Phill. Ch. 142; 2 Lewin, Tr. Text Book Series, p. 805; 1 Perry, Tr. § 123.

**Hobson, J.**, delivered the opinion of the court:

Appellant, Robert M. Jewell, filed this suit against the appellees, the Louisville Trust Company, as the administrator with the will annexed, and S. S. Barnes, the residuary devisee, of C. P. Barnes, deceased. The court below sustained a demurrer to his petition, and, he failing to plead further, dismissed the action. The only question on the appeal is, therefore, Did the petition state a cause of action?

It was alleged in the petition that C. P. Barnes was at the time of his death, and had been for many years theretofore, engaged in business as a jeweler, with his

brother, J. B. Barnes, under the firm name of C. P. Barnes & Co.; that the business was a large one, and C. P. Barnes became a wealthy man; that in the year 1877, when appellant was a small boy, the deceased took him into his employ and treated him as if he had been his own son, often promising him an interest in the business; that appellant started with a small salary, which was increased from time to time until the death of the deceased, when he was receiving \$20 a week; that the deceased died, leaving a will which was duly admitted to probate, and by the seventh clause of the will the testator provided for him in the following language: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitle him to." It is also alleged that on February 23, 1895, within a month after the death of the testator, against his protest, his salary was cut down from \$20 to \$15 a week, and three years later, on February 26, 1898, to \$13.50 a week; that about two months after this, without fault on his part, he was discharged, against his protest, and had been unable to earn anything like \$20 a week from the time of his discharge to the filing of the suit; that appellees were running the store with great profit, and it was incumbent on them, under the will, to keep him in their employment at \$20 a week; that his wages for the time amounted to \$4,780, and he had only received \$3,045.70, leaving a balance due him of \$1,734.30; that C. P. Barnes was the owner of a larger interest in the firm than his brother, J. B. Barnes, and by his will gave to his brother enough of his holdings in the firm to make the brother and the testator's widow, appellee S. S. Barnes, equal partners in the business; that they continued the business under the same firm name from the death of the testator, on February 5, 1895, until May 19, 1897, when the brother, J. B. Barnes, sold out his interest in the firm to the widow, appellee S. S. Barnes; and that she has continued the business under the name of C. P. Barnes & Co. It will be observed that the brother, J. B. Barnes, is not sued. The suit is brought against the personal representative and the widow, as residuary devisee. It will be also observed that, although appellant's salary was cut down to \$15 soon after the testator's death, he continued with the firm and continued to accept the salary that was paid him; and things remained in this shape until after J. B. Barnes sold out, and appellee S. S. Barnes took charge of the business in her own right, after the dissolution of that firm, and the appellant continued to work for her and to accept the reduced salary from her until he was discharged by her something like a year afterwards.

It is insisted for appellant with great

**NOTE.**—For earlier authorities in this series as to precatory words in will to raise trust, see cases in notes to *Knox's Appeal* (Pa.) 6 L. R. A. 353; *Slattery v. Wason* (Mass.) 7 L. R. A. 393; *Powers v. Jeudevine* (Vt.) 7 L. R. A. 519; and *Bryan v. Milby* (Del.) 13 L. R. A. 563; 53 L. R. A.

also *Bills v. Bills* (Iowa) 8 L. R. A. 696; and *Orth v. Orth* (Ind.) 32 L. R. A. 298.

For gifts by will as affected by promises made to testator and by secret trusts, see note to *Gore v. Clarke* (S. C.) 20 L. R. A. 465.

earnestness that the will creates a precatory trust in his favor, and that he is entitled under the will to his wages at \$20 a week. The will does not fix the salary that appellant is to receive if retained in the employ of the firm, nor does it require that he shall be retained. The language imports no more than an expression of the testator's desire, and the clause was, no doubt, put in this shape so as not to embarrass the devisees in the management of their affairs. The will contemplated that the brother and wife of the testator, as a firm, would continue the business; and to this firm the testator expressed the desire that it would retain appellant in its employ on such liberal terms as his long and faithful service entitled him to. The amount of compensation is expressly left to the firm, and no desire is expressed as to anything that should be done after that firm went out of business. The suit here is not against that firm, and, if this action can be maintained, the clause in question will amount, in substance, to a charge of an annuity upon the widow, appellee, S. S. Barnes, in favor of appellant, unless she quits the business. The testator clearly intended no such result. In *Shaw v. Lawless*, 5 Clark & F. 129, the testator expressed his "particular desire" that the devisee, when he received the property, should continue L. "in the receipt and management thereof, and shall likewise employ and retain him in the receipt, agency, and management of the rents," at the usual fees allowed to agents, for this reason, as expressed in the will: "He having acted for me, since I became possessed of said estate, fully to my satisfaction." It was held that no precatory trust resulted. Among other things, the lord chancellor said: "All cases upon a subject like this must proceed on a consideration of what was the intention of the testator. Now, the first observation that strikes one with reference to that matter is that during the life of the testator Lawless was his agent. But then he was agent only during the testator's pleasure, and by the terms of the will the testator desired that he should continue in the agency. Is that desire to be considered a command? If so, for what length of time is he to continue? . . . If Lawless is the equitable encumbrancer to the amount of one-twentieth part of the income of the estate, he has a clear interest in the residue, for he might take one-twentieth part of the residue; he might file a bill in chancery in order to control the application of the residue, and claim to be absolutely invested in what he is entitled to receive, namely, this one-twentieth part." So, here, if the clause in question created a precatory trust, the appellant would have been entitled to maintain a bill in equity to protect his rights and prevent the firm from taking any steps that might imperil his annuity. Such a right might render the estate of the devisee materially less valuable, and make appellant, to no small extent, the real beneficiary under the will. The case above referred to was followed in *Foster v. Elsley*, L. R. 19 Ch. Div. 518, and *Finden v. Stephens*, 2 Phill. Ch. 142. See also 1 Perry, Tr. § 123. The firm composed of the widow and the brother were not required to continue the business. They might close it out at pleasure. If they had sold to a stranger, clearly no trust would have attached in favor of appellant to the assets in their hands received from the sale. When the brother sold to the widow, he was acquit of all responsibility. It was not the testator's purpose to create a permanent charge on the corpus of the estate in the hands of the devisees; and the widow after her purchase was under no obligation to keep appellant indefinitely in her service, regardless of the amount of business she did, or other circumstances affecting her interest.

*Judgment affirmed.*

MANHATTAN LIFE INSURANCE COMPANY, *Appt.*,

v.

Elder H. PATTERSON.

(.....Ky.....)

**A provision in an insurance policy for the issuance of a paid-up policy for such amount as the reserve will purchase "upon surrender of this policy within six months" after lapse for nonpayment of premiums does not make time of the essence of the contract, but, the consideration having been paid, the insured is entitled to the policy, although he does not apply therefor until nearly five years after making default.**

(January 17, 1901.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Harlan County in favor of plaintiff in an action brought to compel the delivery to plaintiff of a paid-up insurance policy according to the terms of his contract. *Affirmed.*

The facts are stated in the opinion.

**Mr. D. B. Logan**, with **Mr. Henry Burnett**, for appellant:

Where time is of the essence of the contract, the thing to be done must be done within the time stipulated, or the contract will be void.

1 Beach, *Modern Law of Contracts*, § 80; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789.

The right to paid-up insurance was coupled with a condition that appellee should apply for the same and surrender his policy within six months from the date of default in the payment of the premium. It was not an absolute right. The enforcement of such a condition is not a forfeiture.

Public policy, as well as precedents, de-

**NOTE.**—As to effect of delay in demanding and surrendering original policy on right to have a paid-up policy of life insurance, see *Mutual L. Ins. Co. v. Jarboe* (Ky.) 39 L. R. A. 504.

As to paid-up policies generally, see *Northwestern Mut. L. Ins. Co. v. Barbour* (Ky.) 15 L. R. A. 449, and *note*; also *Union Cent. L. Ins. Co. v. Buxer* (Ohio) 49 L. R. A. 737.



mands that contracts like this be upheld and enforced according to their terms.

*Heater v. United States L. Ins. Co.* 91 Ky. 356, 15 S. W. 863; *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 429, 15 L. R. A. 449, 17 S. W. 796; *Holly v. Metropolitan L. Ins. Co.* 105 N. Y. 437, 11 N. E. 507; *Atty. Gen. v. Continental L. Ins. Co.* 93 N. Y. 70; *Miles v. Connecticut Mut. L. Ins. Co.* 147 U. S. 177, 37 L. ed. 128, 13 Sup. Ct. Rep. 275; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807.

If it is expressly stipulated that the policy must be surrendered and receipted in full within a specified time after default in payment of the premium to entitle the insured to a paid-up policy, said provision must be complied with, and the option must be exercised within the time designated; otherwise it is lost, for time is of the essence of the contract.

2 *Joyce, Ins.* § 1185; *Hudson v. Knickerbocker L. Ins. Co.* 28 N. J. Eq. 167; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Universal L. Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532; *Smith v. National L. Ins. Co.* 103 Pa. 177, 49 Am. Rep. 121; *Universal L. Ins. Co. v. Whitehead*, 58 Miss. 226, 38 Am. Rep. 322; *Phoenix Mut. L. Ins. Co. v. Baker*, 95 Ill. 410; *Chase v. Phoenix Mut. L. Ins. Co.* 67 Me. 85.

*Mr. Thomas J. Bigstaff*, for appellee:

This case is ruled by *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 80, 39 L. R. A. 504, 42 S. W. 1097.

The premiums by expressed covenant paid for both current insurance and a paid-up policy, and now to deny the assured the benefit of a paid-up policy because the old one was not surrendered in time is in the strictest and most obnoxious sense a forfeiture.

*Southern Mut. L. Ins. Co. v. Montague*, 34 Ky. 653, 2 S. W. 443.

Appellant insurance company certainly cannot make a statute of limitations in such cases, and even if this were barred by our statute of limitation it would have to be pleaded unless the petition shows the non-existence of every ground of avoidance.

*Chiles v. Drake*, 2 Met. 146, 74 Am. Dec. 406; *Board v. Jolly*, 5 Bush, 86.

*Du Rolle, J.*, delivered the opinion of the court:

In November, 1887, the appellee obtained from appellant company a life policy for \$5,000 on the twenty-payment life plan. He paid five consecutive annual premiums, and, nearly five years after making default in the payment of the sixth premium, applied to the company for a nonparticipating paid-up policy for such sum as the legal net reserve on the policy at the time of lapsing would purchase as a single premium at the company's published rates. On the pleadings, judgment was rendered against the company. On this appeal, the cases of *Heater v. United States L. Ins. Co.* 91 Ky. 356, 15 S. W. 863, and *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 429, 15 L. R. A. 449, 17 S. W. 796, are relied on; although in the 53 L. R. A.

case of *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 80, 39 L. R. A. 506, 42 S. W. 1099, this court said, in an opinion by Judge Guffy: "To the extent, if any, that the principles announced in the decisions in *Northwestern Mut. L. Ins. Co. v. Barbour* and *Heater v. United States L. Ins. Co.* conflict with the doctrine announced in *Montgomery v. Phoenix Mut. L. Ins. Co.* 14 Bush, 51, they are overruled."

Appellant undertakes to show that the cases of *Heater* and *Barbour* were not in conflict with the *Montgomery* case, in 14 Bush, 51, and were distinguished from it in the opinions rendered in those cases; that in the *Jarboe* case it was expressly decided that the facts of that case brought it directly within the principles announced in the *Montgomery* case; that, therefore, it was not within the principles laid down in the *Heater* and *Barbour* cases, which had been distinguished from the *Montgomery* case, and, not being in conflict with the *Montgomery* case, have not been overruled at all, because they were overruled to the extent only that they were in conflict with it. Following counsel's logic out to its legitimate conclusion, the clause in the *Jarboe* opinion which overrules those two cases, in so far as they conflict with the *Montgomery* case, is absolutely without meaning, because there is nothing to which the language of the opinion can apply. In order to properly consider this argument, we must examine the provisions of the policies in the four cases referred to, in connection with those in the case at bar. Counsel concedes that "the rulings of this court on the question as to whether or not time is of the essence of a contract such as is involved in this appeal have not been apparently harmonious."

In the *Montgomery* case, in which a most carefully prepared and elaborate opinion was delivered by Judge Cofer, the policy was a ten-year endowment, and contained this provision: "It being understood and agreed that if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the nonpayment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years shall have been made, it will issue a policy for two tenths of the sum originally insured." It also contained a provision that, if the annual premiums were not paid on the dates fixed, "then in every such case the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified, and this policy shall cease and determine." At the time the last payment became due upon which any payment was made there was a partial payment in cash, and a note executed for the unpaid amount, which provided: "And it is hereby understood and

agreed that, if the amount of this note shall not be paid when due, the said policy shall be null and void." The note was not paid, no demand was made for its payment, no offer to return it or the last cash payment was made, no other premiums were paid, and the insured died without surrendering his policy, or demanding a new one, over three years after the execution of the note. It was held that the widow, who was the beneficiary under the policy, might recover five tenths of the amount of the policy, subject to deduction for the amount due upon the notes.

In the *Heater Case* the policy provided that, if the premiums should not be paid on or before the days mentioned for the payment thereof, "then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine; provided that if, after the receipt by this company of not less than two whole years' premiums, this policy should cease in consequence of the nonpayment of premiums, then upon the surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for a proportion of the premiums paid." More than two years' premiums were paid, and after the death of the insured, and nearly fifteen years after the last payment of premium, suit was brought for an amount proportionate to the premiums paid. In an opinion by Judge Bennett it was held that a recovery could not be had, stress being laid upon the provision that on default of payment the company "shall not be liable to the payment of the sum insured, or any part thereof," notwithstanding the fact that in the same sentence it was "provided that if after the receipt by this company of not less than two whole years' premiums this policy should cease in consequence of the nonpayment of premiums, then upon the surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for a proportion of the premiums paid." The opinion distinguishes the case then in hand from the *Montgomery Case*, and does not in express terms overrule the earlier case. But the argument of the opinion is exactly the reverse of the argument in the *Montgomery Case*, and it is quite difficult to discover any stable ground for distinguishing the facts in the one case from those of the other, except upon the ground that a delay of nearly fifteen years was unreasonable. That ground, however, does not appear to have been relied upon, and the opinion has, we think, been uniformly regarded as overruling the doctrine laid down in the *Montgomery Case*.

In *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 431, 15 L. R. A. 453, 17 S. W. 796, the policy was on the ten-payment life plan, and six and one half years' premiums were paid, and a note executed for the next premium falling due, which was never paid. An additional policy had been obtained, upon which two and one half years' premiums

were paid. About three years after default in payment suit was brought for a paid-up, nonparticipating policy. The policy provided: "The said company further promises and agrees that if, after two or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium or interest on the day it shall become due, it will issue a paid-up, nonparticipating policy for as many tenth parts of the original sum insured as there shall have been annual premiums so paid, provided this policy be then freed from all indebtedness to the company, and provided, also, that written application be made therefor, and this policy, and all interest therein, be surrendered in the lifetime of the insured, and within six months from the date of such default. . . . If the said premiums shall not be paid at or before the times above mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine. . . . In every case where this policy shall cease, or become null and void, all payments thereon shall be forfeited to the company, except as above provided, and, except that in case the person whose life is insured die by his own hand, the company shall return the premiums received, less dividends paid." In an opinion by Judge Holt, then chief justice, this case was decided in favor of the insurance company, upon the ground that time was of the essence of the contract, and that the policy did not, by its provisions, cease *pro tanto*, and a portion of the insurance remain in force, but the entire policy determined. This case also is distinguished in the opinion from the *Montgomery Case*, and the cases which followed its reasoning, of *Johnson v. Southern Mut. L. Ins. Co.* 79 Ky. 403; *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269, and *Southern Mut. L. Ins. Co. v. Montague*, 84 Ky. 653, 2 S. W. 443, and was decided upon the authority of the *Heater Case*. It is equally difficult to see any sound reason for distinguishing the provisions of this policy from the *Montgomery* policy, and this case has also been uniformly regarded as a departure from the principles announced in the *Montgomery Case*.

In considering all contracts, the effort of the court is, and should be, to ascertain the intention of the parties, who are, to that end, assumed to be persons of ordinary understanding. And it would be difficult, indeed, for a person of ordinary understanding to see a difference in the intent of the parties to the contract between a provision that upon default of payment of premiums the policy should cease and determine, and that if, after receipt of two premiums, the policy should cease in consequence, then upon a surrender, provided it is made within twelve months, a new policy should be issued (which is, in substance, the provision in the *Montgomery Case*); and a provision that if, after two annual premiums have been paid, default shall be made, the company will issue a paid-up policy for a proportionate part of the sum insured, provided the policy be surrendered within six months from the

date of default, coupled with a provision that, in case the policy shall cease, all payments shall be forfeited to the company, except as above provided (as in the *Barbour Case*); and a provision that, in case of default in payment of premiums, the company shall not be liable to the payment of the sum insured or any part thereof, and the policy shall cease and determine, provided that if, after payment of two years' premiums, the policy should cease, then upon surrender thereof, made within twelve months, a new policy should be issued (as in the *Heater Case*). A person of ordinary intelligence reading these three provisions, would, it seems to us, undoubtedly reach the conclusion that, except with reference to the time provided for, they meant the same thing, and that if time was not of the essence of the contract in the one case it was not so in the other.

In the case of *Holly v. Metropolitan L. Ins. Co.* 105 N. Y. 437, 11 N. E. 507, cited by appellant, it was said: "In cases where the meaning is not entirely plain, and where it is capable of two constructions, one involving a forfeiture and the other being fair and reasonable, and supporting the obligation of the policy against the insurer, that construction is preferred by the courts which does not involve the forfeiture, not only because it is not so harsh, but also because, if the language is doubtful, it is that employed by the insurer, and should be taken most strongly against him."

And so in the *Jarboe Case*, the twenty-year distribution policy provided, as shown by the record: "Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is hereby expressly waived. . . . If this policy shall become void by nonpayment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided." It further provides: "After three full annual payments have been made upon this policy the company will, upon the legal surrender thereof, before default in payment of any premiums, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years' premiums paid bears to the total number required. . . . No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy." After payment of three premiums default was made, and over four years after default suit was brought to compel the issuance of a paid-up policy in ac-

cordance with the provision quoted. It was held, in an opinion by Judge Guffy, quoting liberally from the opinion of Judge Cofer in the *Montgomery Case*, that the principles announced in that case applied to the case under consideration, "and we adhere to the doctrine announced in that decision." And while it was said in the opinion that the facts in the *Jarboe Case* were essentially different from the *Heater Case*, and that the *Barbour Case* was unlike the one in hand, nevertheless the doctrine of the *Montgomery Case* was expressly reaffirmed, and the *Heater* and *Barbour Cases* were expressly overruled, in so far as they conflicted with it. By the reaffirmance of the *Montgomery Case*, and the overruling of the decisions in the *Heater* and *Barbour Cases*, it was intended to decide that there had been a departure from the principles of the *Montgomery Case*, and that the court returned to its original doctrine.

When we come to consider the case at bar, we find a provision in the policy which, in our opinion, conveys to the ordinary mind the same meaning which is conveyed by the provisions in the *Montgomery* and *Jarboe Cases*: . . . If any premium or interest on any note given on account of a premium be not paid when due, or if the insured die in consequence of any violation of law, . . . this policy shall be void, and all payments made upon it shall be forfeited to the company, except after being in force three full years; . . . and, if it shall lapse or become forfeited for the nonpayment of any premium or interest on any note given on account of a premium, the company will, upon the surrender of this policy within six months after such lapse, issue a nonparticipating, paid-up policy for such sum as the legal net reserve on this policy at the time of lapsing will purchase as a single premium, at the company's present published rates." It is argued for appellant that this provision is not substantially different from the provisions referred to in the *Heater* and *Barbour Cases*. We concur in this view. But we are also of opinion that there is no substantial difference between the provisions construed in those cases and those in the *Montgomery* and *Jarboe Cases*. The right to continue the \$5,000 policy in force by the payment of premiums was gone. In that respect the policy had become void. The payments made upon it could not be recovered. They had been "forfeited to the company, except" that, as the policy had been in force three years, the right remained in the beneficiary to a paid-up policy for an amount proportionate to the net reserve upon the policy, which right, together with concurrent insurance in the full sum of \$5,000, had been paid for by the payment of the premiums. The policy was null and void, except for this remaining right. This right was absolute, and, while it is provided that the company would issue a paid-up policy "upon the surrender of its policy within six months after such lapse," the time was not of the essence of the contract. The whole consideration had gone.

There is no pretext appearing in the record that the performance of its contract for which it had received payment was more oppressive at the time it was demanded than if it had been demanded within the six months provided for. Some argument is made that the delay in making the demand imposed upon the company the burden of unnecessary bookkeeping. This we do not regard as sufficiently burdensome to justify retaining the purchase money and refusing to deliver the goods. As said in the *Montgomery Case*:

"The premiums, by express convention, paid for both current insurance and a paid-up policy, and now to deny to the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support in reason, justice, or authority, and cannot be sanctioned in a court of equity."

For the reasons given, the judgment is affirmed.

## CALIFORNIA SUPREME COURT.

### LA SOCIETA ITALIANA DI MUTUA BENEFICIENZA, *Appt.*,

v.

City and County of SAN FRANCISCO *et al.*, *Respts.*

(181 Cal. 169.)

1. Municipal authorities cannot grant to a private corporation land granted by the United States to the city in trust for "public uses," and which has been set apart by ordinance, ratified by the legislature, as a cemetery to be "absolutely dedicated as such," although the grantee intends to use it as such, and to bury there at its expense bodies of its members who, if not members of it, would be buried at the expense of the city.
2. That a private corporation to whom municipal authorities have granted land set apart for a public burying ground has entered into contract and bond to make improvements thereon, in accordance with which it has expended money, will give it no right to enjoin interference by the municipality with its enjoyment of the property, if the grant was made without authority.
3. The statutory duty of a health officer to issue burial permits upon certain conditions does not require the issuance of such permits to bury in a cemetery the use of which has been forbidden by the municipality.

(December 28, 1900.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in an action to enjoin interference with plaintiff's use of a burying ground. *Affirmed.*

The facts are stated in the opinion.

**Mr. James A. Devoto**, for appellant:

The resolution of the board of supervisors is a grant. Appellant having in good faith expended money in complying with the conditions imposed by the board, the contract which was existing between appellant and respondents could not be impaired by subsequent legislation.

**NOTE.**—As to reversion of title to land dedicated as a cemetery when its use for burial purposes is prohibited by the legislature, see, in this series, *Newark v. Watson* (N. J. L.) 24 L. R. A. 843. 53 L. R. A.

*Hovelman v. Kansas City Horse R. Co.* 79 Mo. 632.

The land set apart and designated as a cemetery was absolutely dedicated as such, and the board of supervisors had no right or authority to pass an ordinance having for its purpose the revocation of the same.

*San Francisco v. Canavan*, 42 Cal. 553.

The exercise of police powers must be reasonable, not with partiality or oppression.

*Dill. Mun. Corp.* §§ 319-322; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Ex parte Chin Yan*, 60 Cal. 82.

The courts have the right to inquire whether an ordinance is reasonable or unreasonable.

*Spring Valley Waterworks v. San Francisco*. 82 Cal. 289, 6 L. R. A. 756, 22 Pac. 910, 1046; *Ex parte Bohen*, 115 Cal. 374, 36 L. R. A. 618, 47 Pac. 55.

The board of supervisors could not legislate against plaintiff without first giving notice to it of said board's intention to legislate, and an opportunity to be heard.

Any municipal action interfering with rights of property, or deciding upon and determining the rights of others, is an exercise of judicial or quasi-judicial power.

*People v. Marin County Supers.* 10 Cal. 345; *Robinson v. Sacramento City & County Supers.* 16 Cal. 210; *People v. Goldtree*, 44 Cal. 323; *Tilden v. Sacramento County Supers.* 41 Cal. 68; *Colusa County v. De Jarnett*, 55 Cal. 373.

In the exercise of judicial power, notice and an opportunity to be heard are essential to its validity.

*Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Patten v. Green*, 13 Cal. 325; *Curtis v. Sacramento*, 64 Cal. 106, 28 Pac. 108.

The appellant has acquired certain rights under the resolution setting apart said lots to it, and the board is estopped from legislating in the direction complained of,—the annihilation of rights and privileges acquired by appellant with the approval and sanction of the board.

*Athens v. Georgia R. Co.* 72 Ga. 800; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L.

ed. 83, 6 Sup. Ct. Rep. 1094; Dill. Mun. Corp. § 444.

The privilege or license granted to appellant by reason of the improvements made and money expended is coupled with an interest, and cannot be revoked at will.

*Plickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 25 Pac. 268; *Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84; *Buck v. Foster*, 147 Ind. 530, 46 N. E. 920.

To permit a revocation under such circumstances, without placing the other party in *statu quo*, would be fraudulent and unconscionable.

*Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 744; *Foster v. Bear Valley Irrig. Co.* 65 Fed. 844; *Dickerson v. Oolgrove*, 100 U. S. 583, 25 L. ed. 620; *Sacramento County v. Southern Pac. Co.* 127 Cal. 217, 59 Pac. 568, 825; *Brown v. Atchison*, 39 Kan. 37, 17 Pac. 465.

*Messrs. Franklin K. Lane, Garret W. McEnerney, and William I. Brobeck*, for respondents:

If the city cemetery was duly dedicated to public use under the provisions of the acts of Congress, of the legislature, and of the board of supervisors, such lands became impressed with a public trust which could not be defeated by any attempted grant or conveyance of any portion of it, by either the legislature or the board of supervisors.

*San Francisco v. Itsell*, 80 Cal. 58, 22 Pac. 74; *Hoadley v. San Francisco*, 50 Cal. 275; *Savoy v. San Francisco*, 50 Cal. 375; *Hoadley v. San Francisco*, 70 Cal. 324, 12 Pac. 125, 124 U. S. 646, 31 L. ed. 557, 8 Sup. Ct. Rep. 659; *Home for Care of Inebriate v. San Francisco*, 119 Cal. 534, 51 Pac. 950; *California Academy of Sciences v. San Francisco*, 107 Cal. 334, 40 Pac. 426.

Plaintiff herein is a private corporation, with limited membership, and can in no respect be regarded as invested with the care of the public, or subject to public control.

*California Academy of Sciences v. San Francisco*, 107 Cal. 339, 40 Pac. 426; *Home for Care of Inebriate v. San Francisco*, 119 Cal. 534, 51 Pac. 950.

**Haynes, C.**, filed the following opinion:

Defendants' demurrer to plaintiff's complaint was sustained, and judgment thereon entered against the plaintiff, who appeals from said judgment. The other defendants are the mayor, the board of supervisors, the board of health, and the individuals composing said boards, and the health officer of the city and county of San Francisco; and the principal question involved is the validity of an ordinance of said city passed by the board of supervisors in June, 1897, and approved by the mayor, and which, with the preamble, is as follows: "Whereas, the burial of the dead within the city cemetery is dangerous to life and detrimental to public health, therefore the people of the city and county of San Francisco do ordain as follows: Burials within the City Cemetery Prohibited. Section 1. It shall be unlawful for any person, association, or corporation from and after the first day of January, 53 L. R. A.

1898, to bury or inter, or cause to be buried or interred, the dead body of any person in the city cemetery of the city and county of San Francisco." The second section declared a violation of this order to be a misdemeanor, punishable by a fine of not less than \$100 nor more than \$500, or by imprisonment not exceeding six months, or by both fine and imprisonment. The time when this ordinance should take effect was afterwards extended to March 1, 1898.

Briefly stated, the complaint alleges the following facts: That plaintiff is an incorporated benevolent society having for one of its purposes the maintenance and care of the sick who are members of the corporation; that since its incorporation, in the year 1867, a large number of deaths have occurred among its members; that of the members so dying a number, averaging about 25 per year, were poor, and their bodies, by reason of their membership or for other reasons, are cared for and buried by the plaintiff at its expense; that in January, 1879, the said city and county, being the owner of a tract of land designated on the official map of said city and county as the "Golden Gate Cemetery," adopted a resolution (No. 13,244, New Series), and thereby granted to the plaintiff blocks numbered 9 to 21, inclusive,—part of said Golden Gate cemetery,—for burial purposes, "on condition that plaintiff should construct and maintain such walls or fences, and make such improvements, as might thereafter be designated or required by said board of supervisors on and around the lot so granted as aforesaid;" that plaintiff accepted the said grant and said conditions; that by a subsequent resolution (No. 13,479), adopted in 1879, plaintiff was required to enter into an agreement whereby it undertook, in the sum of \$500, with two good and sufficient sureties, to perform all the requirements of said first-named resolution, and particularly to construct and maintain said walls or fences and to make such improvements as might be required by said board, and also that plaintiff should pay its *pro rata* assessment for the improvement of the avenues of said Golden Gate cemetery; that plaintiff has performed all of said conditions, and has used said land for said burial purposes, and has expended a large amount of money in making said improvements, aggregating not less than \$2,000; and that the Golden Gate cemetery is now known as the "City Cemetery," and is so designated in said ordinance. The prayer is for the annulment of said ordinance, that plaintiff's title be quieted, for an injunction, and other relief.

Appellant contends (1) that said resolution of the board of supervisors was a grant of said lands to the plaintiff; (2) that, even though it be not a grant, the plaintiff is entitled to the relief demanded; and (3) that said ordinance is in conflict with general laws.

Neither of these contentions can be sustained. The tract of land containing 209 acres, and designated originally as the "Golden Gate Cemetery," and afterwards known

as the "City Cemetery," included the lands here in controversy, and the whole tract of 200 acres is a portion of the land referred to in the act of Congress of March 8, 1866 (14 Stat. at L. 4). After the passage of this act, the supervisors passed an ordinance known as "Order 800," which was ratified by the legislature by an act approved March 27, 1868 (Stat. 1867-68, p. 379). By the first section of this ordinance, the board of supervisors were authorized and directed to devise and adopt a plan for the subdivision of the outside lands referred to in said act of Congress into blocks and lots, "and to select and set apart for public uses such lots and portions of said land as said board may deem necessary." The second section of said ordinance provided that after the adoption of the plan the board of supervisors should cause a map of the lands to be made according to this plan, "and upon said map shall be designated the lots and portions of land set apart for public uses, and the particular use for which each lot or portion of land shall have been set apart." Section 6 of said ordinance further provided that "the tract or portion of land set apart and designated thereon as a cemetery, and lots for a hospital, . . . shall be deemed absolutely dedicated as such." The alleged grant to the plaintiff was made by ordinance in 1879, and, though not set out in full in the complaint, it may be conceded that it was sufficient in form to vest in the plaintiff the rights and privileges contended for, but the board of supervisors had no power to make the grant.

That the city held said cemetery lands in trust for public uses as a cemetery cannot be questioned, and it is equally clear that the plaintiff is a private corporation, and that a grant to its use is not a grant to a public use, even though the corporation uses it only for burial purposes. The fact that some of its members are buried at the expense of the corporation, who, if they were not members of the corporation, would be buried at the expense of the city, does not affect the question. The grant and use, each, were for and to the corporation. The cases of *California Academy of Sciences v. San Francisco*, 107 Cal. 334, 40 Pac. 426, and *Home for Care of Inebriate v. San Francisco*, 119 Cal. 534, 51 Pac. 950, are in point, and conclusive of this case, unless appellant's second or third point makes those cases inapplicable.

Appellant's second contention is based upon the fact that a contract was entered into and a bond executed to secure the erection of walls or fences and other improvements on the lands described in the complaint. It is sufficient to say in reply that the board of supervisors had no power to devote the land to any other than public uses, and the plaintiff was bound to know that they had no such power. The city and county cannot be bound by the unauthorized acts of its agents. In *Hoadley v. San Francisco*, 50 Cal. 275, it was said of the property there in controversy: "It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed 53 L. R. A.

to private persons, and is effectually withdrawn from commerce; and, the city having no authority to convey the title, private persons are virtually precluded from acquiring it;" and private corporations are in the same category. The case above cited was approved in *Sawyer v. San Francisco*, 50 Cal. 375, and in *Hoadley v. San Francisco*, 70 Cal. 324, 12 Pac. 125, which was affirmed by the Supreme Court of the United States, upon writ of error, in 124 U. S. 646, 31 L. ed. 553, 8 Sup. Ct. Rep. 659. See also *San Francisco v. Itsell*, 80 Cal. 59, 22 Pac. 74.

Lastly, it is said that this ordinance is in conflict with general laws. It is alleged in the complaint that the board of health of said city, in December, 1897, passed an order providing that, in compliance with said ordinance, no burials should be permitted in said city cemetery from and after the time specified by the board of supervisors. Appellant's contention is not very clear, but as we understand counsel that, under § 3035 of the Political Code, the health officer must obtain a certificate of the cause of death, and that upon receiving it it is his duty to issue a permit for the interment. Undoubtedly that is true; but it does not follow that the health officer may grant a permit for interment in a place prohibited by the lawful authority of the city. The judgment appealed from should be affirmed.

We concur: **Smith, C.; Gray, C.**

**Per Curiam:**

For the reasons given in the foregoing opinion, *the judgment appealed from is affirmed.*

Petition for rehearing in banc denied.

NOLAN BROTHERS SHOE COMPANY,  
Respt.,  
v.  
W. H. NOLAN, Appt.  
(131 Cal. 271.)

1. Failure, for a period of ten years, of a retail dealer to protest against the use, in the wholesale business, of a tradename which conflicts with the name under which his business is conducted, will not deprive him of the right to restrain the use of such name in a rival retail business.
2. The use of a name under which to conduct business, for a period of twenty-two years or more, will establish a right to prevent the adoption of that name by a rival concern.
3. Abandonment of the tradename "N. Bros." is not shown by the fact that for a portion of the time during which the use

NOTE.—For other cases in this series as to right to use one's own name as tradename, though already in use by another person, see *Le Page Co. v. Russia Cement Co.* (C. C. App. 1st C.) 17 L. R. A. 354; *Knoedler v. Gaenger* (C. C. App. 2d C.) 20 L. R. A. 733; *Chas. S. Higgins Co. v. Higgins Soap Co.* (N. Y.) 27 L. R. A. 42; and *Bingham School v. Gray* (N. C.) 41 L. R. A. 243.

of the name is alleged the claimant used as a trademark the name "N. & Sons," where during none of the time was the name as claimed absent from the place of business.

4. The acquisition of a right to a tradename is not prevented by the use of the word "company" before incorporation, as being a fraud upon the public.
5. No right exists to use upon the sign of a retail store the words "successor to" a firm which carried on a wholesale business, but which discontinued without a successor.
6. The use of a family name as a tradename by another member of the same family may be prevented by one who has by long use acquired a right to it, if the new use clearly indicates an intent to mislead and deceive the public.

(December 31, 1900.)

**A**PPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of complainant in a suit to enjoin the alleged wrongful use of a tradename. *Affirmed.*

The facts are stated in the opinion.

**Messrs. W. S. Goodfellow and James L. Robison** for appellant.

**Messrs. C. W. Lynch and F. G. Drury**, with **Mr. James F. Smith**, for respondent:

A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of its use. Abandonment in the nature of a forfeiture must be strictly proved.

*Browne, Trademarks*, § 681; *Julian v. Julian Hoosier Drill Co. Price & Steuart*, *Am. Trademark Cas.* 572, 573; *Block v. Standard Distilling & Distributing Co.* 95 *Fed.* 979.

A trademark or tradename may be part of the goodwill of a firm. When a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of the old place of business by them under the old name, the goodwill remains with the latter as of course.

*Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 *Wis.* 546, *sub nom.* *Fish Bros. Wagon Co. v. Fish*, 16 L. R. A. 453, 52 N. W. 595; *Caswell v. Hazard*, 121 N. Y. 495, 24 N. E. 707; *Story, Partn.* § 100; *Frazer v. Frazer Lubricator Co.* 121 *Ill.* 147, 13 N. E. 639; *Barber v. Connecticut Mut. L. Ins. Co.* 15 *Fed.* 317; *Merry v. Hoopes*, 111 N. Y. 420, 18 N. E. 714; *Banks v. Gibson*, *Cox Manual of Trademark Cases*, 248; *Leather Cloth Co. v. American Leather Cloth Co.* 4 *De G. J. & S.* 137, 11 *H. L. Cas.* 534; *Sebastian, Trademarks*, p. 226; *Feder v. Benkert*, 18 *C. C. A.* 549, 4 *U. S. App.* 99, 70 *Fed.* 612; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Sohier v. Johnson*, 111 *Mass.* 242; *Meriden Britannia Co. v. Parker*, 39 *Conn.* 450, 12 *Am. Rep.* 406.

The intentional use of another's trademark is a fraud, and when the excuse is that the owner permitted such use that excuse is disposed of by affirmative action to put a stop to it.

*Menendez v. Holt*, 128 U. S. 525, 32 L. ed. 53 L. R. A.

529, 9 *Sup. Ct. Rep.* 143; *McLean v. Fleming*, 96 U. S. 253, 24 L. ed. 831.

Where it is clear, upon the facts, that one having a like name makes use of it as a trademark for the purpose of imposing his own articles upon purchasers for another article which has become known and well established, then it is alike an imposition upon the public and an attempt to secure for himself, by this dishonest means, what rightfully belongs to another; and where that is clearly shown to have been the object for which he is using the name as a trademark, he will be restrained thereafter from so using it.

*Stonebraker v. Stonebraker*, 33 *Md.* 268; *Holloway v. Holloway*, 13 *Beav.* 209; *Croft v. Day*, 7 *Beav.* 84; *Rodgers v. Nowill*, 5 *C. B.* 109; *England v. New York Pub. Co.* 8 *Daly*, 375; *Metzler v. Wood*, L. R. 8 *Ch. Div.* 606; *Fullwood v. Fullwood*, L. R. 9 *Ch. Div.* 176; *Levy v. Walker*, L. R. 10 *Ch. Div.* 436; *Massam v. Thorley's Cattle Food Co.* L. R. 14 *Ch. Div.* 748; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Devlin v. Devlin*, 69 N. Y. 212, 25 *Am. Rep.* 173; *Filkins v. Blackman*, 13 *Blatchf.* 440, *Fed. Cas. No.* 4786; *Shaver v. Shaver*, 54 *Iowa*, 208, 37 *Am. Rep.* 194, 6 *N. W.* 188; *Churton v. Douglas, Johns. V. C. (Eng.)* 174; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 *Fed.* 459; *Enoch Morgan's Sons' Co. v. Schwachofer*, 5 *Abb. N. C.* 265.

A man has not a right to use his own name in a business, if the intention is to injure another or impose upon the public.

*Croft v. Day*, 7 *Beav.* 84; *Sykes v. Sykes*, 3 *Barn. & C.* 541; *Burgess v. Burgess*, 17 *Eng. L. & Eq.* 257; *Holloway v. Holloway*, 13 *Beav.* 209; *Clark v. Clark*, 25 *Barb.* 79; *Howe v. Howe Mach. Co.* 50 *Barb.* 236; *Schweitzer v. Atkins*, 37 *L. J. Ch. N. S.* 847; *Meneely v. Meneely*, 62 N. Y. 427, 20 *Am. Rep.* 489; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990; *Pierce v. Guittard*, 68 *Cal.* 68, 8 *Pac.* 645; *Partridge v. Menck*, *How. Cas.* 558; *Phalon v. Wright*, 5 *Phila.* 464; *Kinny, Trademarks*, chap. 10; *Delaware & H. Canal Co. v. Clark*, 13 *Wall.* 311, 20 L. ed. 581; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490.

**Garoutte, J.**, delivered the opinion of the court:

Two brothers by the name of Nolan were engaged for ten years in carrying on a wholesale shoe business in the city of San Francisco under the name of "Nolan Bros." One brother sold his interest in the business to the other, and that brother (W. H. Nolan) shortly thereafter closed out the wholesale business, and opened up a retail shoe business at another point in the city, under the name of "W. H. Nolan & Co., successor to Nolan Bros." A third brother, P. F. Nolan, had been engaged in the retail shoe business in the city of San Francisco for twenty-two years, some of this time in company with J. C. Nolan, a brother, and some of the time joined with one or more of his sons. In the year 1895, and shortly after

the defendant W. H. Nolan had launched his retail shoe business upon the world, P. F. Nolan changed his business into a corporation under the name of "Nolan Bros. Shoe Company," and thereupon that company brought this action to restrain defendant in the conduct of his business from using the tradename "Nolan Bros." The action is based upon the claim that such use is an infringement upon the rights of plaintiff to the use of the name "Nolan Bros."

It is asserted upon the part of defendant that plaintiff allowed him to use the name "Nolan Bros." in the conduct of his shoe business for a period of ten years without objection, and that it is now too late to attack his right to its use. Whatever legal effect this long term of use might have as against plaintiff's claims, if defendant had been engaged in the retail shoe business, we will not decide; for during that period of time defendant was only engaged in the wholesale shoe business, and for that reason no occasion or necessity arose for plaintiff to make any objection. The use of the name by the defendant did not interfere with plaintiff's business, and hence it was an immaterial matter to him. Plaintiff was not injured by the use of the name, and therefore was not concerned in the use. If defendant had been using the name "Nolan Bros." for these ten years in the conduct of the plumbing business, plaintiff surely could not have objected. It does not appear from the showing here made that defendant's wholesale shoe business interfered with plaintiff's retail shoe business to any degree; and without a showing of injury plaintiff had no right, under these circumstances, to object to defendant's use of the name, any more than if the defendant had been engaged in the plumbing business. The mere use of a tradename in one business does not give a party a right to its use in any other business. We therefore attach no importance to the use of the name "Nolan Bros." by defendant for ten years without objection upon the part of plaintiff, and we hold that the case stands exactly as if defendant engaged in the retail shoe business, never having been in the wholesale business.

Upon the foregoing assumption, has plaintiff such an interest in the name "Nolan Bros." as to be entitled to an order restraining defendant from making use of it? And this depends upon whether or not plaintiff's predecessor in interest had established a right to the use of the tradename "Nolan Bros." in the retail shoe business when defendant started his retail shoe business. We will not give the evidence in great detail upon this question. While to some extent it may be said to be conflicting, yet we deem it ample to support the restraining order made by the trial court to the effect that the defendant's use of the name was an interference with plaintiff's rights. Plaintiff's predecessor in interest had been carrying on the retail shoe business in the city of San Francisco twenty-two years or more, and in a great many ways, and certainly for a great portion of that time, was doing business

under the name of "Nolan Bros." The evidence before us of abandonment of the name by plaintiff's predecessor in interest does not establish the fact. The fact that the name "Nolan & Sons" was used as a trademark for a certain period of time by plaintiff's predecessor in interest is but a circumstance, and not at all sufficient of itself, to prove an abandonment. "A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of user. Abandonment in the nature of a forfeiture must be strictly proved." Browne, Trademarks, § 681. In *Julian v. Julian Hoosier Drill Co.*, Price & Steuart, Am. Trademark Cas. 572, 573, it is said: "Abandonment means general abandonment to the public, and must be shown affirmatively and positively as affecting the interests of the public." At no time during the period of twenty-two years was the name "Nolan Bros." absent from the place of business. For fourteen years continuously prior to the commencement of this action four metallic signs, in conspicuous places upon the front of the store, bore the tradename "Nolan Bros.;" for thirteen years immediately prior to the commencement of the action within the doorway of the store a large glass sign carried over its front the words "Nolan Bros.;" for the same length of time a large sign bearing the words "Nolan Bros.," so that all could see it, was visible from the office door; and for the past two years prior to the commencement of this action it is conclusively established by the affidavits that the business was in all substantial respects carried on under the name of Nolan Bros. The fact that other tradenames may have been used by the plaintiff for a short period of time in connection with the one here involved cannot neutralize the effect of the evidence quoted. Our conclusion is that this evidence greatly lacks in showing an abandonment of the right of plaintiff to use the name "Nolan Bros." *Coleman, B. & W. Co. v. Dannenberg Co.* 103 Ga. 784, 41 L. R. A. 470, 30 S. E. 639, is cited to support the contention that P. F. Nolan could not, by using the name, "Nolan Bros. Shoe Co." two years before incorporation, acquire any right to the use of the name "Nolan Bros." It is claimed upon this point that the use of tags by P. F. Nolan, conspicuously indicating and representing that the business conducted by him was owned and conducted by a corporation, was a fraud on the public, by which he could not acquire any right. On examination, we find the case cited fails to support the contention, while *Block v. Standard Distilling & Distributing Co.* 95 Fed. 978, is the other way.

It is next claimed "that defendant had the absolute right to use a sign indicating that he was the successor to Nolan Bros., 10-12 Sutter street, that being the fact." What we have already said is opposed to this contention. The wholesale business carried on by defendant and his brother in another portion of the city is not the same business now carried on by defendant. The latter



is a separate, distinct, and different business, and the statement upon the sign that he (defendant) is a successor of the business formerly conducted under the name of Nolan Bros., 10-12 Sutter Street, is not correct. No one succeeded to that business, and it had no successor. The business became extinct, and the sign does not express the facts.

It is insisted that "the family name of a tradesman or manufacturer cannot be made a trademark so as to exclude the right to its use by another bearing the same family name." This contention is sound to a limited extent only. If the name is used in a manner clearly indicating an intent to mislead and deceive the public, then the use of the name will be restrained by a court of equity. The first answer to appellant's contention in this regard is found in the fact that it is not a use of the family name "Nolan," standing alone, to which objection is made, but it is a use of the name "Nolan Bros.," and in a case like that at bar the principle of law invoked seems to have no application. Furthermore, it is shown by the affidavits "that the said defendant established a retail boot and shoe business at Nos. 1022 and 1024 Market street, . . . and over such store placed a large sign containing the words and figures following, to wit, 'W. H. Nolan & Co., Successors to Nolan Bros., 10-12 Sutter Street.' That the words 'W. H. Nolan & Co., Successors to,' and the words and figures '10-12 Sutter Street,' are in such small and inconspicuous letters and

figures that the same cannot be read at a distance of more than 75 feet or 100 feet, while the words 'Nolan Bros.' are in such large and conspicuous letters, and so prominently displayed, that the same may be readily seen and read for a distance of nearly 300 feet thereof." It is also stated in the affidavits of various parties that said sign is a deceptive sign, and is calculated to deceive the public, and lead the public, the dealers and buyers of boots and shoes and footwear, and the patrons and customers of plaintiff, to believe that the plaintiff is conducting a retail boot and shoe store, and a branch place of business, at Nos. 1022 and 1024 Market street. It is further shown that almost daily, ever since the establishment of said store by said defendant at Nos. 1022 and 1024 Market street, the salesmen of plaintiff have encountered many of the buyers of boots and shoes and the customers and patrons of plaintiff, who have purchased shoes at the store of defendant under the impression and belief that they were dealing with the plaintiff. Under the foregoing facts appellant's contention upon the proposition that he has here advanced is undermined. *England v. New York Pub. Co.* 8 Daly, 375.

The remaining propositions advanced by appellant are not considered meritorious.

For the foregoing reasons, the order is affirmed.

We concur: **Van Dyke, J.; Harrison, J.**

### COLORADO SUPREME COURT.

*Re Estate of Samuel SHELL, Deceased.*

(.....Colo.....)

1. Upon the question of the procurement of a will by undue influence, evidence is not admissible that, some sixteen years before it was executed, propo-  
nent entered testator's family, brought about an estrangement between him and his wife, which resulted in a divorce, and subsequently married him,—especially when it is not connected with evidence tending to prove that undue influence existed and was exercised at or near the time the will was made.
2. A will in favor of a second wife to the exclusion of children of the first one was not unnatural, although one of the children was a cripple from infancy,—especially where testator had already made provision for such children.
3. In the absence of any evidence to sustain a charge of undue influence, made for the purpose of overthrowing a will, the court may direct a verdict in favor of propo-  
nent.
4. Undue influence resulting in a

favorable will cannot be inferred alone from motive or opportunity, but there must also be some testimony, either direct or circumstantial, to show that undue influence not only existed, but that it was exercised with respect to the making of the will itself.

(December 17, 1900.)

**A** PPEAL by contestants from a judgment of the District Court for Arapahoe County affirming a judgment of the County Court admitting to probate a paper purporting to be the will of Samuel Shell, deceased. *Affirmed.*

The facts are stated in the opinion.

**Messrs. George W. Miller and Daniel Sayer** for appellants.

**Messrs. Rising & Marshall**, for appellee:

As the only important inquiry is concerning the pressure of undue influence at the very time of the will, the testimony to show facts of an inferential nature must be confined to what would be legitimately regarded as his then present relations.

*Pierce v. Pierce*, 38 Mich. 412; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61; *Re Langford*, 108 Cal. 608, 48 Pac. 701.

Before contestants should be permitted to give in evidence any fact relating to their condition, for the purpose of showing that the will was unnatural, they should give in

**NOTE.**—For cases in this series as to fraud and undue influence to avoid will, see *Elkinton v. Brick* (N. J.) 1 L. R. A. 161, and *note*; *Kerr v. Lunsford* (W. Va.) 2 L. R. A. 668, and *note*; *Middleditch v. Williams* (N. J.) 4 L. R. A. 738, and *note*; *Davis v. Strange* (Va.) 8 L. R. A. 261, and *note*; and *Sheehan v. Kearney* (Miss.) 35 L. R. A. 102.  
53 L. R. A.

evidence some facts which controverted, or tended to controvert, the facts set up in the will showing its naturalness and reasonableness; and they should also give in evidence some facts showing or tending to show undue influence at some time sufficiently near to the time when the will was made to make such facts competent evidence.

*Re Langford*, 108 Cal. 608, 48 Pac. 701; *Cauffman v. Long*, 82 Pa. 77; *Herster v. Herster*, 116 Pa. 612, 11 Atl. 410.

**Campbell**, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of the district court of Arapahoe county in proceedings on appeal from the county court in which the will of Samuel Shell, deceased, was admitted to probate. Objection to the probate was upon the ground of the mental incapacity of the testator, and undue influence over him exercised by his wife, the proponent and executrix of the will. On full hearing the instrument was adjudged valid in both courts. No question is raised in the briefs as to testator's mental capacity, and under the evidence no reasonable charge of that kind could be sustained. That feature of the case is therefore eliminated. A careful reading of the evidence preserved in the bill of exceptions satisfies us that there is no legitimate testimony by a competent witness, other than that given by Mrs. Chandler, upon which, by the utmost stretch of the imagination, an argument can be based to sustain the charge of undue influence; and, when her testimony is subjected to sound rules of evidence, it will be found that it is lacking in essential elements. It is true that some of the contestants (those directly interested in the will) were produced, and an attempt (which was thwarted by the ruling of the court) made to elicit testimony of this sort; but such testimony, even if admitted, was incompetent, under our statute, and not worthy of serious consideration, even if the ban of the statute did not exclude it. Strictly speaking, "fraud" and "undue influence" are not synonymous expressions. Undue influence is, in one sense, a species of fraud; and while there are sometimes, perhaps usually, present elements of fraud, undue influence may exist without any positive fraud being shown. Opposing counsel do not differ as to what constitutes undue influence, or the rule governing the admission of evidence to sustain it; and it is only respecting the character and admissibility of evidence introduced and rejected, and the application of the law to the facts, that they disagree. In the case of *Clough v. Clough*, 10 Colo. App. 443, 51 Pac. 513, although the requirements of the decision may not have called for the announcement, yet the statement of the rule found in the opinion governing the admission of evidence upon such an issue is substantially correct. The court says: "A charge of undue influence is substantially that of fraud, and it can seldom be shown by direct and positive evidence. While it

is true that it must be proved, and not presumed, yet it can be, and most generally is, proved by evidence of facts and circumstances which, as to themselves, may admit of little dispute, but which are calculated to establish it, and from which it may reasonably and naturally be inferred." And it was also said that a court "should be liberal in admitting evidence of all circumstances, even though slight, which might tend, in conjunction with other circumstances, to throw light upon the relation of the parties, and upon the disputed question of undue influence." Applying this test, we are of opinion that the rulings of the district court in rejecting testimony offered by contestants were clearly right. The witness Mrs. Chandler at one time was a member of the family of the testator. He was divorced from his first wife, by whom he had a family of ten children. He died December 16, 1897. The will was executed June 26, 1891. The attempt was made to show that while testator was living with his first wife the proponent entered the family circle, and as a result of her machinations an estrangement took place between the husband and first wife, which afterwards led to the divorce, and later to the marriage of proponent and testator. As near as we can ascertain from the meager abstract, the time to which this occurrence relates was about the year 1874 or 1875, and it would seem that the second marriage took place in 1880, or perhaps later. While it is unwise to lay down any hard and fast rule respecting the time to which this class of testimony must relate, we are of opinion that, under the facts of this case, these circumstances were entirely too remote to be brought within the category of evidence tending to establish undue influence. Cases very much in point upon this proposition are *Pierce v. Pierce*, 38 Mich. 412; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61; *Re Langford*, 108 Cal. 608, 41 Pac. 701; *Webber v. Sullivan*, 58 Iowa, 260, 12 N. W. 319. But, aside from this objection, the testimony was clearly inadmissible because, not only was there no offer to show by competent evidence a continuance of any general influence, supposed to be established by this class of testimony, down to or near the time of the execution of the will, but there was no testimony whatever showing that any undue influence was exercised by proponent over the testator concerning the making of the will at or near the date of its execution, or at any other time. Testimony like that rejected, in order to be admissible or to have any weight or significance, must be connected with direct or circumstantial evidence tending to prove that undue influence existed, and that it was exercised at or near the time the will was made. Indeed, none of the proposed evidence tended to show that any influence was exercised at the time the will was executed, and it was properly rejected. Its admission could not be other than prejudicial to the proponent.

2. Another claim of contestants is that

the will itself was unnatural; that is, different from what it might have been expected to be. If the testator had a disposing mind, and was free from undue influence, the mere fact that the will might have been otherwise cannot vacate it. But it is not unnatural. To establish this charge, an attempt was made to show that Martha Finn, a child of testator by his first wife, was a cripple from infancy, and that no provision in the will was made for any of the children of the first marriage, and particularly none for her. The proposition is that the intrinsic character of the will itself may be considered as evidence showing that it was unnatural, and that it was proper to admit extrinsic evidence to that effect. This is true. It is to be observed, however, that it does not appear to what extent this child was crippled, or that her infirmity in any respect incapacitated her from earning a livelihood. It would seem that she was or had been married, and, for aught that appears, her husband was abundantly able to care for her. The will itself contains testator's reasons for not making provision for any of these children. It states that he had already made ample provision for all except his daughter Martha, the alleged cripple, and that as she had been a source of much annoyance to him during all her life, and since he had already given to his first wife property which he expected her, by her will, to give to Martha, he omitted her now from the list of recipients of his bounty. Neither below nor upon this review was an attempt made to controvert these facts, and for the purposes of this case we may presume them to be true. Assuming the truthfulness, therefore, of the facts which actuated testator in not making provision for the children of his first wife, there is nothing about this will that is at all unnatural. Indeed, it was just and praiseworthy. If such provision had already been made for the older children, then it was entirely proper for the testator to give, as he did, his entire property to his second wife, with a request that she should, at her death, give the same to his two minor children, the issue of the second marriage.

3. At the close of the testimony for contestants the court directed the jury to find a verdict for the proponent, and of this action contestants now complain. Under the decision of this court in *Clough v. Clough*, 59 Pac. 736, 10 Colo. App. 433, 51 Pac. 513, it was held that, upon the trial in the district court upon an appeal from the county court in the matter of the probate of a contested will, the contestants were entitled to have the issues submitted to a jury. But it does not follow that in no case is it proper for the court to direct a verdict. The court may, in a proceeding of this sort, as in an ordinary civil action, when the facts of the case require it, direct a verdict, and a failure to do so would be a palpable evasion of duty. If there is no evidence at all to sustain the charge of undue influence, it would be the clear duty of the court to

direct a jury to that effect, and the rule governing in such cases, as stated in *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 390, 21 Pac. 148, is applicable here. If the evidence, in the most favorable light in which it may reasonably be considered in behalf of the contestants, shows that no undue influence was exercised by proponent, and if the case had been submitted to the jury upon that evidence, and they had returned a verdict in favor of contestants, the court would have been obliged to set it aside as manifestly against the weight of the evidence, then the court might properly in the first instance direct the jury to find in favor of proponent. It is true that if the question depends upon inferences to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent, upright, and reasonable men, then the question should be submitted to the jury under appropriate instructions, even though there be no conflict in the testimony. Tested by these considerations, we are of opinion that this case ought not to have been submitted to the jury. The only evidence bearing upon this question is to be found in the testimony of the witness Chandler. She testifies that some time in 1890 she met the proponent in a store, and asked the latter how her husband was, to which the proponent replied that he was very poorly. Mrs. Chandler then remarked that she would like to visit him, but was given to understand that proponent preferred that his family (of which the witness Chandler seemed to consider herself a member) would stay away from the house, for it made him worse whenever any of them came. Mrs. Chandler also says that at one time she met testator on the street car, and inquired of him as to his health, and asked him if he was coming over to see her, as had been promised, to which he replied that he could not come, on account of his wife, and that she would not let him. Mrs. Chandler also says that at one time Mr. Shell remarked to her that, if he had this thing to do over (meaning the marriage with his second wife), he would not do it again, and that he forgave Mrs. Chandler for marrying contrary to his wish. It strikes us that, if this testimony tends to prove anything, it is that proponent did not wish the witness to interfere with her opportunity of influencing the testator; but the claim is made that it has some tendency to establish the proposition that the proponent not only had the power of unduly influencing the testator, but that she exercised it respecting the will. To this we reply that we consider it too well settled to need the citation of authorities that undue influence cannot be inferred alone from motive or opportunity; that there must also be some testimony, either direct or circumstantial, to show that undue influence not only existed, but that it was exercised with respect to the making of the will itself. This testimony does not in any degree tend to show that proponent ever exercised any

undue influence, or any influence at all, over the testator in relation to the making of the will. It may, possibly, does, tend to show that proponent exercised her influence over testator to dissuade him from associating with witness; and, from an examination of her testimony, we are disposed to believe, and constrained to remark, that this influence, instead of being undue, was wholesome and salutary. Had this testimony been coupled with a legitimate offer to show, either directly or by way of inference from legitimate testimony, that proponent had the opportunity to wield undue influence, or did exercise it, with respect to the making of a will, a different question might arise. True, it is claimed in argument by contestants that an offer was made to show that the influence obtained by proponent over her husband continued to the time of his death; but we find upon examination of the abstract to which counsel refer that no such offer was made, and the contention in that respect is not worthy of serious consideration.

To summarize our conclusion: It is not putting it too strongly to say that the court would have been derelict in duty, had any question of fact been submitted to the jury. There is not a particle of legitimate and competent evidence to sustain the charge of undue influence; and had the cause been submitted, and a verdict for contestants returned, we would have no hesitation in setting it aside upon the ground that there was not a particle of proof to sustain it. In this connection the remarks of Mr. Justice Paxson in *Oauffman v. Long*, 82 Pa. 72, are pertinent, and commend themselves to our judgment as a wholesome expression of the law that should control the action of courts in questions of this character: "The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as

to what a testator should do with his property, is not to be encouraged. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust,—the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern. The law wisely secures equality of distribution where a man dies intestate. But the very object of a will is to produce inequality, and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human nature. It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, but is the uncontrolled act of his own mind, it is not to be set aside in Pennsylvania without sufficient evidence, nor upon any sentimental notions of equality." The foregoing is as applicable in Colorado as in Pennsylvania.

*The judgment of the court below is right, and should be affirmed.*

#### DISTRICT OF COLUMBIA COURT OF APPEALS.

CAPITAL TRACTION COMPANY, *Appt.*,

v.

George W. OFFUTT.

(17 App. D. C. 292.)

1. A covenant by a corporation purchasing the property and franchise of another to "assume, discharge, and perform all the obligations" of the prior company

NOTE.—For cases in this series as to liability of corporation for debts of predecessor, see *Chicago & I. C. R. Co. v. Hall* (Ind.) 23 L. R. A. 231, and note; *Austin v. Tecumseh Nat. Bank* (Neb.) 35 L. R. A. 444; *Southern R. Co. v. Booknight* (C. C. App. 4th C.) 30 L. R. A. 828; and *Lamkin v. Baldwin & L. Mfg. Co.* (Conn.) 44 L. R. A. 786.

As to right of third party to sue on contract made for his benefit, see *Jefferson v. Asch* (Minn.) 25 L. R. A. 267, and note; *Baxter v. Camp* (Conn.) 42 L. R. A. 514; and *Buchanan v. Tilden* (N. Y.) 44 L. R. A. 170.  
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"and all its liabilities of what kind soever," does not make the purchaser directly responsible to a third party for a liability of the older company.

2. A street railway corporation which purchases the property and franchises of another under statutory authority, when no consolidation is intended or sought to be effected, is not charged with the liabilities of a predecessor in the franchise.

(December 7, 1900.)

APPEAL by defendant from a judgment of the Supreme Court of the District of Columbia in favor of plaintiff in an action brought to recover damages for alleged unlawful occupation of a street in front of plaintiff's property to the injury of his business. *Reversed.*

The facts are stated in the opinion.

Mr. R. Ross Perry, for appellant:

The Washington & Georgetown Railroad

Company could not legally consolidate with the Rock Creek Railway Company of the District of Columbia.

Power to consolidate must be conferred by the state.

1 *Thomp. Corp.* ¶ 315; *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.* 70 Miss. 669, 13 So. 879; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685, note; note to *McMahon v. Morrison*, 16 Ind. 172, 79 Am. Dec. 420; *American Loan & T. Co. v. Minnesota & N. W. R. Co.* 157 Ill. 641, 42 N. E. 153; *Kavanagh v. Omaha Life Asso.* 84 Fed. 295; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714, Affirming 97 Ky. 675, 31 S. W. 476.

Unless there has been a consolidation this action cannot be maintained against the appellant for any acts or omissions of the Washington & Georgetown Railroad Company prior to the 21st day of September, 1895, the date of the said sale.

The right to bring an action cannot be transferred or assigned.

*Dacey*, Parties to Actions, rule 6, p. 80.

The liability to be sued for a tort cannot be transferred or assigned.

Id. rule 99, p. 456.

Unless the sale in question under the act of Congress amounted to a consolidation, the appellant is not liable in this action for the acts or omissions of the Washington & Georgetown Railroad Company.

Appellee cannot recover in this form of action against the appellant for the acts of the Washington & Georgetown Railroad Company.

There is no estoppel upon the appellant to urge that it shall only be held to the liability which it assumed and which the record shows it is discharging.

It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party.

*Constable v. National S. S. Co.* 154 U. S. 73, 38 L. ed. 914, 14 Sup. Ct. Rep. 1062; *Sims v. Brown*, 68 N. Y. 355; *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 687, 10 Sup. Ct. Rep. 494; *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831, 164 U. S. 502, 41 L. ed. 531, 17 Sup. Ct. Rep. 176.

A case cognizable at common law cannot be united with one cognizable in equity, so as to enable one court to maintain jurisdiction of both.

*Giesy v. Gregory*, 15 App. D. C. 49.

The term "consolidation" has acquired a fixed, definite, accepted, and judicial meaning, which is, that it is a dissolution of all the original corporations, and, at the same instant, the creation of a new corporation, with property, rights, liabilities, and stockholders derived from those passing out of existence; and it is held inapplicable to a union of two or more companies in such a way that one of the original corporations is continued in existence, while the others are merged in or absorbed by it.

*Meyer v. Johnston*, 64 Ala. 603; *Green's Brice, Ultra Vires*, 538, 539, note, 550; *Mo-53 L. R. A.*

*Mahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685; *Powell v. North Missouri R. Co.* 42 Mo. 63; *Bishop v. Brainard*, 28 Conn. 285; *Clearwater v. Meredith*, 1 Wall. 25, sub nom. *Ferguson v. Meredith*, 17 L. ed. 604; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

*Messrs. A. S. Worthington and Henry E. Davis*, for appellee:

Equity will not permit the stockholders in any one corporation to organize another, and to transfer all the corporate property of the former to the latter, without paying all the corporate debts; and where such a transfer is made the obligations of the old corporation may be enforced against the new to the extent of the assets received by it.

*Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* 13 Fed. 516; *Brum v. Merchants' Mut. Ins. Co.* 16 Fed. 140; *Blair v. St. Louis, H. & K. R. Co.* 24 Fed. 148; *Thompson v. Northern P. R. Co.* 35 C. C. A. 357, 93 Fed. 384; *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. ed. 157; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Bailey v. New York C. & H. R. Co.* 22 Wall. 604, 22 L. ed. 840; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. ed. 322; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 145; *Stokes v. Detrick*, 75 Md. 256, 23 Atl. 846; *Canal & C. R. Co. v. St. Charles Street R. Co.* 44 La. Ann. 1069, 11 So. 702; *University of Alabama v. Moody*, 62 Ala. 389.

The legal effect of every merger, consolidation, or union of two or more corporations is to be gathered from the authority under which the corporations acted, and the terms of the contract or agreement between them, and the rights of all third persons are to be considered accordingly.

*Meyer v. Johnston*, 64 Ala. 603; *Reynolds v. Myers*, 51 Vt. 444; *Welsh v. First Division of St. Paul & P. R. Co.* 25 Minn. 314; *State use of Dodson v. Baltimore & L. R. Co.* 77 Md. 489, 26 Atl. 865; *Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 283; *Cleveland, C. O. & St. L. R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. 372; *Chicago, S. F. & C. R. Co. v. Ashling*, 56 Ill. App. 327, 160 Ill. 373, 43 N. E. 373; *New Bedford R. Co. v. Old Colony R. Co.* 120 Mass. 397; *Langhorne v. Richmond City R. Co.* (Va.) 19 S. E. 122; *Anthony v. American Glucose Co.* 146 N. Y. 407, 41 N. E. 23.

*Morris, J.*, delivered the opinion of the court:

This suit was instituted by the appellee, George W. Offutt, in the supreme court of the District for damages to his business alleged to have resulted from the unlawful occupation and use of the public street in front of his premises by the appellant, the Capital Traction Company, and by its predecessor in the same franchise, the Washington & Georgetown Railroad Company.

The appellee is a grocer, and conducts his business in a store or warehouse on the north side of M street, formerly Bridge street, in that part of the city of Washington formerly known as Georgetown, a little to the west of Thirty-second street, formerly High street, to which place he moved in 1883, having previously been engaged in the same business at the southeastern corner of the intersection of the same two streets. He seems to have built up quite a large business, a considerable part of which was with persons from the country who came there with their wagons and vehicles, and whose vehicles very often occupied a large part of the street, especially on market days. From 1883 to 1892 his business continued to increase in value and to realize larger profits from year to year; but it decreased again from 1892 to 1896, when the declaration in this suit was filed, in consequence, as the appellee alleged, of the illegal acts of the appellant and its predecessor which are set out in the declaration. And for this damage these proceedings were instituted by the filing of a declaration at common law on November 10, 1896.

The appellant, the Capital Traction Company, is a corporation organized for the purpose of conducting a street railroad system in the District of Columbia. It was first incorporated as the Rock Creek Railway Company of the District of Columbia under an act of Congress of June 12, 1883, for the purpose of constructing and operating a street railroad from a point in the northwestern boundary of the city of Washington outward northwestwardly into the county of Washington; and it was authorized by subsequent enactments to alter its line to some extent, to build outwards in the county of Washington to the northwestern line of the District of Columbia, and to extend its line eastward within the city on U street, so as to intersect the already existing railroad of the Washington & Georgetown Railroad Company at Fourteenth street and at Seventh street, which it proceeded in due time to do.

Subsequently, by an act of Congress of March 1, 1895, the Rock Creek Railway Company of the District of Columbia was authorized to "contract with any street railway company owning or operating a connecting or intersecting line for the joint management, lease, or purchase of such connecting or intersecting line or lines, and operate the same in connection with its original line; and in case of such contract to provide the means necessary by an increase of the capital stock, not to exceed the actual consideration paid or the actual cost of the necessary equipment." And the act further provided that, in the event that the said company should enter into any such contract, it might, if deemed advisable by its directors, change its name from that of "the Rock Creek Railway Company of the District of Columbia" to that of "the Capital Traction Company."

The Rock Creek Railway Company of the District of Columbia entered into a con-

tract, such as was contemplated by the act, with the Washington & Georgetown Railroad Company, purchased the property and franchises of the latter company, whose lines it thereafter continued to operate, and changed its name, as allowed by the act, to that of "The Capital Traction Company."

The Washington & Georgetown Railroad Company had been incorporated and organized under an act of Congress of May 17, 1862 [12 U. S. Stat. at L. 389, 390, chap. 73], to construct and operate a street railroad in the cities of Washington and Georgetown, along Pennsylvania avenue in the former city and Bridge street in the latter, with two branches, one to run northward on Fourteenth street from Pennsylvania avenue to the boundary of the city of Washington, and the other on Seventh street to run north to the boundary of the city, and south to the Potomac river, besides another smaller branch to the Baltimore & Ohio Railroad station. The western terminus of the road in Georgetown was specified in the act to be "on Bridge street, at the intersection with High street, or at such point on said Bridge street east thereof in the city of Georgetown as may be designated hereafter by the corporate authorities thereof;" and the authority was given "to lay down a double-track railway, with the necessary switches and turnouts." The act also contained the following provision in regard to stations, stables, and other terminal facilities: "Sec. 10. Be it further enacted, That said company shall procure such passenger rooms, ticket offices, stables, and depots at such points as the business of the railroad and the convenience of the public may require. And the said company is hereby authorized to lay such rails through transverse or other streets as may be necessary for the exclusive purpose of connecting the said stables and depots with the main tracks. And the said company is hereby authorized to purchase or lease such lands or buildings as may be necessary for the passenger rooms, ticket offices, stables, and depots above mentioned."

There were several subsequent acts of Congress in reference to the business and the affairs of this company to which it does not seem to be necessary here to refer.

The company's road and branches were duly constructed under these statutory enactments; and for upwards of twenty-seven or twenty-eight years were operated by horse power; that is, the cars were drawn by horses. In the meantime at the Georgetown terminus land was acquired and stables were constructed for the storage of the cars and the housing of the horses of the company at a place on the south side of Bridge street, opposite to the appellee's place of business, but a little to the west of it; and the tracks of the company were extended westward of the intersection of Bridge and High streets, and turnouts or switches were laid to run the cars into these stables. By means of a curvilinear track within these stables the cars were enabled to be transferred from the north to the south track.

and the work of switching in the street was avoided. This extension westward of the tracks of the company seems to have been accomplished with the consent of the municipal authorities of the District, at all events without objection from them; and no complaint is made by the appellee of the use of the street by the railroad company during this period in which its cars were drawn by horses.

But by § 3 of the appropriation act of Congress of August 6, 1890, the company was required to substitute within two years for horse power the motive power of cable or electricity. It adopted the cable system, and the cars were begun to be operated by this system on August 6, 1892. It is claimed that the transfer of the cars from the north to the south track was impracticable in the adjacent stables as then constructed, in the manner in which the shifting had been done in the time of the horse cars; and accordingly a switch was constructed in the street adjacent to and in front of the appellee's premises. The constant arrival and shifting of the cars from one track to the other by means of this switch, it is claimed by the appellee, caused a virtual blockade in front of his premises, made the place dangerous for the wagons and vehicles that had been accustomed to come there, and practically drove them off and deprived the appellee of a large number of his customers, who found it more convenient to resort to other places. Many of them never returned, even after the blockade was removed.

This condition of things was continued from August 6, 1892, to July 3, 1896, at which time the road was extended to union station, near the Aqueduct bridge, some three or four squares or blocks farther west on Bridge street, where the shifting of the cars was thereafter done. This union station was required by an act of Congress of August 23, 1894, to be constructed by the Washington & Georgetown Railroad Company. Its site was defined in the act; and it was required to be completed within one year thereafter. It was further provided that upon its completion the cars of the company should be run into it, "and thereafter the said company should cease entirely to switch cars on M street northwest." In due time this was all accomplished. The cars were first run into the union station on July 4, 1896, after which there was no shifting or parking of cars adjacent to the plaintiff's premises.

In the meantime by the act of Congress of March 1, 1895, already referred to, the Rock Creek Railway Company had been authorized to enter into contract with any street-railroad company owning an intersecting line or lines for the joint operation, lease, or purchase of such intersecting line or lines of railroad. It is matter of history that those who controlled the Washington & Georgetown Railroad Company had also acquired the control of the Rock Creek Railway Company, and seeking in some way to combine their interests, but deeming the charter of the latter company as the more advantage-

ous under which to operate, procured from Congress the act of March 1, 1895, the important features of which in the present connection have already been stated. In pursuance of its provisions the two companies entered into a contract, which was finally ratified by all the stockholders of both, whereby, after a lengthy preamble reciting the reasons for the contract, it was agreed between the parties that the Rock Creek Railway Company should purchase from the Washington & Georgetown Railroad Company the entire lines of railway of the latter, and all its power houses, car houses, depots, stations, rolling stock, money, choses in action, and all other property, real and personal, belonging to it, with all its rights, privileges, and franchises for the sum of \$10,750,000, payable in the capital stock of the Rock Creek Railway, which had been authorized by the act of Congress to be increased by that amount, it having previously been \$1,250,000, and being now \$12,000,000. Of this sum of \$10,750,000, it was agreed that the sum of \$2,750,000 should be paid to the then existing holders of the capital stock of the Washington & Georgetown Railroad Company upon the surrender of their stock in this latter company at the market value of \$275 a share; and the remainder, that is, the sum of \$8,000,000 of stock, was to be used in the redemption and cancellation of the bonds of the Washington & Georgetown Railroad Company. Among the recitals in the contract were some to the effect that it was one of the conditions of the contract that the obligations of the Washington & Georgetown Railroad Company should be discharged; that the Capital Traction Company should defend all suits against it, and should satisfy all judgments that might be rendered in such suits; and accordingly the second article of the contract provided as follows:

"In consideration of the sale aforesaid by the said party of the second part (the Washington & Georgetown Railroad Company) and the transfer, conveyance, and delivery to the said party of the first part (the Rock Creek Railway Company) of the railway, property, and franchises aforesaid of the said party of the second part, the said party of the first part will assume, discharge, and perform all the obligations aforesaid of every kind of the said party of the second part, including all debts owing by it, and all its liabilities of what kind soever, and to that end will use and apply, so far as may be necessary, the said property, real and personal, now of the said party of the second part, hereby contemplated and provided to be transferred, conveyed, and delivered to the said party of the first part."

The contract purported in terms to be made by each party for itself, its successors, and assigns. It bore date on July 5, 1895, and was carried into final effect on September 21, 1895, by a deed of conveyance of all its property and franchises by the Washington & Georgetown Railroad Company to the Capital Traction Company, which thereupon went into possession thereof, and has since

continued to own and operate all the lines of railroad that previously belonged to the Washington & Georgetown Railroad Company. The officers of the Capital Traction Company then successively resigned their places, with one exception; and the officers of the Washington & Georgetown Railroad Company, with a similar exception, were elected in their places. The president of the latter company became the president of the Capital Traction Company. But the Washington & Georgetown Railroad Company was not dissolved; nor were there any formal steps then or afterwards taken to terminate its corporate existence. There was no resignation of its president or other officers, although no business seems thereafter to have been performed by them, and no corporate meeting held. Suits, however, continued to be defended and prosecuted in its name; and service of process was had in such suits upon the continuing president of the company, and appeal bonds were given by the company through its president.

In this condition of things, about sixteen months after the transfer of all its property and rights by the Washington & Georgetown Railroad Company to the Rock Creek Railway Company, thereafter known as the Capital Traction Company, the present suit was instituted on November 10, 1896, by the plaintiff against the Capital Traction Company, by the filing of a declaration at common law in three counts. Of these counts the first and second, which are not materially different from each other, charged the unlawful occupation of M or Bridge street, west of Thirty-second or High street, by the Washington & Georgetown Railroad Company with its tracks and switches, and the illegal use of those tracks and switches for the shifting of cars and the keeping of cars standing thereon in front of the plaintiff's premises and adjacent thereto, from July 1, 1892, to September 21, 1895, and after the latter date and until the filing of the declaration the same unlawful use and occupation by the Capital Traction Company, whereby the customers of the plaintiff were excluded from having the same free access to the plaintiff's premises which they formerly had, greatly to the detriment of his business. The third count charged the Capital Traction Company with the alleged illegal action of the Washington & Georgetown Railroad Company from July 1, 1892, to September 21, 1895, without any allegation of the continuance of the nuisance by the traction company itself after the latter date. It would seem that at the trial the counsel for the plaintiff sought to abandon any claim for damages for the alleged unlawful occupation of the street by either company with tracks and switches, and to confine the recovery to the alleged unlawful use of the tracks and switches so constructed; but in the subsequent charge of the court to the jury the two things seem to have been to some extent blended, as they were in the plaintiff's declaration; and a considerable part of the controversy at the trial was over the question whether the Washington & Georgetown Rail-

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road Company had any right under its charter or other acts of Congress to extend its tracks for any purpose or in any form beyond the west line of the intersection of the two streets. To this declaration the defendant pleaded the general issue and the statute of limitations. By virtue of the latter plea, the effect of which was conceded on the part of the plaintiff so far as it was applicable, the period of alleged unlawful use and occupation was restricted to a duration of three years before the institution of the suit; that is, from November 10, 1893, to November 10, 1896. And as the unlawful occupation and use, if it ever existed, is conceded to have ceased on and after the completion of the union station and the running of the cars thereto on and after July 4, 1896, the period of liability can be no longer than from November 10, 1893, to July 3, 1896. But these dates do not seem to have been very greatly regarded in the development of the case before the jury.

The trial seems to have been quite protracted; and in the course of it numerous exceptions were reserved to the admission or exclusion of testimony by the court. There were also exceptions to the instructions as given or refused by the court. The verdict of the jury was for the plaintiff in the sum of \$25,000; and upon that verdict judgment was entered, from which the defendant has appealed to this court.

The assignments of error are exceedingly numerous, amounting to seventy-seven in all. But we do not deem it necessary to consider all these, or, indeed, more than one of them. For we are of opinion that this suit cannot be sustained against the Capital Traction Company for the alleged delinquency of the Washington & Georgetown Railroad Company. We know of no rule or principle of the common law, which would authorize suit to be maintained against one person, who is *sui juris*, for the default of another person, who is equally *sui juris*, whether the persons be natural persons or corporations. For one corporation can no more be held for the default of another corporation than can one natural person for the default of another natural person.

This principle of law is not sought to be controverted on behalf of the appellee; but it is supposed that there is something in this case which takes it out of the general rule. And the argument is that the Washington & Georgetown Railroad Company and the Capital Traction Company have become in fact consolidated or merged into each other, and that therefore the latter, as the surviving or consolidated company, has become liable for the obligations of its predecessor.

It is undoubtedly the law that, when two or more corporations become consolidated with each other by permission or authority of the sovereign power, whether under a new name or under the name previously held by one of the component companies, the new corporation so formed, although in technical strictness an independent organization entirely distinct from the companies which have become merged in it, is chargeable, at



all events in equity, and generally, if not always, even at common law, with all the liabilities of its component members and of each one of them. Moreover, as is very justly argued on behalf of the appellee, there may be actual consolidation to all intents and purposes, without its being so designated. There is no magic in the use of the word "consolidation" to effect that result. If the coming together of two corporations under the authority of law be in fact consolidation, it is of no consequence by what name the act is characterized; nor is it of any consequence by what steps the result has been effected. One of those steps may take the shape of bargain and sale.

But the power of corporations, especially those which exercise a public function such as is exercised by railway companies, is derived from the law of their creation; and they may not combine with each other, or be amalgamated, or consolidated, or be merged one into another, except by express authority of statute enacted for the purpose, which, when given, will be the measure of the extent and character of the combination to be effected. It is very plain that statutory authority to one corporation to purchase the property, or the property and franchises, of another corporation, with appropriate action thereunder by the corporations to be affected, cannot, of itself and without further provision of some kind, operate to effect a consolidation of the two companies, so as to charge the purchaser company in law with the liabilities of the vendor. For it might well be that the vendor company might desire to dissolve, or go out of business, or to limit its business; or that, being hopelessly involved in debt beyond the value of its assets, it could not efficiently exercise its franchise for the benefit of the public, which yet should be exercised, and therefore should be transferred to some more capable corporation. And it might well be that the purchaser company would pay in cash a full and adequate consideration for the property and franchises purchased by it. Assuredly in such cases, when no consolidation is intended or sought to be effected, the mere purchase by one corporation of the property and franchises of another corporation under authority of law, and the succession of the purchaser corporation to the exercise of the franchise held by the vendor corporation, could not reasonably be held to operate as a consolidation of the two companies, or to charge the purchaser company with the liabilities of its predecessor in the franchise. The succession of the purchaser company to the franchise in such a case is not a succession in the sense in which that term is used in relation to the kind of corporation which is known as a corporation sole.

A contract of purchase and sale between two corporations is not different in law from a similar contract between two individuals, except that individuals may contract freely with each other, and corporations require legislative authority to enter into such contracts as are involved in the case under consideration. The construction and effect 53 L. R. A.

would be the same, whether such contracts were made by individuals or by corporations. In neither case would the purchaser become liable either for the torts or the contracts of the vendor, and least of all for the torts, unless such liability entered into the transaction and became part of the consideration for the transfer, and then only in the manner and to the extent stipulated. This is so plain a principle of law and justice that it needs only to be stated in order to insure its prompt acceptance.

It is very plain, therefore, that something more than the mere purchase of the assets and franchises of one company by another under authority of law given for such sale and purchase is required to effect a consolidation of the two companies, or to charge the purchaser company with the liabilities of the vendor. Now, there is nothing whatever in the act of Congress under which the purchase in question was authorized, beyond the mere authority to make the purchase, which looks to a consolidation of the Washington & Georgetown Railroad Company with the Rock Creek Railway Company. Except an authority for joint management or lease, which may be left out of consideration inasmuch as it was never availed of by the Rock Creek Company, the sole provision in the statute—and there is nothing else in our laws that has any bearing on the subject—is an authorization to the Rock Creek Company to purchase any connecting or intersecting line or lines of railroad, and to operate the same in connection with its original lines, and permission to raise the money for the purpose of effecting the purchase by a sufficient increase of its capital stock. Whatever may have been the intention of those who promoted this legislation, there is not a word in the statute which intimates in any manner that it was its purpose to effect a consolidation of the two companies, or that the proposed purchase should be made subject to the assumption of the liabilities of the Washington & Georgetown Railroad Company by the Rock Creek Railway Company. On the contrary, the plain inference from the statute was that the latter company should pay to the former a full and adequate consideration for the property and franchises proposed to be transferred, which should serve as a substitute therefor to meet the liabilities of the vendor company, if any it had, and not that there should be any consolidation of the two, or merger of one into the other. In the absence of statutory authority, we cannot see how there can be consolidation in this District of two or more corporations exercising the franchise of a railroad company; nor can we see how, in the absence of legal provision, a company which purchases the property and franchises of another company, can, by virtue of such purchase, be charged with the liabilities of the company from which it has purchased.

But in this case, and apparently as part of the consideration for the transfer, and entering into the contract therefor, the Rock Creek Railway Company covenanted to

"assume, discharge, and perform all the obligations of the Washington & Georgetown Railroad Company, "and all its liabilities of what kind soever," and to that end would use the property conveyed to it, so far as might be necessary; and it is contended that this agreement and the contract, in which it is contained, operated to make the appellant liable to the appellee. But we understand it to be conceded, and certainly it must be conceded, that such a contract between two natural persons would not make the purchaser directly responsible at common law to a third party for the obligations of the vendor; and this for the reason, if for no other, that the liability of the vendor is without limitation, and that of the purchaser is to be governed by the terms of his contract, and generally does not extend beyond the value of the property transferred to him. Whatsoever, therefore, might be the liability of the purchaser under such a contract to a third party in equity, it is certainly not contemplated that he should be subject to a suit at common law at his instance for the liabilities which primarily are those of the vendor. Now, it is not apparent why, in the absence of statutory provisions expressly or by implication imposing such liability as a condition of the transfer, a corporation should be any more liable to a third party for the obligations of another corporation whose property it has purchased, than a natural person would be under similar circumstances. The law is not different in this regard for the corporation and for the natural person. The act of Congress might have required the Rock Creek Railway Company, as the condition for being permitted to purchase the franchise of the Washington & Georgetown Railroad Company, to assume the liabilities of the latter, and to submit to suit for them as though it had been itself originally liable; but it made no such condition; and the contract between the two companies cannot be construed to operate as imposing such liability against their will.

In connection with the question of consolidation some importance apparently is attached to the fact that of the \$10,750,000, of the new stock authorized to be issued by the Rock Creek Railway Company, stock of the par value of \$2,750,000 was agreed to be issued to the stockholders of the Washington & Georgetown Railroad Company, upon their surrender of their stock in this latter company at the market value of \$275 a share; and this is claimed to evidence mere consolidation. But we do not so understand it. The provision was that the whole sum of \$10,750,000 should be paid by the Rock Creek Company to the Washington & Georgetown Railroad Company as the approximate value of all the assets of the latter; and that of this sum \$8,000,000 should be used for the retirement of the bonds of the latter company, and the remainder for the purchase or extinguishment of the stock, without which the transfer of the property could not well have been effected.

We do not think that the conclusion which  
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we have here reached is antagonized by any of the adjudicated cases cited on behalf of the appellee. Some of these are cases of consolidation, pure and simple, authorized by express provision of law; others are cases in which the property of one company has been transferred to another in fraud of the rights of creditors or subject to a charge in favor of creditors, and in which courts of equity have reached such property for the benefit of such creditors. One of them, the case of *University v. Moody*, 62 Ala. 389, was where there was a change of name and of management, and no actual change of the corporation itself. But the case principally relied on by the appellee in this connection is that of *Chicago, S. F. & O. R. Co. v. Ashling*, 56 Ill. App. 327, first in the intermediate appellate court of the state of Illinois, and afterwards in the supreme court of the state, in 160 Ill. 373, 43 N. E. 373. In that case it appeared that there was a general statute of the state of Illinois which provided that in all cases when any company or corporation chartered under the laws of the state should consolidate its property, stock, or franchises with any other company or companies, such consolidated company should be liable for all debts and liabilities of each company included in such consolidation, and suit might be instituted and maintained therefor against such consolidated company. But there was no law regulating or prescribing the course to be pursued in effecting a consolidation. One railroad company purchased the whole property and franchises of another railroad company, and by way of purchase issued its own stock, dollar for dollar, to the stockholders of the absorbed company, changing their rights merely from the selling to the purchasing company. An action of trespass was pending against the vendor company at the time of the consolidation or absorption. A plea in abatement to the effect that the vendor company was dissolved, and that the suit against it could no longer be maintained, was overruled, and the plaintiff recovered judgment. Afterwards suit was entered on this judgment against the consolidated company, and judgment rendered thereon against the latter company. This came for review before the appellate tribunals, and it was held that the transaction was a consolidation, and not merely a bargain and sale. But it is to be noticed that the statute authorized consolidation, and not the transfer in terms of its property and franchises by one corporation to another. Consolidation plainly was what was intended, whether it was so called or not; and the law governing consolidation was the only law applicable. One company may be authorized to consolidate its property and franchises with another company, and yet not to sell to it and still maintain its separate existence; and, on the other hand, one company may be authorized to sell to another and yet not to be consolidated with it. The difference between these two provisions is the difference between the case cited and that before us for our consideration.

So, also, the case of *New Bedford R. Co. v. Old Colony R. Co.* 120 Mass. 397, is supposed to be almost identical with the present case. But plainly this is an error. There one railroad company was authorized to purchase the franchise and property of another railroad company, but upon the express condition that the purchasing corporation should then "be subject to all the duties, liabilities, obligations, and restrictions" of the vendor company; and it was held that the liabilities thus imposed were not merely liabilities towards the public for the faithful exercise of the franchise, as claimed by the purchaser company, but the liabilities of every kind resting upon the vendor. We fail to see wherein this is an authority for the present case.

Without further elaboration, we may say that, if Congress had intended a consolidation in this instance, it could easily have said so. It seems studiously to have avoided saying so, and therefore not to have intended it. Likewise, it would have been competent for Congress, as a condition for the purchase which it authorized, to impose upon the purchaser a liability for the obligations of the vendor company. It seems studiously to have avoided doing this also. It authorized a purchase, and nothing whatever beyond that; and we think that it would do violence to the statute to add to it by construction provisions which are not contained in it. The rights of the creditors of the Washington & Georgetown Railroad Company do not demand any such construction. Those rights seem to be reasonably secure in any event. That company remained, and we may assume yet remains, alive for the purpose of suit against it; and it is not apparent that a judgment against it will not be paid, or that it cannot be enforced by proper proceedings for the purpose. It is true that its property and franchises have now passed into the possession of the Capital Traction Company; and presumably it has now no property of its own wherewith to satisfy its liabilities, if any there are. But this fact, while it may justify recourse to a court of equity in proper cases, does not, any more than in the case of a natural person similarly situated, authorize the institution of suit at common law against the traction company for the delinquencies of the Washington & Georgetown Railroad Company. It appears from the record that judgments against the latter company rendered subsequently to the transfer of assets to the traction company have been duly paid; and therefore, while it might have been more convenient if suit had been authorized directly against the Capital Traction Company in cases like the present, yet, as Congress has not so provided, we see no hardship in remitting parties to the ordinary procedure of the common law.

We are of opinion, therefore, that this suit cannot be sustained against the Capital Traction Company for any tortious action committed by the Washington & Georgetown Railroad Company before September 21, 1895, which seems to have been the date 53 L. R. A.

of the transfer of its assets by the latter company to the former; and that there was error in the rulings of the trial court to the contrary. Consequently we must reverse the judgment appealed from, and remand the cause for a new trial. And it is very clear that upon a new trial, in order to justify any recovery against the defendant in this case, all claim of damage for the tort of the Washington & Georgetown Railroad Company must be eliminated.

We greatly regret that we cannot put our judgment in a shape to be reviewed by the Supreme Court of the United States upon the record now made. If the case stood alone on the third count of the declaration, we might do so by entering a final judgment here, or by declining to remand the cause for a new trial; for then it would be plain that, if the view which we take of the case be correct, there could be no recovery whatever by the plaintiff in these proceedings. But the judgment from which the appeal has been taken is a general judgment upon all the counts; and in two of these, the first and second, there is a good cause of action stated against the defendant for its own alleged tort for the period between September 21, 1895, and the time of the institution of the suit on November 10, 1896. We have no option, therefore, but to remand the cause for a new trial.

*The judgment of the Supreme Court of the District of Columbia in this cause will therefore be reversed, with costs; and the cause will be remanded to that court, with directions to set aside the verdict and to award a new trial; and it is so ordered.*

Jesse C. LOVE et al., *Appts.*,

v.

Samuel H. STIDHAM.

(.....D. C. App.....)

1. A covenant by a partnership in selling its business, binding the partners not to engage in business again within a certain distance of the old stand, will be broken by one partner's so engaging, so as to render him liable for the breach.
2. Having a stand in a public market, and selling from a wagon on the street butter, cheese, eggs, and poultry, are sufficient to require the opinion of a jury whether or not such acts constitute a breach of a covenant not to engage in the grocery business.

(May 22, 1901.)

**A** PPEAL by plaintiffs from a judgment of the Supreme Court of the District of Columbia in favor of defendant in an action brought to recover damages for alleged breach of a contract not to engage in the grocery business. *Reversed.*

The facts are stated in the opinion.

NOTE.—For a case holding that an agreement by a partnership, on making a sale of its business, not to re-engage in such business, is not broken by one partner engaging in such business individually, see *Stelchen v. Fehleisen* (Iowa) 51 L. R. A. 412.

*Messrs. Thomas M. Fields, Douglass & Douglass, and Jean F. P. Des Garennes*, for appellants:

The contract declared upon was a partnership instrument,—a joint contract. Both partners are liable for a breach by one.

21 Am. & Eng. Enc. Law, p. 182; *Thwing v. Clifford*, 136 Mass. 482; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038.

In an action against a firm on a firm contract all of the partners must be joined as defendants.

17 Am. & Eng. Enc. Law, p. 1243; *Wiley v. Sledge*, 8 Ga. 532; *Boorum v. Ray*, 72 Ind. 151; *Curtis v. Hollingshead*, 14 N. J. L. 402; *Cowdin v. Hurford*, 4 Ohio, 132; *Simonds v. Speed*, 6 Rich. L. 390.

If one partner only signs the contract, and the other consents to it as a firm contract, and afterwards the firm receives and uses the money obtained on account of such contract, then both partners are liable.

*Buzard v. McNulty*, 77 Tex. 438, 14 S. W. 138; *Calloway v. Woodward*, 28 Mo. App. 320; *Nelson v. Hill*, 5 How. 127, and note in 12 L. ed. 81.

A plaintiff may take judgment against such partners as have been served, when he sues all and some cannot be served.

17 Am. & Eng. Enc. Law, p. 1327.

Under U. S. Rev. Stat. § 737, a plaintiff may sue and recover against any one of several joint contractors in the district where found, and the nonjoinder of those out of the jurisdiction does not constitute matter in abatement or objection to the suit.

*Noyes v. Barnard*, 11 C. C. A. 424, 15 U. S. App. 527, 63 Fed. 782; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825. See also *Imbusch v. Farwell*, 1 Black, 571, 17 L. ed. 190; *Cow v. Maddux*, 72 Ind. 206; *Merriman v. Barker*, 121 Ind. 80, 22 N. E. 992; *Dennett v. Chick*, 2 Me. 191, 11 Am. Dec. 59; *Tappan v. Bruen*, 5 Mass. 193; *Joll v. Howe*, 4 C. B. 254.

If the nonjoinder of a defendant is not apparent of record, the defendant must plead it in abatement, or it will be waived.

The proof offered certainly entitled the appellants to recover at least the sum paid by them for the goodwill, etc., as damages.

*Johnson v. Gwinn*, 100 Ind. 466. See *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Beal v. Chase*, 31 Mich. 490; *Foulke v. Harding*, 13 Pa. 245; *Jenkins v. Temples*, 39 Ga. 655, 99 Am. Dec. 482.

Laying aside the element of partnership, and treating the contract as a merely joint obligation, it is still insisted that the breach by one was in law a breach by both, or that the doing of the prohibited act by one of the two joint covenantors was a breach of the covenant, for which both (or the one served in an action against both for the breach) are liable in damages.

*Duvall v. Craig*, 2 Wheat. 45, 4 L. ed. 180; *Carleton v. Tyler*, 16 Me. 392, 33 Am. Dec. 673; *Wing v. Chase*, 35 Me. 260; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Jefferson v. Markert*, 112 Ga. 498, 37 S. E. 758, 52 Cent. L. J. 167, and note, 53 L. R. A.

If appellee's acts be not in direct violation of the letter of the covenant, they clearly are in indirect violation thereof.

It is remarkable how often evasions of contracts in restraint of trade have been attempted, but checked by the courts.

*Germania F. Ins. Co. v. Francis*, 52 Miss. 457, 24 Am. Rep. 674; *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124; *Harris v. State*, 50 Ala. 130; *Hoagland v. Segur*, 38 N. J. L. 237.

No evasions of valid contracts in restraint of trade will be tolerated by the courts.

*Whitney v. Slayton*, 40 Me. 224; *Treat v. Shoninger Melodeon Co.* 35 Conn. 543; *Richardson v. Peacock*, 28 N. J. Eq. 151; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Smith v. Martin*, 80 Ind. 260, 41 Am. Rep. 806; *Kramer v. Old*, 119 N. C. 1, 34 L. R. A. 389, 25 S. E. 813; *Doe ex dem. Gaskell v. Spry*, 1 Barn. & Ald. 617; 3 Am. & Eng. Enc. Law, p. 885; *Greenhood*, Pub. Pol. 736; *Sander v. Hoffman*, 64 N. Y. 248; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Heichew v. Hamilton*, 4 G. Greene, 317, 61 Am. Dec. 122; *Avery v. Langford*, 1 Kay, 663; *Helphenstine v. Downey*, 7 App. D. C. 343; *Turner v. Evans*, 2 El. & Bl. 512, 2 De G. M. & G. 740; *Brampton v. Beddoes*, 13 C. B. N. S. 538; *Boutelle v. Smith*, 116 Mass. 111; *Jefferson v. Markert*, 112 Ga. 498, 37 S. E. 758; *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167.

A contract for the sale of the goodwill of the business of selling in a certain county a certain medical compound is broken by the vender's selling in such locality the same compound under a different name, and representing it to be superior to the original.

*Gregory v. Spieker*, 110 Cal. 150, 42 Pac. 576; *Van Valkenburgh v. Dean*, 15 Ind. App. 693, 44 N. E. 652; *Peterson v. Schmidt*, 13 Ohio C. C. 205, 7 Ohio Dec. 202; *Webster v. Williams*, 62 Ark. 101, 34 S. W. 537; *Klein v. Buck*, 73 Miss. 133, 18 So. 891; *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573; *Wentzel v. Barbin*, 189 Pa. 502, 42 Atl. 44; *Laurence v. Times Printing Co.* 90 Fed. 24.

The appellee's acts in entering into the business of selling butter, eggs, cheese, and poultry at retail, within a few weeks of the covenant and a few squares of the store, constituted a gross violation in law and fact of the letter or spirit, or both, of his covenant.

The appellee's acts broke the covenant as to both him and Jones, and both of them are liable for his acts.

*Western Dist. Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308; *Boutelle v. Smith*, 116 Mass. 111; *Stark v. Noble*, 24 Iowa, 71; *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748.

*Messrs. J. J. Darlington and Joseph D. Wright*, for appellee:

The only issue raised by the pleadings was upon the question whether or not Jones and Stidham, jointly, and not severally, had engaged in any branch of the retail grocery business.

As to the defendant Stidham, there was no proof that he did anything within the prescribed territory except to maintain a butter, eggs, cheese, and poultry stand in the Riggs market, and without proof or attempt at proof that a market-stall dealer in those articles was engaged in "the retail grocery business," within the sense and meaning of those terms as known to the trade or otherwise.

1 Parsons, Contr. 11; *Crosby v. Jerolomon*, 37 Ind. 265; Lindley, Partn. 365, 366; 1 Addison, Contr. 38.

Where two or more persons make a contract without any words of severance whatever, the instrument is joint only; and the contract of a partnership forms no exception to this rule.

*Ibid.*

The clause agreeing not to engage in the retail grocery business is joint, and is an undertaking by the firm that it, as such, will not engage in such business, and not that the individual members separately shall not so engage.

The plaintiffs rested their case without offering a single word of evidence to go to the jury on the meaning of the term "retail grocery business" as understood in the trade or otherwise. They cannot, then, insist that the court should have submitted this question to the jury under an issue which wholly failed of support in the testimony, even if there had been such proof.

*Eastman v. Chicago*, 79 Ill. 178; *Shiels v. Great Northern R. Co.* 30 L. J. Q. B. N. S. 331.

Alvey, Ch. J., delivered the opinion of the court:

This was an action of covenant instituted in the supreme court of this District by the appellants, Jesse C. and William Thomas Love, against the appellee Stidham and James W. Jones. The said Jones not having been served with process, the action proceeded to trial against the said Stidham alone, and who is the sole appellee in this appeal.

It appears that Stidham and Jones, prior to the 31st day of March, 1896, were engaged in the retail grocery business, at No. 1800, Fourteenth street, northwest, in the city of Washington, District of Columbia, in which business they sold at retail, groceries, provisions, butter, cheese, eggs, poultry, and other articles usually kept in a retail grocery store, and that they conducted said business under the firm name and style of S. H. Stidham & Co. That on the 31st day of March, 1896, they sold out their store to the appellants, with the entire stock of goods on hand, also two horses, wagons, harness and fixtures, together with the goodwill of the said business, at and for the sum of \$3,300. The contract was duly executed under the hands and seals of the parties, and the premises were duly delivered to the appellants under and in accordance with the terms of the contract, on the day that the contract was executed. By the contract it was provided that the party of the first

part, that is to say, Stidham and Jones, "shall not enter into the retail grocery business for the period of five years, within 1 mile of the store building located as herein set forth, and that the said party of the first part hereby assumes all responsibility for the payment of all debts incurred in said business up to and including March 31, A. D. 1896."

There are five counts in the declaration, but they state the cause of action with but slight variation—the breaches assigned being substantially the same in all the counts. The breach in the last count is substantially as follows: That the defendants, Stidham and Jones, in open violation of their said covenant, did, on the 20th of April, 1896, enter into the retail grocery business, to wit, the business of selling at retail, groceries, provisions, butter, cheese, eggs, poultry, meats, vegetables, fruits, marketing, and other articles usually kept and sold in retail grocery stores, within 1 mile of the store building located as aforesaid, at and in the premises No. 1508, S street, northwest, in the City of Washington, D. C., and at and in and about a certain stall or stand in a certain market house, known as "Riggs Market," situate on P street, northwest, between Fourteenth and Fifteenth streets, in said city, and have or has been so engaged therein thence continually to the present time, whereby a large number, to wit, one hundred persons, who prior to said last-mentioned date were customers of the plaintiffs having become so by reason of the said purchase by the plaintiffs from the defendant, and who as such customers had been theretofore accustomed to purchase from and deal at the said store of the plaintiffs so purchased by them as aforesaid, for large quantities of groceries, provisions, butter, eggs, poultry, meats, vegetables, fruits, marketing, and other articles usually kept and sold in retail grocery stores in said city, have, instead of making such purchases of the plaintiffs, at the store purchased of the defendants, purchased said articles of the defendants at the place or stall in the market aforesaid, in which place or places of business the defendants carried on the retail grocery business, and the business of selling at retail groceries, provisions, butter, cheese, eggs, poultry, meats, vegetables, fruits, etc., articles usually kept and sold in retail grocery stores in said city, since the time aforesaid, whereby the business and trade of the plaintiffs at the said store have, since the said date, been greatly injured and diminished, and by reason of such breach of said covenant the plaintiffs have lost a large amount of trade, many customers, and large profits, and the property so purchased and paid for by them, and especially said goodwill, have been rendered of little value in their hands, and they have thus suffered damage in the sum of \$10,000, for which they bring suit.

To the declaration the defendant Stidham pleaded several pleas, the defendant Jones not appearing. The pleas are as follows:

1. That he, said Stidham, did not jointly with his codefendant Jones, nor did he indi-

vidually or severally, covenant, promise, or agree, in manner and form as the plaintiffs have alleged.

2. That the defendant Stidham did not, with defendant Jones, nor did he individually or severally at any time since the 31st day of March, 1896, enter into the retail grocery business within 1 mile of premises No. 1800, Fourteenth street, northwest, in said city of Washington, in manner and form as alleged.

3. That he did not with said Jones, nor did he individually or severally, on the 20th of April, 1896, or at any time since the 31st day of March, 1896, enter into the business of selling at retail butter, eggs, or poultry, being a branch of the retail grocery business, and being also a branch or portion of the business which the defendants had sold to the plaintiffs, and in which the defendants had been engaged prior to the 31st day of March, 1896, etc., as alleged in the third count of the plaintiffs' declaration, in manner and form as alleged.

4. That the defendant Stidham did not with said Jones, nor did he individually or severally, on the 20th of April, 1896, or at any time since the 31st day of March, 1896, enter into the business of selling at retail butter, eggs, poultry, cheese, meats, vegetables, marketing, or provisions, being a branch of the business which the defendant sold to the plaintiffs, in manner and form as alleged in the fourth count of the plaintiffs' declaration.

5. The fifth plea is of former judgment recovered in favor of the defendant Stidham, in an action on the covenant sued on in this case; but there was no evidence offered, so far as the present record discloses, in support of that plea, and it must therefore be treated as wholly immaterial upon this appeal.

Issue was joined upon all the pleas; and upon the trial it was shown in proof that the defendant Stidham, after the sale of the store and goodwill of the business at No. 1800, Fourteenth street, northwest, carried on a business of selling butter, eggs, poultry, and cheese, and that such business was carried on and conducted by said Stidham at stand No. 8, Riggs Market; and that the plaintiffs lost a considerable number of their customers by reason of said defendant carrying on said business. The plaintiffs gave in evidence two business cards of the defendant Stidham. The first of which is as follows:

"S. H. Stidham, dealer in finest grades of Elgin butter, and strictly fresh eggs.

"Residence: 1508 S Street, N. W. Stand No. 8, Riggs Market."

The second card is as follows:

"S. H. Stidham, poultry dealer. Dressed poultry a specialty. Residence: 1508 S Street, N. W. Stand: No. 8 Riggs Market."

The plaintiffs offered evidence further to prove, that at the time of the sale of the store and goodwill of the business to them the defendants had about seventy-five regular customers who dealt with the plaintiffs for a time after the sale; that very soon

thereafter the plaintiffs' said customers began to drop off, and that the majority of said former customers of Stidham & Co. quit dealing with the plaintiffs from time to time, off and on; that the witness knew and could name about thirty-nine regular customers of said Stidham & Co. who dealt wholly with the plaintiffs for a time after the sale, but who entirely stopped dealing with the plaintiffs; that the business comprised dry groceries and green groceries, including butter, eggs, cheese, and poultry. That Stidham, after the sale to the plaintiffs, sold butter, eggs, and poultry from his wagon to certain customers named; that witness saw him at several places delivering goods from his wagon, and that he had butter, eggs, cheese, and poultry in it. That the distance of the Riggs market from the plaintiff's store is three squares, and that of No. 1508, S street, northwest, is one and a half squares.

The witness, on cross examination, testified that he never knew the defendant Jones to engage in business after the sale to the plaintiffs; that the customers who left the plaintiffs discontinued all purchases from them; that he had never known Stidham to sell sugar, coffee, meats, or any other articles than butter, eggs, cheese, and poultry, after the sale of the store and goodwill to the plaintiffs.

Upon the evidence offered by the plaintiffs the defendant moved the court to instruct the jury to return a verdict for the defendant, and that instruction was given and the verdict returned for the defendant accordingly. The judgment was entered thereon and the plaintiffs have appealed.

The specific ground upon which the ruling of the court below was founded is not stated in the bill of exception; but it seems to be conceded by both sides that the view upon which the court acted in withdrawing the case from the jury was, that the covenant sued on was not broken by the acts and conduct of Stidham alone; that as the covenant in terms was joint, and provided only against the joint acts of both Stidham and Jones, to entitle the plaintiffs to recover it was incumbent upon them to show that the breach complained of was committed by the joint act or acts of both Stidham and Jones; and without evidence to that effect no recovery could be had against Stidham for acts committed by him alone. That is to say, the acts of one are not to be construed as the acts of both under the covenant. Whether this is the proper construction of the covenant is the first and principal question in the case.

There can be no question but that the covenant sued on is, by its terms, a joint covenant, and not joint and several. But does it follow that it requires the joint act of both defendants in order to constitute a breach of this covenant? A joint covenant does not necessarily mean a joint act to incur liability under it. The covenant is negative in form, that is to say, that the party of the first part "shall not enter into the retail grocery business for the period of

five years, within 1 mile," etc. The covenant is not "that the party" shall not as partners, and only as partners, enter into the retail grocery business, but they jointly obligated themselves that they will not enter into such business. They ceased to be partners from the time of selling out their business to the plaintiffs. To say that there could be no violation of the covenant except by the joint acts of the defendants as and in their character of partners would seem at once to deprive the plaintiffs of all substantial benefit and protection of the covenant, by reason of the easy manner in which it could be evaded. If such be the construction of the covenant, both Stidham and Jones, acting separately and individually, could each establish a place for carrying on the grocery business, within a block of the plaintiff's store, with entire impunity. Such could never have been the intention of the parties. The violation of the spirit and substantial meaning of the covenant by one of the defendants is a violation by both and for which both are liable. The authorities seem to be clear to the effect that any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done. [*Cabell v. Vaughan*] 1 Wms. Saund. 291 b, note 4; 1 Addison, Contr. 38, 39. The substance of the covenant ought not to be sacrificed to a dry technicality without reason, as would certainly be the case if one, or both of the defendants separately could do what the defendant Stidham has done without incurring liability under the covenant.

There are decided cases that fully support the contention of the plaintiffs. The case of *Kramer v. Old*, 119 N. C. 1, 34 L. R. A. 389, 25 S. E. 813, was where there was a sale of a mill by partners, and the joint stipulation on their part was "that they will not continue business of milling in the vicinity of Elizabeth City after the first day of September, 1891, and the full completion of this agreement." In that case it was held to be a violation of the contract for any one, or all of the vendors to take stock in, help to organize, or manage a corporation formed to compete with the purchaser of the mill in such business. It was also held to be a violation of the contract for the prohibited parties to furnish machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view of competing with the person protected by his contract against such injury. The court in that case proceeded upon the ground that a reasonable and fair construction of the restrictive stipulation fully warranted the judgment against the defendants.

In the case of *Boutelle v. Smith*, 116 Mass. 111, a firm of two bakers sold their business and goodwill to another firm, with an obligation that they would not enter into the business within a limited area and time. One of the vendors engaged as a clerk with a third person having his store or place of business outside of the limited area, but 53 L. R. A.

such clerk drove a wagon over his former routes and sold and delivered bread to his former customers. This was held to constitute a breach of the contract and to render both vendors liable for the acts of the one. The court, speaking by Mr. Chief Justice Gray, said: "The acts of one of the defendants offered to be proved at the trial, were a clear breach of their joint obligation;" citing case of *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748.

The case of *Western Dist. Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308, was a suit instituted against Hobson and others for damages, and to restrain Hobson from carrying on the tobacco business in Paducah or in that vicinity, in violation of a stipulation in restraint of such business. The bill of sale of Hobson & Co., by which they disposed of their warehouse business, contained this provision: "And also all our goodwill in said warehouse business as members of the firm of H. H. Hobson & Co., or as individuals; and we agree with said company not to engage in said business, directly or indirectly, for a period of ten years from this date." This provision of the contract of sale was violated by the individual acts of Hobson alone. The court of appeals held that the plaintiff was entitled to redress for such violation of the contract of sale, and in their opinion stated the case as follows: "It appears that appellees were the owners of a tobacco warehouse in Paducah, and had built up quite a large trade in that vicinity. Some time prior to March 14, 1892, the appellant purchased the property and goodwill of the appellees, and also, as alleged, contracted and agreed with them that they, (appellees) would not enter into said business directly or indirectly for ten years. Appellees executed deed of conveyance to appellant for said property, but afterward appellee Hobson engaged in the same business, in the city of Paducah, and within less than five years from the sale." For this violation of the contract by the acts of Hobson alone, his co-contractors and obligors were held liable. See also the case of *Stark v. Noble*, 24 Iowa, 71, where the same principle is maintained.

It is urged on behalf of the defendant Stidham, that the cases of *Boutelle v. Smith* and *Western Dist. Warehouse Co. v. Hobson* do not apply to this case, because they were cases where the contract was both joint and several. But whether that be the case or not is wholly immaterial in the application of those cases to the present. In those cases the court enforced the joint obligation of the parties, for the separate violation by one of them, treating all as equally and jointly bound for breaches committed by one or more of them, by virtue of the joint term in the contract.

2. The validity of the covenant sued on is not questioned, and could not be, upon the settled doctrine upon the subject as laid down by the Supreme Court, in the case of *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553. That being so, the only remaining question

is, whether the facts of the case as proved by the plaintiffs were sufficient to require the case to be submitted to the jury for their consideration, to establish a breach of the covenant. Did the defendants or either of them enter into the retail grocery business, within the time and area prescribed? To answer this question in the affirmative it does not require that it be shown that the defendant had a regular store, or that he retailed all the articles that had been kept and retailed from the store sold to the plaintiffs. If a material and substantial part of such articles were retailed and sold by the defendant within the prescribed limits, that would constitute a breach of the covenant, provided it comes within the definition of a retail grocery business. The defendant is responsible if he served customers within the prescribed limits, although he might have no residence, shop, or place of business within such limits. *Turner v.*

*Evans*, 2 El. & Bl. 512; *Brampton v. Beddoes*, 13 C. B. N. S. 538. He must, however, have entered into and carried on a retail grocery business. What constitutes a retail grocery business is, to a large extent, a matter of fact, and must be determined by a jury, under proper instructions from the court, as to the meaning and construction of the contract. We think the evidence in this case was of a nature proper to have been submitted to the jury upon the question as to whether a breach of the covenant had been committed, and if breach had been found to have been committed, as to the quantum of damages.

Upon the whole, we think there was error in the ruling of the court below, in taking the case from the jury, and we must therefore reverse the judgment and remand the case for a new trial; and it is so ordered.

*Judgment reversed, and cause remanded.*

### MISSISSIPPI SUPREME COURT.

John WHITLEY, *Appt.*,

*v.*

STATE of Mississippi.

(.....Miss.....)

1. A confession made by one accused of murder, under threats that he would be delivered back to a mob unless he confessed, is incompetent, and should not be admitted in evidence.
2. Proof of the finding of a sack of money at the place designated by one who, under threats of being delivered back to a mob, confessed to having committed a murder and to having hidden a sack of money taken from the body at a certain place, is inadmissible where neither money nor sack was identified as belonging to the murdered man.
3. A confession made the day following a prior confession which was induced by threats cannot be received in evidence, unless it is shown that the influence which induced the first confession had been entirely destroyed.

(November 12, 1900.)

NOTE.—Admissibility of evidence obtained by aid of an involuntary or inadmissible confession.

#### I. In general.

#### II. Necessity of identifying things found.

The authorities are very conflicting as to the admissibility of a confession otherwise inadmissible, where facts disclosed thereby are found to be true; some holding that the entire confession is thereby rendered admissible, some that only the part relating to such facts is admissible, and some that no part of the confession is admissible; but almost all agree that the facts discovered by aid of the confession are themselves admissible, and that evidence is also admissible to show they were discovered in consequence of the confession; a few statements being found to the effect that if the confession was obtained by criminal violence the facts dis-

APPEAL by defendant from a judgment of the Circuit Court for De Soto County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

*Messrs. Farley & Lauderdale*, for appellant:

The first confession was not voluntary, and should have been ruled out.

*State v. Young*, 52 La. Ann. 478, 27 So. 50; *State v. Berry*, 50 La. Ann. 1309, 24 So. 329.

The following day the sheriff carried defendant, without any guard but himself and one deputy, to the place of killing, in the very midst of the homes of the parties who the day before constituted the mob, and there pumped from him a repetition of what he said the day before; there while he, defendant, no doubt was looking every minute for the mob to appear and recapture him, or, peradventure, thought that these very officers would turn him over to the mob if he should make a different statement. This was not a voluntary confession.

*Greenl. Ev. § 219; State v. Young*, 52 La.

covered might not be admissible, and some expressions to the effect that if the confession was improperly obtained by violence or otherwise the facts discovered by means thereof ought not to be admitted. Almost the only exception, however, to the admissibility of such evidence is where the thing discovered is not identified, although some cases hold that the confession itself sufficiently identifies the property, and in others the question of identity does not seem to have been raised.

#### I. In general.

As above stated, evidence discovered by aid of inadmissible confessions is usually held to be admissible. Thus, in 2 Hawk. P. C. chap. 46, § 3, note 2, it was stated that although a confession obtained by the flattery of hope, or the impressions of fear, is inadmissible, yet, if any facts arise in consequence of such a con-



Ann. 478, 27 So. 50; *State v. Auguste*, 50 La. Ann. 488, 23 So. 612.

**Mr. Monroe McClurg**, Attorney General, for the State:

When the confession is made under such influences, and followed up by such a demonstration on the part of the accused, as make the confession absolutely true, the reason for the rule excluding involuntary confessions is gone, and every sensible reason for admitting and believing it is presented.

1 Wharton, Crim. Ev. 695; 1 Greenl. Ev. 232.

The money of the deceased was not only found by the voluntary acts of the accused and by accused himself, but it was thoroughly identified.

*Belote v. State*, 36 Miss. 96, 72 Am. Dec. 163; 6 Am. & Eng. Enc. Law, 2d ed. p. 551.

**Terral, J.**, delivered the opinion of the court:

John Whitley was sentenced to be hanged

fession they may be given in evidence, as they must be immutably the same.

And whatever acts are done, or facts arise, in consequence of a confession improperly obtained, are admissible, although the confession itself is not. *Mosey's Case*, 1 Leach C. L. 263, note; *Spicer v. State*, 69 Ala. 159, *obiter*; *Jones v. State*, 75 Ga. 825; *Daniels v. State*, 78 Ga. 98, and *White v. State*, 3 Helsk. 338.

And that the fact was found in consequence of the information given. *Warren v. State*, 29 Tex. 369.

In *Harvey's Case*, 2 East, C. L. 658, Lord Eldon said that when the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence he should direct an acquittal unless the fact itself which was proved would have been sufficient to warrant the conviction without the confession.

Any facts discovered in consequence of an inadmissible confession are admissible, notwithstanding such confession. *United States v. Hunter*, 1 Cranch, C. C. 817, Fed. Cas. No. 15,424; *Walrath v. State*, 8 Neb. 80.

And in *King v. Lockhart*, 1 Leach, C. L. 386, 2 East, C. L. 658, the court said that the law was clearly settled that, although a confession improperly obtained cannot be given in evidence, yet it cannot require the rejection of the evidence of other witnesses obtained in consequence of such a confession. In this case the stolen property had been sold by the defendant, and he confessed the fact and the name of the purchaser, who was called to prove that he had received the property from defendant.

In *Brister v. State*, 26 Ala. 107, the court states, *arguendo*, the general rule that if, in consequence of a confession improperly obtained, the body of the person murdered, or any other material fact, is discovered, it may be shown that such fact was discovered conformably to the information given.

And *Thurtell's Case*, cited in *Joy on Confessions*, 84, states that, although a confession obtained by means of promises or hopes held out could not be used against defendant, the fact that goods were recovered or a corpse found in consequence of the confession, and at the place mentioned therein, is receivable in evidence.

And in *Walker v. State*, 2 Tex. App. 326, the court said that when a prisoner makes a statement of facts, and in consequence of such information the property stolen, the bloody

by the circuit court of De Soto county, and he appeals from the judgment of the court. Meriwether and Gore, the latter being deputy sheriff, rescued the defendant from the hands of a mob, and held him in custody for the murder of Brice Martin. On the day of the arrest, upon the threat of Meriwether and Gore to deliver him back to the mob unless he should confess to the killing of Martin, and upon their assurance that the mob would kill him if delivered to them, the defendant made a circumstantial statement of the killing of the deceased without any provocation, and of getting from Martin's person a sack containing \$6.50 or \$7.50, and of hiding the money at a certain place designated by him, and known to them, where the next day the sack and money were found. These confessions were admitted by the court as being freely and voluntarily given, and proof also was made as to the finding of the sack and money where the prisoner stated them to be, upon which much value seems to be

clothes of the defendant, or the instrument with which he says the offense was committed, or any other material fact is discovered, such confession together with the statement itself is admissible.

And in *State v. Douglass*, 20 W. Va. 770, the court states that while there is a diversity of opinion as to whether the confession itself is admissible when corroborated by finding the stolen goods or dead body where defendant said it would be found, all agree that the fact when and where the property or body was found is admissible, no matter how the information was obtained.

And a similar statement is found in *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

Where stolen goods are found in the place indicated by defendant in his confession, such fact is admissible, even though the confession was improperly obtained. *Garrard v. State*, 50 Miss. 152; *State v. George*, 15 La. Ann. 145; *McGlothlin v. State*, 2 Coldw. 223; *Stage's Case*, 5 N. Y. City Hall Rec. 177; *People v. Hoy Yen*, 34 Cal. 176; *Gates v. People*, 14 Ill. 433, *obiter*; *Rector v. Com.* 4 Ky. L. Rep. 323; *State v. Winston*, 116 N. C. 990, 21 S. E. 87; *State v. Mortimer*, 20 Kan. 93; *Strait v. State*, 43 Tex. 486; *Hudson v. State*, 9 Yerg. 408; *Yates v. State*, 47 Ark. 172, 1 S. W. 65.

Or that they were found in the possession of a particular person soon after the burglary. *Murphy v. State*, 63 Ala. 1.

Or in possession of the accused. *King v. Warickshall*, 1 Leach, C. L. 263.

Where defendants, charged with stealing horses, in an involuntary confession state where and with whom they may be found, and they are found accordingly, the facts and circumstances so ascertained are to be considered by the jury in determining the guilt of defendants. *Selvidge v. State*, 30 Tex. 60.

The fact that defendant conducted witnesses to the place where the stolen property was concealed is admissible against him, although he was induced to make his confession, and such disclosure, by threats, and by being hung to the limb of a tree. *People v. Ah Ki*, 20 Cal. 178.

The offer of the accused to conduct those having him under arrest to the place where the stolen goods were concealed, and the discovery of the goods at such place, are admissible, though the offer was preceded by an assurance that it would be best for him to tell all he knew about the matter. *Banks v. State*, 84 Ala. 430, 4 So. 382.

set by the prosecution. On the next day after the making of the first confession, while going out to get the money and sack hidden by the defendant, being in charge of Sheriff Williamson and of Deputy Sheriff Gore and Meriwether, to which two last-named persons the first confession had been made, the defendant, at the insistence of Gore, made a second confession, both to Gore and to Williamson, of the killing of Martin, without any cause, except that Martin "fussed" at him for spitting upon him. Gore says that he assured Whitley that he was safe from the mob, and insisted that he should then tell the truth of the matter to him and to the sheriff; but it is to be noted that the parties then were in search of evidence to corroborate and fortify the vicious confession of the day before. There was other evidence in the case not necessary to be here recited.

Before the case was submitted to the jury,

In *Belote v. State*, 36 Miss. 96, 72 Am. Dec. 168, the court held that, although a confession had been improperly obtained by means of an agreement not to prosecute if the stolen money were returned, rendering the confession inadmissible, the fact that the accused went to the place where he confessed the money was hidden and got a part of it is admissible, as, when the acts of the accused point out and produce the stolen property in its place of concealment, that fact speaks for itself, and is inconsistent with the idea both of falsehood and of innocence.

Where defendant confesses, although under duress, to having stolen the property in question, and states that it is concealed in a certain place, and points it out to the witness, evidence is admissible that in consequence of such statements the witness and defendant went to the place indicated, and that defendant pointed out such property. *State v. Lindsey*, 78 N. C. 499.

In *Van Buren v. State*, 24 Miss. 516, a slave was charged with stealing, and after being whipped and threatened with another whipping he confessed that he had stolen certain articles and where they could be found, and accompanied the person to whom he made the confession to the place, and showed him the articles taken. The court stated that no objection was made to the admission of the part of the evidence detailing defendant's conduct and action in pointing out the articles, and that they were certainly facts competent to be proved, but held that the part of the confession relating to the time and manner in which he alleged having obtained them was inadmissible.

Where the accused, upon a promise that he shall not be prosecuted, confesses his guilt and selects and returns the stolen lumber, the fact that he selects such lumber is evidence against him. *United States v. Richard*, 2 Cranch C. C. 439, Fed. Cas. No. 16,154.

The fact that accused charged with theft of gold dust delivered, as part of a confession improperly obtained, gold dust to a certain person, representing it to be that which was stolen, is admissible, but not his accompanying declaration that the gold dust was taken by him. *Beery v. United States*, 2 Colo. 186.

Where defendant is induced by promises or threats to show the prosecutor where he had concealed the stolen articles, but denies all guilt in the matter, claiming that he received them from another not knowing that they had been stolen, evidence of such concealment and dis-

closure leading to the discovery is admissible against him. *Rice v. State*, 3 Heisk. 215.

In *State v. Brick*, 2 Harr. (Del.) 530, the court, on a trial for stealing bank notes, part of which were found in pursuance of defendant's confessions, charged that, although a confession made under promise of favor, or threats, is inadmissible, yet, where the confession leads to the discovery of stolen property, or produces a development of acts which *per se* prove the guilt of the party, such facts are to be considered by the jury.

And in *Tucker's Case*, 5 N. Y. City Hall Rec. 164, the court in its charge stated that, although a confession made under promises of favor is inadmissible, yet, if property is found by reason of the confession and by the showing of the prisoner, such fact is admissible. In this case defendant was charged with stealing a piece of silk, and confessed the theft, and told to whom she had sold the different pieces into which the original piece had been cut, and all of it was recovered.

And in *Jackson's Case*, 1 N. Y. City Hall Rec. 28, the court in its charge to the jury stated that, although a confession made in consequence of promises of favor is inadmissible, yet if it leads to other facts which, independent of the confession, are sufficient to establish defendant's guilt, such facts are admissible.

In this case the prisoner, on being charged with theft by the owner of the property and promised that nothing more would be said if she confessed, acknowledged that she had paid money to a specified person, and the latter's wife stated that an amount about equal to the amount of money stolen had been paid her by defendant.

Where defendant, charged with arson, confesses under the influence of hope and fear, and as part of the confession points out the place where goods supposed to have been taken from the store while on fire were concealed, at which place they are found, it is competent to prove that he stated where they might be found, and that they were found at the place indicated. *Denthridge v. State*, 1 Sneed, 75.

In *Speights v. State*, 1 Tex. App. 551, defendant was charged with the theft of a horse. The court held that a statement by him that the saddle used on such horse was concealed in a specified place, and that it was found there, was admissible, as it conduced to show defendant's guilt of the theft of the horse.

In *Reg. v. Gould*, 9 Car. & P. 364, defendant charged with burglary made a confession in

dence was not excluded, had to the case, it is difficult to see. The finding of the sack and money where Whitley said they could be found is certainly no more nor stronger evidence than if found upon his person. Neither money nor sack was identified, and if they had been found on the person of Whitley they proved nothing. The admission of the circumstances relating to the money and sack containing it is not justified by anything said by the court in *Belote's Case*, 36 Miss. 96, 72 Am. Dec. 163.

It is said that the confession made the day after the arrest to Gore, the deputy sheriff, to whom on the day before he had confessed under a threat of handing him over to the mob if he did not confess, and his confession made at the same time or on the same day to Sheriff Williamson, at the insistence of Gore, should be excluded, because it is not shown that the influence of the threats of the day previous had ended or had

ceased to operate; and the court is of the opinion that the objection is well taken, and that said confessions should have been excluded. The second confession was made the next day after the first, and while the parties to whom it was made were in quest of circumstances to fortify the first one, and there is ground to suppose the influence first operating upon the defendant's mind was still affecting it. Where a confession is made under the influence of threats, such influence is presumed to continue until removed by evidence, and a subsequent confession will not be received unless the influence of the first confession is shown to have been totally done away with by a warning of the consequences of a confession or by other means. 1 Greenl. Ev. § 221; *Peter v. State*, 4 Smedes & M. 31; *Van Buren v. State*, 24 Miss. 516; *Simon v. State*, 37 Miss. 288.

*Reversed and remanded.*

which he referred to having thrown a lantern into a certain pond. It was shown that the lantern was found there, and the court also admitted so much of the statement as referred to throwing it into the pond.

Where a confession was made which is inadmissible because induced by promises, the fact that the officer to whom it was made went to a pawn office in consequence thereof and found the stolen watch is admissible, the court stating that undoubtedly if the prisoner had requested he would have been entitled to have so much of the confession as related to the facts so discovered given in evidence. *Duffy v. People*, 26 N. Y. 588.

Where the accused stated that he had pawned a watch taken from the murdered man at a specified pawn shop, where it was found in pursuance of such statement, the statement, in connection with evidence identifying the watch and showing that it was found in pursuance of the statement at the place described, is admissible. *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

Although a confession made after an admonition by the prosecutor that it would be better to confess is inadmissible, the prosecutor may prove that the prisoner brought to him a guinea and a note which he gave up as the guinea and one of the two notes stolen. *Rex v. Griffin, Russ. & R. C. C. 152*.

One of the judges dissented in this case on the ground that the production was alone admissible, and not the statement that the note produced was one of the notes stolen.

Where the accused confessed to the killing of her daughter's new-born child, and showed where it was buried, that part of the confession relating thereto and the discovery of the body are admissible. *Gregg v. State*, 106 Ala. 44, 17 So. 821.

Where the accused as part of his confession stated where the deceased was concealed, partially covered with leaves, and the body was found as described, that part of the confession and the fact of discovery are admissible though the confession was not voluntary. *Lowe v. State*, 88 Ala. 8, 7 So. 77.

In *Cain's Case*, 1 Craw. & D. C. C. 37, cited in 2 Heard, Lead. Crim. Cas. 617, defendant was charged with concealing the birth of her child. A constable asked her where her child was and she denied having any, but upon the constable's statement that he should search for it and that she had better tell she confessed where it was hidden. The court admitted evi-

dence that it was found concealed in the place stated, although the confession itself was excluded.

In *Elisabeth v. State*, 27 Tex. 329, the court held that, even if the declarations of the defendant, a slave, accused of aiding in the murder of her master's child, offering to show where its body was, were inadmissible because made after she had been whipped, or because she was a slave, yet her act in connection therewith in going to a pool of water and bringing the body from it was admissible, the court saying that all material facts are admissible, whatever may be the source from which the information leading to their discovery was obtained.

In *Reg. v. Berriman*, 6 Cox. C. C. 388, the court refused to permit the witness to state that search had been made and bones of a newly born child had been found "in consequence of" what defendant had said in her confession improperly obtained, holding that, although the search and what was found were admissible, they could not be connected with defendant.

In *State v. Motley*, 7 Rich. L. 327, defendants were charged with the murder of a negro. One of them, under persuasion and in the hope of immunity, made a confession. The court held that the fact that the one to whom it was made found the bones of a negro in a certain place conformably to the information given was admissible.

In *State v. Crowson*, 98 N. C. 505, 4 S. E. 143, the accused confessed, under compulsion, that she had drowned her child, and accompanied a deputy sheriff to the stream where the body was afterwards found. The court held that the confession was inadmissible because compulsory, but nothing was said as to the admissibility of the evidence of the finding of the body, or as to its effect on the admissibility of the confession.

Although a confession may be inadmissible, the fact that the weapon used in committing the murder was found in the place pointed out by the prisoner and in consequence of his direction is admissible. *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491.

Although defendant's confession of murder is inadmissible, it may be proved that he said something (without giving his words) about a hatchet, in consequence of which it was found in the place described. *Com. v. James*, 99 Mass. 438.

On a trial for poisoning by strychnine evi-

dence that a vial of strychnine was found in a place indicated by defendant is admissible, although the confession was improperly obtained by a promise that she would be pardoned if she would tell all about it. *Jane v. Com.* 2 Met. (Ky.) 30.

In *State v. Garvey*, 28 La. Ann. 925, 26 Am. Rep. 123, the question at issue was as to the admissibility of a confession obtained by undue influence, and the court held it inadmissible although certain objects used in committing the murder were found in the place indicated by defendant. In the opinion the court states that the law is well settled that when, in consequence of the information obtained, objects are found, or any material fact discovered, it may be shown that the discovery was made conformably to the information given, but that the confession itself is not thereby rendered admissible.

In *Weller v. State*, 16 Tex. App. 200, the defendant while in custody, without being warned, and induced by promises of protection from mob violence, confessed that he had killed the deceased, and told where money taken from him could be found, at which place it was found. He also told where the murder was committed, and blood was found there, as were also marks of the body having been dragged along the path indicated in the confession. The court stated that such facts were admissible, although the real point at issue was the admissibility of the confession.

In *Done v. People*, 5 Park. Crim. Rep. 364, the prisoner, charged with murder, indicated a spot where the stolen bank bills might be found under the carpet in his room, and they were found there. The court stated that the fact of finding the bills could undoubtedly have been given in evidence, no matter under what circumstances the statement had been made by him.

In *Loyd v. State*, 19 Tex. App. 137, defendant was charged with murder. He confessed soon after the homicide that he sold a horse to a specified person, and it appeared that it was subsequently claimed by the brother of the deceased that the horse had belonged to the latter. The court stated that if the horse sold was the same one ridden by the deceased at the time of the murder, and if defendant, though in arrest, told of the whereabouts of the horse, and in pursuance of such information the horse was found, such facts would evidently be admissible, although to make the confession itself admissible the horse must have been found in pursuance of the information given.

Evidence that a buckshot was found in a tree near the place of the murder and very nearly in the range of a gun if shot at deceased from the place mentioned by accused is admissible, as well as the confession itself. *Mose v. State*, 36 Ala. 211.

In *Clemons v. State*, 4 Lea, 23, defendant was charged with aiding a prisoner to escape from the penitentiary. A confession was improperly obtained from him, in which he stated that his wife had in her possession a draft and deed. These were sent for and delivered, and the draft was found to be signed by a brother of such prisoner payable to defendant or his wife, and the deed a conveyance by such prisoner's wife to defendant's wife. The court held that evidence of such discovery and so much of the confession as related thereto were admissible.

The following cases hold that when, in consequence of a confession otherwise inadmissible, certain facts are found to be true, either the entire confession, or so much as relates to the facts discovered, is admissible. Although nothing is said as to the admissibility of the

facts themselves, it is evident that they were admitted in evidence, and they are accordingly given here. Many of the cases are from the courts of Texas, in which state there is a statute (Code Crim. Proc. arts. 749, 750) providing that a confession may be used against accused if it appears that it was freely made without compulsion or persuasion, but that it shall not be used if the accused was in confinement or custody, unless he made a statement of facts or circumstances found to be true, such as the finding of secreted or stolen property or the instrument with which he states that the offense was committed. *Sampson v. State*, 54 Ala. 241; *State v. Moore*, 2 N. C. (1 Hayw.) 482; *State v. Drake*, 82 N. C. 592; *Laros v. Com.* 84 Pa. 208; *State v. Vaigneur*, 5 Rich. L. 391; *Davis v. State*, 2 Tex. App. 588; *Burfey v. State*, 3 Tex. App. 519; *Berry v. State*, 4 Tex. App. 492; *Davis v. State*, 8 Tex. App. 510; *Walker v. State*, 9 Tex. App. 38; *O'Connell v. State*, 10 Tex. App. 567; *Massey v. State*, 10 Tex. App. 645; *Allison v. State*, 14 Tex. App. 122; *Bean v. State*, 17 Tex. App. 60; *Collins v. State*, 20 Tex. App. 399, 24 Tex. App. 141, 5 S. W. 848; *Brown v. State*, 26 Tex. App. 308, 9 S. W. 613; *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Sands v. State*, 30 Tex. App. 578, 18 S. W. 86; *Prince v. State* (Tex. Crim. App.) 20 S. W. 582; *Davis v. State* (Tex. Crim. App.) 23 S. W. 687; *Smith v. State*, 34 Tex. Crim. Rep. 124, 29 S. W. 775; *Spearman v. State*, 34 Tex. Crim. Rep. 279, 30 S. W. 229; *Williams v. State*, 34 Tex. Crim. Rep. 827, 30 S. W. 669; *Frederick v. State*, 3 W. Va. 695; *Bex v. Butcher*, 1 Leach, C. L. 265, note a.

The following cases, although relating to the admissibility of the confession, are inserted, as it is believed that they will be found helpful on the question as to the admissibility of the evidence discovered by its aid.

In *Anderson v. State*, 104 Ala. 83, 16 So. 108, the statement is made that nothing therein is intended to impair the rule that involuntary confessions may be admitted when they point to the discovery of physical facts which are discovered and proved in connection with the confession.

And *State v. Jones*, 46 La. Ann. 1395, 16 So. 369, holds that the discovery through a confession of facts legally admissible and tending to prove defendant's guilt does not render the confession itself admissible if it was not voluntary.

And in *Greer v. State*, 31 Tex. 129, the confession is held inadmissible under the Texas statute, nothing being said as to the admissibility of the discovery of the stolen watch in consequence of the confession.

And in *Kennon v. State*, 11 Tex. App. 356, defendant, charged with stealing a horse, confessed while in custody that another person specified caught the horse and brought it to him, and that he took off a ball and chain which were on the horse and threw them away and rode the horse off. The court held that evidence that the horse had on a chain and ball at the time it was stolen does not make the confession admissible where the chain and ball were not found, but stated that if defendant had confessed to having placed the ball or chain in a certain place, and it had been found there in pursuance of the information, such facts would have been admissible.

In the following cases the confession was held to be inadmissible because it did not lead to the discovery of any facts, either because the information had previously been obtained from others or for other reasons. It seems clear from them that if any facts had been discovered as the result of the confession such facts would

have been admitted. *Nolan v. State*, 14 Tex. App. 474, 46 Am. Rep. 247; *Neeley v. State*, 27 Tex. App. 329, 11 S. W. 876; *Crowder v. State*, 28 Tex. App. 51, 11 S. W. 835; *Musgrave v. State*, 28 Tex. App. 57, 11 S. W. 827; *Rains v. State*, 33 Tex. Crim. Rep. 294, 26 S. W. 398; *Binyon v. State* (Tex. Crim. App.) 56 S. W. 339; *Rex v. Jenkins, Russ. & R. C. C.* 492.

And in *Zumwalt v. State*, 5 Tex. App. 521, a confession made under arrest was held admissible under the Texas statute, where it was proved to be true by leading to where the stolen horses were, although they had already been found by other persons.

In a few cases the admissibility of evidence obtained by aid of a confession improperly obtained has been questioned.

Thus, in *State v. Roberts*, 12 N. C. (1 Dev. L.) 259, the court remarks, *obiter*, that if it were not for authority he should say that where the fact has been obtained by extorted confessions such fact may be proved, but nothing which the prisoner said in regard thereto, and if it were not for authority he should say that not even the fact of recovery by means of the confession would be admissible.

And in *Jordan v. State*, 82 Miss. 382, defendant was charged with murder by two private persons, one of whom had a pistol with which he threatened to shoot him if he did not confess, the other striking him with a stick. Defendant thereupon told of the time and place of losing a knife, and the court stated that in such a case the rule protecting against a confession extorted by lawless violence protected the accused against testimony which could only be discovered or made available through the instrumentality of such confession.

And from other statements in the opinion it would seem that the decision would have been the same if the confession had been obtained by means of promises.

And in *Rusher v. State*, 94 Ga. 363, 21 S. E. 593, the court, while holding that the fact of the discovery of stolen money at the place pointed out by the accused was admissible, although he was ordered to point it out and those present operated on his hopes or fears, stated that such evidence might be inadmissible if criminal violence, such as whipping, was used, as one crime ought not to be committed to discover another.

But in *People v. Ah Ki*, 20 Cal. 178, the discovery of stolen property at the place pointed out by the accused was admitted, although he was induced to make a disclosure by threats and by being hung to a tree.

And there can be no doubt that the great weight of authority is to the effect that evidence obtained by aid of a confession is admissible if relevant, regardless of the manner in which the confession was obtained.

## II. Necessity of identifying things found.

Almost the only exception to the admissibility of evidence obtained by aid of an inadmissible confession is where the thing found is not identified by evidence other than the confession.

Several cases hold that in such case the evidence is inadmissible, but some cases hold that the confession alone is sufficient identification without other evidence, and in some cases no question seems to have been raised as to the necessity of identification, although it would appear that it might have been.

WHITLEY v. STATE is a case where a confession of murder was held inadmissible because obtained under threats that defendant would be delivered back to a mob unless he confessed.

The confession was at first introduced in evidence but afterwards excluded, and on appeal the court held that the exclusion of the confession was proper. As a part of the confession the defendant told of getting a sack of money from the deceased and hiding it at a designated place, where it was subsequently found. Neither the sack nor the money was identified by any other evidence, and of course after the evidence of the confession was excluded there was nothing to show that it was in any way connected with the deceased or with the crime committed. The court held that evidence as to the finding of the sack had no relevancy whatever to the case, and should have been excluded.

In *State v. Due*, 27 N. H. 256, defendant was charged with the theft of a wallet and two 100-dollar bills, and on promises of favor by the owner he confessed the theft and produced a 100-dollar bill, stating that it was one of those stolen. The bill was not otherwise identified, and the court held that the evidence was incompetent.

In *Rex v. Jones, Russ. & R. C. C.* 152, which was a prosecution for theft of £1 8s. the prosecutor told the defendant that all he wanted was his money, and the latter took 11s. 6½d. from his pocket, and said that was all that was left. The majority of the court held such evidence inadmissible, and, although nothing is said in the case as reported as to the reason for so holding, the probability is that it was because of the failure to identify the money.

*Rex v. Clarke, Car. C. L.* 59, is stated in 4 Mews English Case Law Digest Col. 1817, to involve the same principle as the preceding case.

In *Walrath v. State*, 8 Neb. 80, the court, in criticising an instruction that any circumstance tending to show guilt may be proved, although brought to light by a declaration inadmissible *per se* as having been obtained by improper influence, states that such facts must be clearly proved by other testimony than the confession.

In *Williams v. Com.* 27 Gratt. 997, defendant was charged with the theft of money, and made a confession to a detective in which he directed him to go to certain gamblers and get the money. He went and they paid over a certain amount, one denying that defendant had been there at all, and the other that he had lost any money. The money so paid over was not otherwise identified. The court stated that if the money so delivered up had been proved by independent evidence to have been that stolen, the fact that it was thus delivered, and that the prisoner's confession led to the discovery, would have been admissible, but as it was not identified all evidence, including the confession, was held to be inadmissible.

And in *Jordan v. State*, 32 Miss. 382, defendant, induced by threats and violence, confessed to having lost a knife at a specified time and place, and the court, while deciding the case on another point, said that it was probably true that in order that the finding of the knife should be admissible the place of finding it must agree with that stated by defendant.

On the other hand, *Beery v. United States*, 2 Colo. 186, holds that the fact that the accused, when charged with the theft of gold dust, delivered gold dust to the one making the charge, representing it to be that which was stolen, is admissible, although the confession was improperly obtained.

And in *Rex v. Griffin, Russ. & R. C. C.* 152, defendant, when charged by the prosecutor with stealing a guinea and two bank notes, delivered to him a guinea and a note, which he gave up as the guinea and one of the notes stolen, and

the court held that such evidence was admissible, although the prosecutor could not identify the note further than that it was of the same bank and of the same denomination as that stolen.

And in *State v. Motley*, 7 Rich. L. 327, defendant, on being charged with the murder of a negro, confessed the murder under persuasion and the hope of immunity. The court held that the fact that the one to whom the confession was made found the bones of a negro conformably to the information given was ad-

missible, although they do not seem to have been otherwise identified.

In *Rector v. Com.* 4 Ky. L. Rep. 323; *Belote v. State*, 36 Miss. 96, 72 Am. Dec. 163; *Jackson's Case*, 1 N. Y. City Hall Rec. 28; and *Done v. People*, 5 Park. Crim. Rep. 364,—the things found were held to have been sufficiently identified.

And in *People v. Hoy Yen*, 34 Cal. 176, and *McGlothlin v. State*, 2 Coldw. 223, the money found is spoken of throughout as the stolen money, and no question of identity seems to have been raised. J. H. H.

## ILLINOIS SUPREME COURT.

### ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*, v. City of CHICAGO.

(173 Ill. 471.)

1. Lands covered by the waters of Lake Michigan are not within the provision of the act of February 10, 1851, § 8, incorporating the Illinois Central Railroad Company, which authorized it to take "any lands, streams, and materials of every kind for the location of depots" and other specified purposes.
2. The word "stream" does not include the waters of a great lake like Lake Michigan.
3. A grant of land covered by the waters of Lake Michigan, for the private use of a railroad company, is not within the power of the state, as it holds the title to the land in trust in its sovereign capacity for the people of the entire state.

(June 18, 1898.)

**A** PPEAL by complainant from a decree of the Superior Court for Cook County in favor of defendant in a suit to enjoin defendant from interfering with the filling in by complainant of certain land covered by shallow water of Lake Michigan. *Affirmed.*

Statement by **Craig, J.:**

This is a bill in equity filed by the Illinois Central Railroad Company against the city of Chicago, praying for an injunction restraining the city from interfering with or preventing the company from filling in certain land covered by the shallow waters of Lake Michigan, lying between Twenty-fifth and Twenty-seventh streets, produced, for the purpose of constructing an engine house thereon. The bill is quite voluminous, but it will only be necessary to set out those provisions which have a direct bearing on the questions involved.

The bill sets out the history of the na-

**NOTE.**—For earlier cases in this series as to grant to railroad company by state of land under water, see *New York C. & H. R. R. Co. v. Aldridge* (N. Y.) 17 L. R. A. 516; and *Saunders v. New York C. & H. R. R. Co.* (N. Y.) 26 L. R. A. 378.

As to power of state to grant land under tide waters, see cases in note to *Goff v. Coughle* (Mich.) 42 L. R. A. on page 163. 53 L. R. A.

tional charter of the Illinois Central Railroad Company, and its consideration in Congress, resulting in the passage of the act of Congress approved September 20, 1850 (9 Stat. at L. 466, chap. 61). By that act the right of way through the public land was granted to the state of Illinois for the construction of the railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said state, to Dubuque, in the state of Iowa, with the right, also, to take the necessary lands, waters, and materials of earth, timber, etc., for the construction of the railroad. The act also granted to the state of Illinois, for the purpose of aiding and making the railroad and branches above named, every alternate section of land designated by even numbers, for six sections in width, on each side of the railroad and branches. By the act it was further provided that the railroad and branches should be and forever remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States. The bill further sets forth that the company was created, organized under, and now exists by virtue of, the act of the legislature of the state of Illinois approved February 10, 1851, entitled "An Act to Incorporate the Illinois Central Railroad Company" (Private Laws 1851, p. 61); and by its charter it was authorized to survey, locate, construct, complete, alter, maintain, and operate a road, with one or more tracks or lines of rail, from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same into Chicago, on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa; that by § 3 of its charter it was provided as follows: "The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and

singular any lands, streams, and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil-banks, turn-outs, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to Provide for a General System of Railroad Incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided: . . . provided, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." The bill also avers that the company constructed its line of railroad within the then limits of the city of Chicago in the year 1852, and completed its railroad extending between the termini named in its charter, in the state of Illinois, in the year 1857; that the total number of miles of its railroad in the state, upon completion, was 706; that at the time of the construction of its railroad, in 1852, into the city of Chicago, the southern limits and boundary of the city extended only to Twenty-second street; that in 1852 it constructed its line of railroad immediately along the shore, and partly over the shallow waters of Lake Michigan, from Fifty-first street to Twenty-second street, then the southern boundary of the city, and that its railroad was constructed into the city of Chicago through the waters of Lake Michigan, pursuant to an ordinance of the city; that its railroad within the limits of the city was constructed on piling set in the open waters of Lake Michigan east of the shore; that between Park Row and Randolph street the distances in a direct east and west line between the shore line and the inner or west line of the piling on which the railroad of the company was constructed through the open waters of Lake Michigan varied from 5 feet at Park Row to 310 feet at Madison street, and that the depth of the water along the line of piling between the points above named varied from  $2\frac{1}{2}$  to  $9\frac{1}{2}$  feet; that the company now owns or controls by lease, and is now operating under one management, the whole of the trunk line as one continuous line from New Orleans, through the states of Louisiana, Mississippi, Tennessee, Kentucky, and Illinois, into the city of Chicago; that it controls, by lease or otherwise, under the same management, many other lateral lines in the states above named, and also in the states of Wisconsin, Iowa, Minnesota, and Dakota, which connect with and are tribu-

tary to the parent line of the company; that the number of miles now owned or controlled by the company under one management exceeds 4,600. It is further alleged in the bill that the city of Chicago is the business center of the various lines which constitute the system owned by the company; that the business carried on over the terminal tracks and facilities of the company within the present limits of the city of Chicago is so great and so constantly increasing that the whole of its right of way and lands contiguous thereto, within said limits, are used to their utmost capacity as yards, shops, depot grounds, side tracks, switching tracks, storage tracks, delivery tracks, team tracks, and other structures, all of which are absolutely necessary as terminal facilities to enable the company to carry on and conduct its business as a common carrier of freight and passengers, and that all the tracks, structures, and appliances of its terminal facilities are necessary and essential to enable the company to carry on its business; that the business of the company as a common carrier greatly increases from year to year; and that it has so continued to increase that its terminal facilities in the city are not wholly adequate for the purposes and uses prescribed and intended by its charter. The bill sets out in detail its business and its increase from year to year, and alleges that its terminal facilities in the city of Chicago have been found to be wholly inadequate to enable the company to carry on its business; that, in order to meet the increased business necessities and requirements of the company, it is absolutely necessary that the company should construct, operate, and use an engine house 316 feet in diameter, and containing 40 stalls, together with a machine shop, turntable, coal chute, and other structures; that it has no engine house whatever at which it is practicable for its engines to be overhauled and fitted for operation; that it has no land whatever unoccupied by other necessary tracks and structures, which is either sufficient in dimensions or suitably located, upon which to locate and construct an engine house of the necessary dimensions and capacity, with the necessary appurtenances thereto, required and necessary for the business of the company; and that, in order to build such engine house and the appurtenances, it is necessary to construct the same upon land covered by the shallow waters of Lake Michigan, at a point between Fifty-first street and Eighteenth street.

It is also set up in the bill that in 1852, at the time of the construction of the road within the city of Chicago, it purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan; that in the deeds the shore of Lake Michigan was designated as the east boundary line thereof, and that the company, as owner, was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land; that in the year 1882 it constructed a break-

water or bulkhead in the shallow waters of Lake Michigan, the same being located and constructed in front of the land which the company purchased in 1852, above referred to, the east and west line of the breakwater on the north extending from a point on the shore continuous with the northern boundary of the land conveyed to the company in 1852, and extending to a point 200 feet easterly from the shore line, running thence southerly a distance of 781 feet, and thence westerly to the shore line, a distance of 325 feet; that the breakwater built by the company in 1882 was constructed on two rows of piling driven into the bed of Lake Michigan, and the space between the rows of piling was filled in with stone, in order to strengthen the breakwater, and enable it to withstand the force of Lake Michigan during periods of storm; that all the shore land embraced within the lines of the breakwater now is, and ever since the year 1852 has been, owned in fee simple by the company, and that it is entitled to all the riparian rights and privileges incident to the ownership in fee of the shore land; that the superficial area of the land covered by the shallow waters of Lake Michigan lying within the lines of the breakwater and the shore line of Lake Michigan is 195,200 square feet, or 4.48 acres; that the superficial area of the ground necessary for the construction of the engine house, machine shop, coal chute, and other necessary structures appurtenant thereto is 168,426.9 square feet, or 3.86 acres. The bill further states that in the year 1894 a part of the breakwater referred to as having been constructed by it in the year 1882 was destroyed by a storm on Lake Michigan; that it being necessary, to enable the company to carry on and conduct its business, that an engine house of sufficient capacity to meet its necessary requirements and demands in conducting its business, and to accomplish the objects for which the company was chartered, be constructed and erected at a reasonably suitable and proper location, and it being necessary that such engine house should be erected and constructed upon the lands submerged by the shallow waters of Lake Michigan lying in front of land on the shore of Lake Michigan owned in fee simple by the company, the company caused plans to be made, as before stated, for an engine house 316 feet in diameter, and containing 40 stalls or compartments; and under the power, authority, and right given and vested in the company by its charter, and in the exercise of its rights as riparian owner, it elected and determined to locate and construct said engine house on land submerged by the shallow waters of Lake Michigan lying within the limits of the breakwater, and to repair the breakwater and fill in the submerged lands lying within the limits of the breakwater, for the purpose of constructing thereon said engine house and the necessary appurtenances thereto; that the breakwater does not in any way interfere with the navigation of Lake Michigan: that the Secretary of War gave his consent to 63 L. R. A.

the repair of the breakwater; that the commissioner of public works of the city of Chicago also gave his consent to the repair; that the company placed upon the ground large quantities of material for repairing the breakwater, the filling in of the lands covered by the shallow waters of Lake Michigan embraced within the lines thereof, and for the construction of the engine house and appurtenances thereto on the lands to be filled in; that it repaired the breakwater by driving two rows of piling, and filled in a large part of the space between the exterior and interior line of piling with stone, for the purpose of enabling the breakwater to withstand the force of Lake Michigan; that the company was prevented by the police force of the city of Chicago, acting under the orders and direction of the mayor, from completing the work; that the city of Chicago, without right or authority, interferes with and prevents the company from filling in the land within the lines of said breakwater. The bill prayed for an injunction restraining the city from interfering with the company. The superior court denied the application for an injunction, and dismissed the bill, and the complainant appealed.

**Messrs. C. V. Gwin and James Fentress** for appellant.

**Messrs. Charles S. Thornton and Granville W. Browning** for appellee.

**Craig, J.**, delivered the opinion of the court:

On the application for an injunction, the facts set forth in the bill were admitted to be true; and the question presented by this record is, admitting the facts set out in the bill to be true, whether the court erred in denying the motion for an injunction, and in dismissing the bill. It is contended in the argument of counsel for appellant that the Illinois Central Railroad Company has the right and power, under its charter, to enter upon, take possession of, and use land covered by the shallow waters of Lake Michigan for the purpose of constructing thereon an engine house necessary for the altering, maintaining, preserving, and complete operation of its road, when such use does not interfere with navigation. It appears, as has been seen from the allegations of the bill, that in 1852, when the railroad was constructed within the city of Chicago, the company purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan, the shore of the lake being the east boundary line of the lands so purchased. The submerged land in question lies between Twenty-fifth and Twenty-seventh streets, extending into the lake in front of the land purchased in 1852, inclosed by a breakwater erected by the company in 1882. The breakwater extends into the lake 200 feet on a line contiguous with the north boundary line, extended, of the lands purchased by the company, thence southerly 781 feet, thence westerly a distance of 325 feet, to



the shore line. If the space thus inclosed should be filled in as is proposed by the company, the area of land purchased by the company bordering on the lake will be increased to the extent of 4.48 acres heretofore covered by the waters of the lake. This tract of 4.48 acres the railroad company proposes to fill in, and then erect upon it its engine house. The railroad company claims the right to fill in the land, and erect its engine house upon it, on two grounds: First, upon the ground that § 3 of its charter confers the power; and second, because it owns the fee of the shore lands, and has the right as a riparian owner.

Section 3 of the act incorporating the Illinois Central Railroad Company, approved February 10, 1851, provides: "The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil-banks, turn-outs, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to Provide for a General System of Railroad Incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided: . . . provided, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." In the construction of a statute, where the words used are clear and unambiguous, they must be taken in their ordinary, natural, and commonly received sense. *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350. Indeed, where the language of a statute is plain and unambiguous, there is no room for construction, and the words used must have their natural meaning, unless some absurd or injurious consequence will result which was not foreseen by the legislature. *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201. See also *Sutherland*, Stat. Constr. § 237.

Adopting the rule of construction indicated, which we regard as the correct one, does § 3 of the charter empower the railroad company, at any time it may see proper, to enter upon and appropriate to its own use, for railroad purposes, lands covered by the waters of Lake Michigan? Conceding

that the first clause of § 3 conferred upon the railroad company the right to take for right of way a strip of land 200 feet wide upon the location of its line in 1852, that fact has no bearing on the question involved here. The land for right of way in the city of Chicago and along the entire line was selected upon the location of the line of road in 1852, and as to lands taken for right of way there has been no controversy from any quarter. The land here involved is no part of the 200 feet selected or granted for right of way, but it is a tract covered by water beyond the right of way, and the right to appropriate it is claimed under the second clause of § 3, which declares that the railroad company "may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind for the location of depots and stopping stages, for the purpose of constructing . . . station grounds, . . . engine houses," etc., necessary for the construction and operation of the road. The word "lands," as used, cannot mean any portion of Lake Michigan unless that word is given a meaning different from what is generally understood when the word has been used. Webster, in defining the word "land," says: "Earth, or the solid matter which constitutes the fixed portion of the globe, in distinction from the waters, which constitute the fluid or movable part." Under this definition there is a marked distinction between land and water, so that, when the word "land" is used, it cannot be so construed as to include water. Moreover, if the legislature intended, by the use of the word "lands," to include lands covered by water, why also use the word "streams," for all streams are but lands covered with flowing water? We think, therefore, it is apparent that the legislature, by the use of the word "lands," in § 3 of the charter, did not intend to include lands covered by the waters of Lake Michigan.

In regard to the word "streams" used in the section, that term has a well-defined meaning. It is defined in the Century Dictionary as follows: "A course of running water; a river, rivulet, or brook. Second. A steady current in a river or in the sea, especially the middle or most rapid part of a current or tide; as . . . the Gulf Stream. Third. A flow; a flowing; that which flows. . . . Fourth. Anything issuing from a source, and moving or flowing continuously. Fifth. A continued course or current." In *Trustees of Schools v. Schroll*, 120 Ill. 510, 60 Am. Rep. 575, 12 N. E. 243, we had occasion to consider what was meant by the use of the word "stream," and it was expressly held that the distinction between a stream and a pond or lake is that in the one case the water has a natural motion or current, while in the other the water in its natural state is substantially at rest; that this is so, independently of the size of the one or the other; that the fact of some current in a body of water is not of itself, in every instance, sufficient to make it a stream, nor will the swelling out

of a stream into broad water sheets make it a lake. The word "stream," so far as we are advised, has never been held to include the waters of a great lake like Lake Michigan. If the word can be applied to a large body of water like Lake Michigan, it may also be applied to the ocean. The language of the charter does not authorize the company to enter upon and take possession of any lands, waters, and materials belonging to the state, as seems to be supposed, but the authority is to enter upon "any lands, stream, and materials." The last clause of the section has an important bearing, showing that the authority conferred related to streams, and not to the lake. It declares: "Nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." We are therefore of opinion that the grant in § 3, "all such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes," did not include lands covered by the waters of Lake Michigan.

But, even if the grant in the charter was broad enough to include the waters of Lake Michigan, it does not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands covered by the waters of Lake Michigan, provided only that the navigation of the lake is not interfered with. It is true that the state holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The state has no power to barter and sell the lands as the United States sells its public lands, but the state holds the title in trust, in its sovereign capacity, for the people of the entire state, as held in *People ex rel. Moloney v. Kirk*, 162 Ill. 146, 45 N. E. 830. This question was fully discussed in the Supreme Court of the United States in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, and it was there held, as we understand the decision, that it was grants of parcels of lands for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which do not impair the public interests in the lands and waters remaining, which are sustained by the courts. In the discussion of the question, the court, among other things, said: "The interest of the people in the navigation of the waters and in commerce over them may be improved, in many instances, by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interests in the lands and waters remaining," 53 L. R. A.

that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

It is not proposed here to take or appropriate the land in question for the erection of wharves, docks, or piers, the construction of which may facilitate or aid the navigation of the waters of the lake, but the sole purpose seems to be to appropriate the submerged land for the private use of the railroad company. It is unreasonable to believe that the legislature, in the enactment of § 3 of the charter of the railroad company, ever intended to place in the hands of the company unlimited power to go on, from time to time, and appropriate to its own use parcel after parcel of the lands covered by the waters of Lake Michigan; and, if such unlimited power was contemplated, it transcended its authority. It, in effect, undertook to part with governmental powers, which it could not do.

We are, however, referred to three cases in support of the position of the railroad company: *Illinois C. R. Co. v. Rucker*, 14 Ill. 353; *Illinois v. Illinois C. R. Co.* 33 Fed. 730, and *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. We do not regard the case first cited as one having a bearing on the question presented by this record. In that case, after the Illinois Central Railroad Company had lo-

cated its line of road, with the consent of the city of Chicago, over the shore waters of Lake Michigan, the company applied to the county court of Cook county to appoint appraisers to assess damages to certain parties who owned land on the lake shore. The railroad having been located in front of the premises of said lake shore owners, and partly over the same, the company sought to condemn this property, but the county court refused the application. Upon petition for mandamus to this court a mandamus was awarded, and the court held: First, that the railroad company had the right, with the consent of the city, to locate its line of road over the shallow waters of Lake Michigan on the line selected; second, that the right was not forfeited by the failure to locate prior to January 1, 1852; and, third, it was the duty of the county court to appoint appraisers. It thus appears that no question was raised or decided, as we understand the case, in regard to the right of the railroad company to go beyond the 200 feet granted and selected for right of way, and take lands covered by the waters of the lake for an engine house or for other railroad purposes named in the charter. As to the second case mentioned, that case was removed by writ of error to the Supreme

Court of the United States; and the questions of law involved were settled in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. That case is also relied upon in the argument. There may be found expressions in the opinion of the court which might seem to favor the view of appellant; but when the facts of that case are taken into consideration, and the entire opinion is examined, we do not think that the case lends support to the position of appellant in this case.

It is also set up in the bill that the railroad company has the right, as a riparian owner, to fill in the lake, and erect its engine house on the new-made land. But this question has not been discussed in appellant's argument, and we must regard it as waived. Moreover, under the facts presented by this record, we are aware of no well-considered case which would sustain the proposed acts of appellant in filling in the lake, and erecting upon the newly made land an engine house.

*The decree of the Superior Court will be affirmed.*

Affirmed by Supreme Court of United States March 12, 1900.

## INDIANA SUPREME COURT.

STATE of Indiana *ex rel.* Frank H. SNYDER, *Appt.*,

*v.*

PORTLAND NATURAL GAS & OIL COMPANY.

(153 Ind. 483.)

A corporation organized for the production of oil and gas may be deprived of its franchises in case it enters into an agreement with a rival company fixing the price to be charged for gas in a certain city in which their pipes are laid, and binding it to refuse to supply gas to customers supplied from the rival's pipes.

(June 6, 1899.)

**A** PPEAL by relator from a judgment of the Circuit Court for Randolph County in favor of defendant in a quo warranto proceeding to forfeit defendant's franchises. *Reversed.*

The facts are stated in the opinion.

*Messrs. William H. Williamson and Frank H. Snyder* for appellant.

*Mr. J. J. M. LaFollette* for appellee.

*On petition for rehearing.*

*Messrs. J. W. Headington and J. F. LaFollette*, for appellee:

The complaint does not make a case un-

der the law as laid down by the court. There is absolutely no averment, not even in the way of a conclusion, showing that anyone has been damaged or hurt, or that any damage is threatened. In the absence of an averment that the rates fixed were exorbitant, we must infer that the rates were reasonable and as low as gas could be furnished.

Fixing a price on goods, wares, and merchandise is not an offense against the public. If no one is hurt in person or purse, we know of no reason why it can be said that corporations offend against the law of their creation.

A party "can legally prove no material fact which the declaration does not allege." Gould, Pl. 160.

A pleading must aver facts, and not conclusions of law.

*Casky v. Greensburgh*, 78 Ind. 233; *Booth v. Cass County Comrs.* 84 Ind. 428; *Jackson School Twp. v. Farlow*, 75 Ind. 118; *Krug v. Davis*, 85 Ind. 309.

There is no averment that any customer of the Citizens' Gas & Oil Mining Company ever asked to be supplied with gas from the pipe lines of the defendant.

*Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123; *Moore v. State ex rel. Johnson*, 71 Ind. 478.

Prior to the act approved March 5, 1897, there was no statute in this state making any agreement or combination, the purpose of which was to prevent competition in any kind of business, unlawful.

**NOTE.**—For other cases in this series as to forfeiture of corporate charter for entering combination to create monopoly, see *People v. North River Sugar Ref. Co.* (N. Y.) 9 L. R. A. 33, and note. See also *Leslie v. Lorillard* (N. Y.) 1 L. R. A. 456, and note.  
53 L. R. A.

*Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544.

**Jordan**, Ch. J., delivered the opinion of the court:

This is a proceeding in quo warranto by the state of Indiana, on the relation of the prosecuting attorney of the twenty-sixth judicial circuit, to dissolve, and seize the corporate franchises of, appellee. The venue of the cause was changed from the Jay circuit court to the Randolph circuit court, in which court a demurrer was sustained to the information for insufficiency of facts, and judgment was rendered in favor of appellee thereon. The state appeals, and assigns error on the ruling of the court in sustaining the demurrer to the information.

The information alleges: That the defendant is a corporation duly organized in December, 1886, under the laws of the state of Indiana relating to the incorporation of manufacturing and mining companies. The object of its organization is to conduct the business of mining oil and gas, and to furnish the same for fuel and illuminating purposes and for propelling machinery, etc. Its place of business or operation is stated to be at the city of Portland, in the state of Indiana. After its incorporation it obtained from said city permission to lay gas pipes along and under the public streets of that city for the purpose of supplying its inhabitants with gas for light and fuel, and it engaged in furnishing gas to them for such purposes. That the citizens' Natural Gas & Oil Company was also duly incorporated in February, 1889, under the same laws and for the same purposes as was defendant, and it also was granted the privilege by the city of Portland to lay its pipes in and along the streets of the city for the same purposes as was defendant, and it engaged in supplying gas to the inhabitants of said city for fuel and light. After alleging these facts, the information charges that the defendant on the 1st day of September, 1891, "in violation of law and in the abuse of its corporate powers, and in the exercise of privileges not conferred upon it by law," entered into a certain agreement or combination with said Citizens' Gas & Oil Mining Company "to fix the rate of gas to be charged by them, and each of them, to the consumers in said city of Portland." It was further agreed by and between the defendant and said other mentioned company that "neither of said companies should or would attach the service pipes of any gas consumer in said city to its pipe lines if at the time such customer or consumer was a patron of the other company." It is further averred that the defendant has observed and complied with said agreement, and the price of gas has been fixed thereby, and it has at all times refused to sell or furnish gas to the inhabitants of said city at any other price than the one fixed by said agreement, and in pursuance of said agreement, and in order to prevent competition, it has refused, and still refuses, to supply divers inhabitants of the said city of Portland with

gas, who, as it is alleged, were consumers of gas from the pipe line of the said Citizens' Gas & Oil Mining Company. It is further alleged that there is no other corporation, company, or person in said city engaged in supplying gas for light and fuel to its inhabitants. The information is not a model pleading, and may perhaps be said to be open to the objection that in some respects it is uncertain, and in others states conclusions instead of facts. The question, however, presented for our decision, is, Are the facts as therein alleged sufficient to entitle the state to demand that the appellee's corporate franchises shall be declared forfeited? Reduced to a simple proposition, the gravamen upon which it bases its demand for a forfeiture of the defendant's corporate rights is that it has, by an agreement, illegally united with the Citizens' Gas, etc., Company, a competing company, under which agreement the price of gas to be charged consumers has been fixed, and has agreed with said company that neither would furnish gas to persons who were patrons of the other company. By this agreement it appears that it was controlled, and at all times refused to furnish its product to divers inhabitants of the city of Portland, simply because they were consumers of gas from the lines of the Citizens' Gas Company. The insistence of counsel for the state is that the defendant, under the facts charged in the information, is shown to have combined with the Citizens' Gas Company to fix and maintain the price of gas, and that these companies agreed with each other not to furnish gas to consumers who were patrons of the other company, in order to prevent legitimate competition; that, in carrying out the compact or agreement, the defendant exercised powers not conferred by law, and committed an act violative of law, and is shown to have abused the rights conferred upon it by the state, and hence it ought to be ousted from longer or further exercising its corporate rights. The Code provides that an information may be filed against a corporation when it does or omits acts which amount to a surrender or forfeiture of its rights and privileges as a corporation, or when it exercises powers not conferred by law. Burns's Rev. Stat. 1894, § 1145 (Rev. Stat. 1881, § 1131; Horner's Rev. Stat. 1897, § 1131, subd. 4). The statute exacts that the information "shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court." Burns's Rev. Stat. 1894, § 1147 (Rev. Stat. 1881, § 1133; Horner's Rev. Stat. 1897, § 1133). The authorities assert, as a general rule, that courts will proceed with extreme caution in the forfeiture of corporate franchises, and a corporation will not be deprived thereof unless under express limitation, or for a plain abuse of its powers, whereby it fails to fulfil the design and purpose of its organization. When the state seeks to destroy the life of an incorporated body, it is required to show some grave misconduct,—some act, at least, by which it has offended the law of its crea-

tion, or something material which tends to produce injury to the public, and not merely that which affects only private interests, for which other adequate remedies are provided. High, Extr. Legal Rem. §§ 649, 654; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 832; *Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234. Where, however, the facts disclose that a corporation has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement, the performance of which is detrimental or injurious to the public, it thereby may be said to offend against the law of its creation, and consequently forfeits its right to longer exercise its franchises, and is subject to a judgment of ouster. *People v. North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386, 7 N. Y. Supp. 406, 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 832; *State ex rel. Colburn v. Oberlin Bldg. & L. Asso.* 35 Ohio St. 258; *State v. Cincinnati, N. O. & T. P. R. Co.* 47 Ohio St. 130, 7 L. R. A. 319, 23 N. E. 928; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; High, Extr. Legal Rem. § 666. Courts have enlarged the rule so that an information in the nature of a quo warranto is now regarded, not only as appropriate means of testing the right to exercise corporate franchises, but such proceedings are also a proper remedy for the abuse by a corporation of the powers with which it has been invested. Beach, Priv. Corp. § 53. Of course, as asserted by the authorities previously cited, proceedings in quo warranto will not be countenanced or receive the sanction of a court, as a general rule, where the act complained of is of a trivial character, or where the abuse charged may be said to be a doubtful one, or there exists any other adequate or ample remedy therefor. Id. § 436. Corporations are recognized as creatures of the law, and they certainly owe obedience thereto; and when they fail to perform duties which they were created to discharge, and in which the public have an interest, or where they do unauthorized or forbidden acts, the state unquestionably has the right, and it is its duty, to object, and it may interpose by information, and wrest from the offending corporation its franchises. Id. §§ 840, 841; Cook, Stock, Stockholders, & Corp. Law, § 635; *People ex rel. Atty. Gen. v. Dashaway Asso.* 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277. Appellee is in its nature a public corporation, which fact has been recognized by our legislature in conferring upon companies engaged in a business of like character the right of eminent domain. Acts 1889, p. 22 (Burns's Rev. Stat. 1894, § 5103). Being the creature of the law, the franchises granted to it by the state—in theory, at least—were granted as a public benefit; and in accepting its rights, under the laws of the state, it impliedly agreed to carry out the purpose or object of its creation, and assumed obligations to the public, and such obligations it is required to discharge. Beach, Trusts, § 221; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950. It certainly can be

said, and the proposition is sustained by ample authority, that, in furtherance of the purposes for which it was created, it owed a duty to the public. Its duty towards the citizens of the city of Portland, and their duty towards it, may be said to be somewhat reciprocal; and any dealings, rules, or regulations between it and them which do not secure the just rights of both parties cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially, so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it, and complied with the company's reasonable regulations and conditions. *Portland Natural Gas & Oil Co. v. State ex rel. Keen*, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818, and authorities there cited; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 288, 8 L. R. A. 497, 22 N. E. 798; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 13 N. E. 169; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Central U. Teleph. Co. v. State ex rel. Falley*, 118 Ind. 194, 19 N. E. 604; *Central U. Teleph. Co. v. Suvoelend*, 14 Ind. App. 341, 42 N. E. 1035; 8 Am. & Eng. Enc. Law, p. 614. It is an old and familiar maxim that "competition is the life of trade," and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests, and is therefore deemed to be unlawful, on the grounds of public policy. Greenhood, Pub. Pol. pp. 654, 655; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 13 N. E. 169; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Consumers' Oil Co. v. Nunemaker*, 142 Ind. 560, 41 N. E. 1048; Beach, Priv. Corp. §§ 54, 55. The authorities affirm, as a general rule, that if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor, or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public. It is sufficient to know that the inevitable tendency of the act is injurious to the public. *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Swan v. Chorpennin*, 20 Cal. 182; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *Gibbs v. Smith*, 115 Mass. 592; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36; Beach, Trusts, § 82.

Recognizing and adopting the principles to which we have referred as sound law, we next proceed to apply them as a test to the facts involved in this case. It will not be unreasonable to presume that one of the ob-

jects, upon the part of the city of Portland, in granting permission to the Citizens' Gas Company to lay its pipes and mains along and under the streets of that city, after it had awarded the same rights to appellee, was that there might be a reasonable and fair competition between these two companies. By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other. That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between the two companies, certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement, appellee disabled, or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests. The agreement in controversy, as it is disclosed by the facts averred in the information, evidently could serve, so far as the public was concerned, no other purpose than a restriction upon competition, and created at least a basis for a monopoly. The law, as we have seen, is inimical to monopolies, and recognizes the right of the public to have the benefit of a fair and healthy competition, and requires that equal facilities and reasonable rates in carrying out the purposes of such business as that in which appellee is engaged, so far as practicable, be secured to all. In *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 568, 41 N. E. 1051, we said: "The law has always been hostile to the creation of monopolies when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good is void on the ground of public policy. This policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance prices to the injury of the public in general." In the appeal of *Thomas v. West Jersey R. Co.* 101 U. S. 83, 25 L. ed. 952. Miller, J., speaking as the organ of the 53 L. R. A.

court, said: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions—which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes—is a violation of the contract with the state, and is void, as against public policy." While appellee, by the agreement in controversy, cannot be said to have fully renounced autonomy, still it did so to the extent, at least, that it thereby disabled itself from supplying persons with gas who were patrons of the other company. That, by entering into this agreement and carrying it into execution, appellee violated the principles of public policy and clearly abused the rights and powers conferred upon it by the state, and may be said to have offended against the law of its creation, there can be no question. Such an illegal act or agreement upon the part of a corporation like appellee cannot be permitted to override the law, and it was the manifest duty of the state to interpose, as it has done, and call it to account; and, if the charge made is established, a deserving penalty ought to be inflicted.

In addition to the prayer for the forfeiture of appellee's rights as a corporation, the information asks that such other relief be granted as is just and proper. The rule is well settled that a court, in cases in quo warranto proceedings, like this, if the facts justify, may, in the exercise of its discretion, render a judgment against defendant, declaring a forfeiture of its corporate franchises, or the judgment may be a forfeiture or ouster only of the right of the defendant to carry out or continue the illegal act or acts charged and established. *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *Cook, Stock, Stockholders, & Corp. Law*, § 635.

From what we have said, it follows that the court erred in sustaining appellee's demurrer to the information; and *the judgment is therefore reversed*, and the cause remanded, with instructions to the trial court for further proceedings consistent with this opinion.

Rehearing denied.

## MARYLAND COURT OF APPEALS.

CROWN CORK & SEAL COMPANY of  
Baltimore City, Appt.,

v.

STATE of Maryland.

(87 Md. 687.)

1. A corporation is not entitled to have the assessment of its capital stock for purposes of taxation limited to the value of its property other than patents granted by the United States, since, under the Code, art. 81, §§ 2, 4, 141, 144, the tax is levied, not upon the corporation or its stock, but upon the owners of the shares.
2. A tax levied upon corporate stock is not prohibited by the Constitution of the United States, although the corporation is the owner of, and its stock was largely paid for by the assignment of, patents granted by the United States.

(June 28, 1898.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas in favor of plaintiff in a suit to recover taxes alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

**Messrs. Fisher, Bruce, & Fisher** for appellant.

**Messrs. J. Alexander Preston, Alexander Preston, and Robert Ludlow Preston**, for appellee:

The exemption of property from taxation does not exempt the value of shares of stock to the extent of the value of such property. The tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares.

*United States Electric Power & Light Co. v. State*, 79 Md. 70, 28 Atl. 768; *Firemen's Ins. Co. v. Baltimore*, 23 Md. 311; *Baltimore v. Canton Co.* 63 Md. 218.

The ownership of patent rights carries with it no exemption from laws of the state wherein the business of the owner of the patent is carried on.

*Jordan v. Dayton Overseers*, 4 Ohio, 294; *State ex rel. American U. Teleg. Co. v. Bell Teleph. Co.* 36 Ohio St. 297, 38 Am. Rep. 583; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

Not only can the state regulate the use of patents within its boundaries, but it may even prevent the owner from selling or disposing of the articles manufactured under his patent.

*Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Webber v. Virginia*, 103 U. S.

**NOTE.**—For taxation of patent rights, see cases in note to *Com. v. Petty* (Ky.) 29 L. R. A. on page 792; also *People ex rel. Edison Electric Illuminating Co. v. Brooklyn Bd. of Assessors* (N. Y.) 42 L. R. A. 290, and *State ex rel. Guilbert v. Halliday* (Ohio) 49 L. R. A. 427. 53 L. R. A.

344, 26 L. ed. 565; *Livingston v. Van Ingen*, 9 Johns. 507.

Even government agencies are only exempt from state taxation in so far as it interferes with their efficiency in performing the functions by which they serve the government.

*Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 551, 31 L. ed. 794, 8 Sup. Ct. Rep. 961.

The property of corporations may be taxed even though they be agents for the United States; the property is that of the agents, not of the United States.

*Central P. R. Co. v. California*, 162 U. S. 125, 40 L. ed. 914, 16 Sup. Ct. Rep. 766; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 2, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054.

In *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370, the whole capital stock of the corporation was invested in United States patents; yet it was held to be subject to taxation by the New York court of appeals.

Where shares of stock are invested in United States bonds, in assessing the value of the stock the value of the bonds need not be deducted from the total value of the capital stock.

*People v. Home Ins. Co.* 92 N. Y. 328.

The proper test of the value of stock is its earning power, not, What are the assets of the corporation?

*People v. American Bell Teleph. Co.* 117 N. Y. 243, 22 N. E. 1057.

**Roberts, J.**, delivered the opinion of the court:

This suit was brought by the state of Maryland in the court of common pleas of Baltimore city to recover from the appellant certain taxes assessed upon its capital stock, and claimed to be due the state for the year 1895. The case was tried before the court below without the aid of a jury. At the trial below, the state (appellee here) offered in evidence the tax bill, properly certified, when it was admitted that the state tax commissioner had duly assessed the capital stock of the appellant for the year 1895, and that the appellant, refusing to abide by the action and determination of the tax commissioner, took its appeal to the comptroller and treasurer of the state, in accordance with the provisions of the Code, and it is conceded that the assessment on which the taxes are claimed is in accordance with the valuation fixed by the treasurer and comptroller on such appeal. The appellee then closed its case, and the appellant offered evidence of similar character to that of the appellee, showing the valuations of its stock as made by the tax commissioner and on appeal by the comptroller and treasurer, and that the same are proper evidence of the facts stated. The appellant, as shown by the record, was incorporated on the 9th of March, 1892, under the general incorpora-

tion laws of the state of Maryland, for the purpose of "acquiring, developing, improving, using, working, or otherwise utilizing and disposing of the patented inventions following, for which patents have been granted in the United States and Canada;" then follows a list of the patents referred to, which do not require enumeration here. The appellant transacts its business in this state and elsewhere, and owns real and personal property other than the patent rights mentioned herein. The aggregate authorized capital stock of the appellant is \$1,000,000, divided into 10,000 shares of the par value of \$100 each. The charter of the appellant in express terms provides that "the said corporation is formed upon the articles, conditions and provisions herein expressed, and subject in all particulars to the limitations relating to corporations, which are contained in the general laws of this state." The appellant also offered evidence to show the minutes of a meeting of its shareholders on the 10th of March, 1892, at which all of its stock was subscribed for, except 495 shares, and paid for by a lot and factory and chattels to the value of \$57,791.09, and the assignment of valuable United States patents, claimed to be essential to the business of the appellant; and it was further proved that the Canadian patents were never used by it, and that it has never engaged in the manufacture of its patented product in Canada. The foregoing statement substantially presents the facts essential to a proper understanding of the nature and character of the controversy arising on this appeal. The appellee offered one instruction in the court below, which was granted, and sought to exclude certain testimony by means of four motions offered for that purpose, each of which was overruled by the court. The appellant offered six prayers, all of which were rejected except the fifth, which was granted. The finding and judgment being against the appellant, it prosecutes this appeal.

The questions here presented are important to the interests of both parties. Important to the appellee, not only because its revenues are affected by the determination of the issues here presented, but because it adopts and declares the rule of law to be adhered to in all cases of like character with the one now under consideration. It is clearly important to the appellant by virtue of the fact that it involves the question of its liability for the payment of *vel non* of the taxes assessed upon a large and valuable property, which the court of last resort of an adjoining sister state, whose decisions are entitled to and receive the highest consideration by this court, has declared adversely to the contention of the appellee advanced and sought to be maintained on this appeal. The leading question which this appeal presents is whether, in the assessment of the capital stock of the appellant company for purposes of taxation, the appellant is entitled to have the assessment limited to the value of the property other than the patents granted by the United States.

There is another question closely interwoven with the main proposition just stated, and will be considered in the course of this opinion, which relates to the constitutionality, both Federal and state, of the contention of the appellee. It will not be necessary to burden the report of this case with the various provisions of the Code relating to the taxation of the shares of stock of corporations incorporated under the laws of this state, as they are lengthy, and can be conveniently found by reference to §§ 2, 4, 141, and 144 of the Code, contained in article 81. Mr. Chief Justice McSherry, speaking for this court in the case of *United States Electric Power & Light Co. v. State*, 79 Md. 70, 28 Atl. 768, has forcibly said that "the taxable value of shares of capital stock is fixed by the state tax commissioner. He is required by the statutes to deduct from the aggregate value of all the shares of the capital stock of banks and other corporations the assessed value of the real estate owned by the company, and to divide the residuum by the number of shares of the stock, and the quotient is declared to be the taxable value of each share for state purposes of taxation. Upon the valuation thus ascertained the state tax is levied. But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property. They belong to the stockholders respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax, not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder, respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership, and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all." This statement of the law, recently announced by this court, gives to the statute a construction so clear and free of doubt that no suggestion of uncertainty can fairly arise as to its meaning and effect. Under the sections of the Code just referred to, the taxes in controversy here have been levied and assessed without regard to the value of the United States patents. The state tax commissioner has, in the proper discharge of his official duty, assessed the value of the shares of stock in the appellant corporation, and has certified and returned said valuation and assessment to the comptroller of the treasury, who has duly notified the appellant of such valuation and assessment, and upon appeal the comptroller and treasurer have corrected the same, and made their final valuation and assessment, which is final and absolute, unless they shall have



committed some error in the discharge of their official duties. It is insisted that they have erroneously valued and assessed the patent rights in question, and this is the chief grievance of the appellant. But why should not the shares of stock in the appellant corporation be valued and assessed, and taxes paid thereon? The number of corporations incorporated under the laws of this state, engaged in business here, employing vast sums of money, and possessed of extensive property rights, is almost unlimited, and yet most of them, in the proper and successful management of their business, have been compelled to purchase and use patent rights, to enable them to compete successfully with other corporations engaged in a similar business. They are without exception compelled to pay taxes on their shares of stock, levied and assessed in like manner with those in controversy here. It is a total misconception of the object sought to be maintained on this appeal to assert that this is an effort to tax patent rights. It is not, however, necessary to the determination of the rights involved in this controversy to decide any such question. It is a proposition about which there is no lingering doubt, that patent rights are personal property, and entitled to the same protection as any other property (*Cammeyer v. Newton*, 94 U. S. 225, 24 L. ed. 72), and it will remain for future consideration whether a patent right may not of itself be a proper subject of taxation; but that, as just stated, is not a question necessary to be decided on this appeal. It has been elsewhere maintained that a patent right resembles a franchise, in being a privilege which concerns, and is intended to benefit, the public, which depends for existence and preservation upon the authority which confers it. It has also been argued in the hearing of this appeal that a patent contains a bargain made with the government and the patentee, to be judged like other bargains. Conceding both propositions to be correct, how does either tend to affect the questions under consideration here? To say that the shares of stock of a corporation incorporated under the laws of this state cannot be taxed because the corporation enjoys certain franchises, the very use of which enables it to successfully carry on its business, would be to strike down our entire system of taxation relating to corporations. And even if it be true that a patent right exists through the medium of a contract with the Federal government, its only effect upon the value of the shares of stock of a corporation, which are unquestionably taxable, is to aid in the development of the business interests of such corporation, and largely multiply the chances of its successful management. So that it is not a question as to how the value of the shares of stock of such corporation has been enhanced, whether by the aid of patent rights, or by the sale of the manufactured products obtained by the use of such patent rights, or by the superior business qualifications of the agents of the corporation, who manage and control its af-

airs. It matters not how numerous nor how valuable its patent rights might have been at the inception of the appellant's business enterprise; the shares of its stock would now be comparatively valueless had not other agencies, forceful and active, put life and energy into the undertaking. The supreme court of Ohio (*Jordan v. Dayton Overseers*, 4 Ohio, 309), speaking with respect to the meaning of the patent laws of the United States, and quoted with approval in *Patterson v. Kentucky*, 97 U. S. 507, 24 L. ed. 1117, says: "The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent." In the granting of patents the Federal government has never sought to do more, and in fact has never exercised greater authority, than to extend protection to the privilege, such as that granted by a patent for an invention, against the infringement of those who seek to invade it. A patent right, in its usual signification, means a privilege granted by the government to the first inventor of a new and useful discovery or mode of manufacture that he also shall be entitled, during a limited period, to the exclusive use and benefit thereof. After a careful examination, we have failed to discover any satisfactory authority showing that the government has ever yet indicated any intention of limiting the power of the states in dealing with a subject of this kind, although involving patent rights. It is a proposition without support to seek to maintain that patent rights are agencies or instrumentalities of the general government with which the states have no right in any manner to interfere. *Patterson v. Kentucky*, 97 U. S. 506, 24 L. ed. 1117; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565. It is now well-settled law, as determined in *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 551, 552, 31 L. ed. 794, 8 Sup. Ct. Rep. 965, that "the agencies of the Federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government." In the case of *Livingston v. Van Ingen*, 9 Johns. 507 (cited and approved in 97 U. S. 508, 24 L. ed. 1118, *supra*), Chancellor Kent said that "the national power will be fully satisfied if the property created by patent be, for the given time, enjoyed and used exclusively, so far as under the policy of the several states the property shall be deemed fit for toleration and use. There is no need of giving this power any broader construction in order to attain the end for which it was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts." Mr. Justice Harlan, in referring to the Ohio case and the New York case just quoted from, in 97 U. S. 24 L. ed. *supra*, and pursuing much the same line of thought, remarks that the right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right, or, in the language of Lord Mansfield in *Millar v. Taylor*, 4

Burr, 2303, "a property in notion, which has no corporeal tangible substance." The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile state legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of state legislation, simply because the inventor acquires a monopoly in the discovery.

We have given careful scrutiny to the various authorities to which we have been referred bearing upon the questions raised by this appeal, and have found the propositions contended for both novel and interesting. The result of our investigation is that we have found but two cases directly bearing upon the subject of the taxation of patent rights, as such, which is not the specific question to be determined on this appeal. The case which supports the theory of the exemption of patent rights from taxation is the case of *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111. The supreme court of Pennsylvania, having filed no opinion, adopted that of the lower court, from which we briefly quote, and which sufficiently marks the distinction between the Pennsylvania case and the one now under consideration. The former case maintains that, "the tax being upon the capital stock, it is a tax upon the company's property and assets." This is not the law of Maryland, and such view is not the accepted doctrine held by the United States Supreme Court. *Bank of Commerce v. Tennessee*, 161 U. S. 146, 40 L. ed. 645, 16 Sup. Ct. Rep. 460. "Taxes being made the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined, and founded upon plain language. . . . It has been said that a well-founded doubt is fatal to the claim. No implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power." This court, as hereinbefore referred to, has, through its chief justice, in 79 Md. 28 Atl. *supra*, declared that "the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and under existing laws are taxable property." We have referred to the one case—that of 151 Pa., 24 Atl., *supra*—which maintains the nonliability to taxation of patent rights. The case of *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370, maintains a doctrine directly contrary to the Pennsylvania case. The New York case was a proceeding by certiorari to review the action of the state comptroller in imposing a tax upon the re-

lator, the Edison Electric Light Company, a domestic corporation, under the corporation tax act. The entire capital stock of the relator was originally invested in patent rights. Corporations were formed in New York and other states, to whom the relator granted the right to use these patents, receiving in compensation stock in such corporations. It was decided that as to so much of such stock as was in corporations organized in New York, it was the capital of the relator employed in that state, and as such was a basis of taxation, but that the stock in corporations in other states was capital employed outside the state, and not taxable. It was also claimed in that case that the relator held bonds of foreign corporations, issued to it in payment for patent rights granted, and on this question it was determined that so much of relator's capital as was invested in these bonds was a basis of taxation under the statute. In delivering the opinion of the court, Earl, J., said: "It is sufficiently accurate for the purpose now in hand to say that the entire capital of the relator was originally invested in patent rights. Corporations were formed in various cities of this state, and to a large extent in cities outside of this state, to use these patents; and to those corporations the relator granted the right to use the patents, and in compensation for such grants it received stocks of such corporations, and during the year 1891 it held such stocks and received the dividends declared thereon. As to so much of such stocks as was in corporations organized and existing in this state, it cannot be doubted that its capital was employed within this state. So much of its capital, to wit, its patents, as was used to purchase such stocks, was employed for that purpose, and was thus used for the business of the relator. The stocks existed within this state, and were kept and held to produce revenue here, and hence in every sense were employed within this state. They took the place, as a portion of the relator's capital, of the patent rights transferred in payment for them. The stocks which the relator took in companies organized outside of this state stood for so much of the relator's capital invested outside of the state. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the state to purchase those stocks. . . . Those stocks had no situs here, and were not taxable here under any system of taxation which has ever existed in this state. . . . To make it [such capital] a basis for taxation, it must have been employed within this state. . . . It is said in this record, although not distinctly shown, that the relator also held bonds of foreign corporations, issued to it in payment for patent rights granted. We think that so much of the capital as was invested in such bonds was a basis of taxation here under the act. Those bonds were presumably held at its office in this state, and such bonds, as well as all choses in action, unless kept, employed, or used outside of the state, have their situs at

the domicil of the owner. The bonds took the place of the patent rights granted for their purchase. They were kept and held here to earn revenue for the relator, and they were, in a proper sense, employed here for that purpose." We have thus presented both sides of this controversy, at perhaps greater length than was necessary, but the question is yet *in limine*, and may be regarded as opening a new avenue of judicial investigation. If the comptroller and treasurer have, in reviewing the action of the state tax commissioner, discharged their duty in accordance with the provisions of the Code, under which they were acting,—and we think they have,—their action is final, and from it no appeal will lie.

The second contention which we are called upon to consider on this appeal is whether there is any prohibition in the Constitution of the United States compelling the appellee to make any reduction in the amount of taxes assessed on the shares of stock of the appellant by reason of certain patents granted by the Federal government, and now owned by the appellant. Much that we have already said meets this objection. We fail to see how a state tax upon patent rights themselves would directly or indirectly conflict with the power conferred upon the Fed-

eral government "to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." U. S. Const. art. 1, § 8. The power of Congress (giving effect to this provision) goes no further than to secure to the author or inventor a right of property, which, like every other species of property, must be used and enjoyed within each state according to the laws of each state. Chancellor Kent in *Livingston v. Van Ingen*, 9 Johns. 581. This, we think, correctly announces the rule of construction which ought to be applied to the section of the Constitution just referred to. We entertain no doubt as to its meaning and effect, and find the questions raised on this appeal in no respect in derogation of the Constitution. We find no error in the rulings of the court below, which we have treated collectively, rather than separately, as we have, by so doing, been the better enabled to consider them. It follows, from the views expressed, that the judgment of the court below must be affirmed.

*Judgment affirmed, with costs.*

Writ of error dismissed by Supreme Court of United States January 31, 1900.

## MINNESOTA SUPREME COURT.

RAMSEY COUNTY  
v.  
ROBERT P. LEWIS COMPANY.

(.....Minn.....)

\*Special Laws 1885, chap. 10, §§ 26, 27 (St. Paul city charter), authorize an assessment on every lot in the city of St. Paul of an annual frontage tax, where water pipes are laid in front of said lot, for the use of the water commissioners. *Held*, that the statute is not unconstitutional, as in violation of the 14th Amendment of the Federal Constitution, as a taking of property without due process of law.

(June 18, 1901.)

CASE certified by the District Court for Ramsey County for the opinion of the Supreme Court after judgment in favor of plaintiff in an action brought to recover taxes alleged to be due and unpaid. *Judgment affirmed.*

The facts are stated in the opinion.

Mr. Daniel W. Doty, for defendant:

In *Norwood v. Baker*, 172 U. S. 269, 43 L.

\*Headnote by LEWIS, J.

NOTE.—As to constitutionality of local assessments in excess of special benefits, see *Re Bonds of Madera Irrig. Dist.* (Cal.) 14 L. R. A. 755, and note; *Raleigh v. Peace* (N. C.) 17 L. R. A. 330, and note; *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and note; *Asberry v. Roanoke* (Va.) 42 L. R. A. 636; *Weed v. Boston* (Mass.) 42 L. 53 L. R. A.

ed. 443, 19 Sup. Ct. Rep. 187, the court announced:

1. Special assessments may be levied upon abutting property to meet the cost of public improvements of a local nature, and only upon the ground that such property is specially benefited thereby in a sum substantially equal to, or in excess of, the assessment.

2. The exaction from private property of the cost of a public improvement in substantial excess of such special benefit is to the extent of such excess a taking, under the guise of taxation, of private property for public use without compensation.

3. A statute which requires the assessment of the total cost of a street improvement upon abutting property, by frontage, without regard to benefits, and without providing for a prior judicial hearing and determination as to benefit, is unconstitutional and void (p. 279, 172 U. S., p. 447, 43 L. ed., p. 197, 19 Sup. Ct. Rep.), or, as stated by the dissenting opinion (p. 302, 172 U. S., p. 455, 43 L. ed., p. 197, 19 Sup. Ct. Rep.), such a legislative act is adjudicated to be, not only not conclusive evidence, but not even prima facie evidence, that such property was

R. A. 642; *Rolph v. Fargo* (N. D.) 42 L. R. A. 646; *Sears v. Boston* (Mass.) 43 L. R. A. 834; *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289; *Schroder v. Overman* (Ohio) 47 L. R. A. 156; *Kersten v. Milwaukee* (Wis.) 48 L. R. A. 851; and *Adams v. Shelbyville* (Ind.) 49 L. R. A. 797.

benefited to the full cost of the improvement; in short such a statute is *prima facie* void.

4. Some courts conceived it was further decided that all special assessments upon the basis of frontage are in violation of the 14th Amendment to the United States Constitution.

*Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732; *Fay v. Springfield*, 94 Fed. 409; *Cowley v. Spokane*, 99 Fed. 840.

The alleged fourth proposition has been swept away entirely.

*Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623.

The effect of the new decisions, and the only effect, is to modify the third proposition above stated.

The legislature may authorize a municipal board to assess the entire cost of a street pavement according to frontage, without any preliminary hearing as to value or benefits, and such law is *prima facie* valid; but in any case the right of the owner of property so assessed at all times remains, to show to a court of equity that such *prima facie* valid assessment is in fact invalid if made in violation of the first and second principles announced in *Norwood v. Baker*.

*French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Detroit v. Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644, 645; *Shumate v. Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

The original decision in this case must stand because, even under that rule, the company has alleged and shown that the assessment is very substantially in excess of the benefit; in fact that there is no benefit.

All these new decisions were in regard to assessments made by a municipal board, and notice of the improvement and a hearing of the property owners were provided for in each case. The owner also had the right to make defense to the tax bill when sued for its collection.

Each of these cases considered improvements admitted to be in the strictly urban part of the city where the property was all of one class, and in no case was it claimed that the assessment exceeded the benefit, or that one lot was benefited more or less than another.

In each of the cases the entire cost of a specific improvement of a definite length was computed, and the expense divided upon the abutting property.

In none of these cases was an assessment made on property reaching away back beyond the zone of benefits.

The cases under consideration were all those in which there was a high ratio of special benefit as compared with the general benefit.

In all these cases the court considered a law which authorized the local authorities to determine upon an improvement after

notice and hearing upon the propriety and necessity of the same.

If the legislature provides for notice to, and hearing of, each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.

*Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *McMillen v. Anderson*, 95 U. S. 38, 24 L. ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 621; *Rolph v. Fargo*, 7 N. D. 640, 42 L. R. A. 440, 70 N. W. 252.

When the legislature only fixes the amount of these assessments and the district in which they are to be raised, but also specifically apportions in advance the amount of the tax which each specific piece of property shall pay, and further fixes this amount without regard to value, benefits, or costs, and without any right to be heard at any stage of the proceedings, no authority can be found that will sustain so arbitrary an act; such an act is *prima facie* void.

*State v. Pillsbury* (Minn.) 85 N. W. 176.

If the legislature attempts to do it all, and make an assessment for the benefit of the city of St. Paul, not as a "general tax," but as a "local assessment" upon a portion of the property of the benefited district, then any departure by the legislature from sound principles or procedure is as much subject to review of the court as if it had been done by a local board, and no authority will be found to maintain the omnipotence and unaccountability of the legislature under these circumstances.

*State, Agents, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

The Constitution itself cannot give the legislature power, as has been suggested in this case, to deprive a citizen of his property without due process of law.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; 10 Am. & Eng. Enc. Law, 2d ed. p. 297; *Clark v. Mitchell*, 69 Mo. 627.

*Messrs. James E. Markham and Franklin H. Griggs*, for plaintiff:

*French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Detroit v. Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Wormley v. District of Columbia*, 181 U. S. 402, 45 L. ed. 921, 21 Sup. Ct. Rep. 609; *Farrell v. West Chicago Park Comrs.* 181 U. S. 404, 45 L. ed. 924, 21 Sup. Ct. Rep. 609,—are subversive of the supposed doctrines of *Nor-*

*wood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

This case is not within the supposed rules of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

That was a case involving what was, or, as it transpired, what should have been, an assessment of the special benefits conferred by a local improvement; here, on the other hand, we are met with a constitutional provision which defines the initial instalment, the subsequent enlargement and extension, and the continuous maintenance in complete repair, of a comprehensive municipal water supply system as something other than a distinctively local improvement, the special benefits of which cannot be successfully estimated to a nicety in degree.

*Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The legislature had full power to lay out just the taxing district it did in the case at bar.

*Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *State v. Robert P. Lewis Co.* 72 Minn. 87, *sub nom. Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108; *Guilder v. Otsego*, 20 Minn. 74, Gil. 59; *State ex rel. Merrick v. Hennepin County Dist. Ct.* 33 Minn. 235, 22 N. W. 625, 632; *Hennepin County v. Bartleson*, 37 Minn. 343, 34 N. W. 222; *State ex rel. Steteler v. Reis*, 38 Minn. 371, 38 N. W. 97; *Maliby v. Tautges*, 50 Minn. 248, 52 N. W. 858; *Steiner v. Sullivan*, 74 Minn. 498, 77 N. W. 286; *State ex rel. St. Paul v. Ramsey County Dist. Ct.* 75 Minn. 292, 77 N. W. 968; 2 Dill. Mun. Corp. 4th ed. § 752; 1 Desty, Taxn. § 24.

*Messrs. Horace E. Bigelow and Thomas R. Kane* also for plaintiff.

**Lewis, J.**, delivered the opinion of the court:

In the matter of the proceedings to enforce the delinquent taxes upon real estate within the county of Ramsey for the year 1898, the trial court certified to this court for decision the following questions: (1) Are Special Laws 1885, chap. 10, §§ 26, 27, providing for the assessment for water pipes in the city of St. Paul, and the assessment made thereunder against the defendant's land in this action, in violation of the Constitution of the United States? (2) Is said law and said assessment void under § 27, art. 4, of the Constitution of Minnesota? (3) And, if said law is valid, then did the district court err in computing the frontage of the defendant's land?

Section 26 of the St. Paul city charter reads as follows: "In addition to all other powers conferred upon said board they are authorized to and shall assess upon each and every lot in the city of St. Paul in front of which water pipes are laid an annual tax or assessment of ten (10) cents per lineal foot of the frontage of such lot or lots, and which shall be a lien on such lot or lots, and shall be collected as herein- 53 L. R. A.

after provided." Section 27 provides that the tax be collected and enforced in connection with and under the same general provisions applicable to the collection and enforcement of general taxes. These sections were presumably enacted with reference to certain provisions in § 1, art. 9, of the state Constitution, which authorizes such a front-foot tax, without regard to benefits or valuation, in cities with a population of 5,000 or more. It appears from the record that the "lot" in question consisted of 65 acres of unplatted land located in a suburban part of the city of St. Paul. The land was in a thinly settled part; was used for pasturage purposes; was bounded on the west by a public highway called Dale street, for a distance of 2,340 feet, and on the south by Front street, for a distance of 630 feet. A water conduit from the waterworks into the city was laid on Dale street in front of this property, and a water pipe on Front street. The tax levied by the board of water commissioners according to this frontage was sustained by the trial court. In a former appeal by this appellant in proceedings with reference to a similar tax for a previous year upon the same land, it was held that the provisions of the city charter referred to were not in conflict with the state Constitution as to equality of taxation, and that the method adopted by the commissioners for computing the frontage was a proper one. *State v. Robert P. Lewis Co.* 72 Minn. 87, *sub nom. Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108. We are therefore not required to review that question here. And as to the second point certified, in view of the conclusion we have reached on the first question, it will not be considered, and we will confine our attention to the first proposition, which was not discussed nor involved in the former cases.

So far as we are aware, the bearing of the Federal Constitution upon the legislative power with respect to assessments for local improvements has never been presented to this court for consideration. Prior to the appearance of the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, perhaps the trend of the decisions in this country was in support of the theory that the legislative power in respect to special assessments was practically unlimited, and since that case was decided the state courts have not been agreed as to its scope and meaning. Probably no decision emanating from the Supreme Federal Court for many years has been so sweeping, and at the same time so imperfectly understood and applied. We shall not attempt here a review of the facts upon which the decision was based. To be thoroughly comprehended, it must be carefully read, and all its bearings considered in the light of the authorities cited in its support. We shall content ourselves with stating, as we understand them, the final propositions of law as there declared and adopted, and then consider whether they are applicable and controlling in the case before us. They are as

follows: First. Upon the ground that abutting property may be specially and peculiarly benefited, special assessments may be levied upon such property to meet the cost of building highways, sewers, and like public improvements of a local nature. The principle which justifies such assessments is that the property is specially and peculiarly benefited, and that the owner receives in that form the value of what he gives in the form of the assessment. Second. Under the 14th Amendment of the Federal Constitution, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." Third. Where the principle of assessment adopted by the legislature is arbitrary and without reference to benefits, and without reference to a just and equal proportion and distribution of the burden, no provision having been made for a hearing or review, the act is illegal and void, and it is unnecessary for the owner to tender the amount of the conceded benefits as a condition for obtaining relief.

It is fundamental that, in the absence of constitutional limitations, the exercise of the taxing power rests exclusively in the legislative discretion. The first and second propositions above stated are not new principles of law, and are not declared as such in *Norwood v. Baker*. The cases cited and reviewed show that the court was careful to lay the foundation for its conclusion that the legislative power in respect to local assessments is not absolute, but is confined within certain limits. That it was the intention of the court to lay down a rule of law broad enough to embrace the logic and reasoning of the discussion seems to us indisputable. It cannot be that the court's conclusions were intended to be limited to a technical construction of the Ohio statute, as intimated in *Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732, and *Cass Farm Co. v. Detroit*, 124 Mich. 433, 83 N. W. 108, and in *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559. The principle involved was not necessarily confined to "street-opening" cases. The same principle was recognized by the court as applicable to all classes of local public improvements, whether in the opening, grading, and paving of a street, or in the construction of a sewer or the laying of a water main. This appears from the scope of the investigation and the nature of the cases reviewed. That the court intended to give voice to a general principle, and not to a narrow construction, is further evident from the language with which the opinion closes: "The judgment of the circuit court must be affirmed upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting prop-

erty therefrom, to take private property for public use without compensation; and it is so ordered." That the decision rested upon the doctrine that there was a limit to the legislative power, as defined in the third proposition above stated, appears from the fact that the dissenting opinion is based upon a denial of the soundness of such conclusion. That such was the scope and effect of the decision has been declared by the following courts: *Loeb v. Columbia Twp.* 91 Fed. 37; *Fay v. Springfield*, 94 Fed. 409, a street-paving case, where this language is found: "Equality is equity. And the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited does not depend alone upon the state Constitution exacting equal taxation, but has its foundation in those elementary principles of equity and justice which lie at the root of the social compact" (*Re Canal Street*, 11 Wend. 154-156); and he can therefore invoke for its security and protection the Federal Constitution, which inhibits, not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the state the power to 'deny within its jurisdiction the equal protection of the laws.'" See also *Charles v. Marion*, 98 Fed. 166, 100 Fed. 538; *Lyon v. Tonawanda*, 98 Fed. 361, —both street-improvement cases. Some of the state courts have been impressed with the decision under consideration, and have applied its doctrine. *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876. In *Hutoheson v. Storrie*, 92 Tex. 685, 45 L. R. A. 289, 51 S. W. 848, it was held distinctly, on the authority of *Norwood v. Baker*, that a statute was void which conferred on municipal authorities power to assess property for a local improvement without giving the property owner an opportunity to be heard on the question of benefits; and it was further held that the property owner might contest the validity of such invalid assessment, without regard to the actual amount of the benefits.

Before passing to a consideration of the particular statute involved in this appeal, it will be well to refer to the expressions of this court upon the subject of such special assessments. In the early case of *Rogers v. St. Paul*, 22 Minn. 494, the then charter of St. Paul was attacked on the ground that it was in violation of the state Constitution as to equality of taxation, because it did not protect the owner from an assessment in excess of the benefits conferred by the improvement. The opinion by Justice Berry states that the principle of local assessments is that the special benefits which will accrue to a property owner from a proposed local improvement will be, at least, equal to the tax assessed upon his property on account of such improvement. The charter was sustained upon the ground that the question was delegated to the common council, who were empowered in their discretion to assess the benefits. And it was further held that when so assessed the result was

final and conclusive, unless impeached for fraud or mistake. In *State ex rel. Merriek v. Hennepin County Dist. Ct.* 33 Minn. 235, 22 N. W. 625, 632, the court had under consideration the constitutionality of the act which provided for the assessment of property benefited by the acquisition of lands for public parks. In sustaining the act as constitutional, and referring specially to the amendment as to an assessment for local improvements upon the property fronting upon such improvements, the court says, Justice Dickinson writing the opinion: "Neither from the circumstances under which the amendment was adopted, nor from its language, is it considered that its purpose was to wholly abrogate, in respect to such assessments, the requirement that 'all taxes . . . shall be as nearly equal as may be,' although the basis of assessment, by which equality of apportionment should be sought to be attained, is changed, and the legislature is invested with a discretion to determine the manner in which assessments shall be made. *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444. It must still be regarded as the constitutional duty of the legislature to frame its enactments with regard to the principle of equality, and a clear disregard of that requirement would affect the validity of legislative action. But where the legislative discretion has been actually exercised, and a law framed which, in its judgment, is calculated to effect an equal apportionment of the burden of assessment upon the principle of benefits conferred, such legislation cannot be set aside by the courts merely because they may deem the law inexpedient, or not well devised for the purpose of securing in the highest degree equality in the apportionment of assessments. It is not enough to warrant the courts in declaring the law to be invalid that they may consider that the law may actually fail to accomplish the purpose of equal and just assessment. It should at least be apparent that the law is framed upon a plan or principle not calculated to result in equality of apportionment, or that in its operation, when carried into effect with honesty, and in the exercise of sound judgment on the part of those who are to execute its provisions, it will produce such gross inequality as cannot be deemed, in a just sense, an apportioning 'as nearly as may be' of the burden, before courts can interfere and declare the enactment void." In *State ex rel. Stater v. Reis*, 38 Minn. 371, 38 N. W. 97, in sustaining the "street sprinkling act," speaking through Justice Mitchell, the court defined the power of the legislature in reference to special assessments as follows: "First, it must be levied for a public purpose, for the power of taxation can be exercised for none other; and, second, the property on which it is assessed must be peculiarly and specially benefited by the work for which it is levied; third, that it must be apportioned according to some reasonable rule, upon the basis of benefits, ascertained or implied, resulting to the property

assessed." Whether these propositions were correctly applied in that case we need not consider. We quote them to show that the court recognized the true basis of such assessments. In *State ex rel. Shannon v. Eleventh Judicial Dist. Judges*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122, it was held that an assessment by the board of public works under the charter of the city of Duluth was void, because the board adopted an arbitrary rule, without regard to benefits. Gilfillan, Ch. J., speaking for the court, says: "It is true that in such cases, whether particular property is benefited, and to what extent it is benefited, must be left to the judgment of those whose duty it is to make the assessment, and that, when they have exercised their judgment, their determination, in the absence of fraud or demonstrable mistake of fact, is conclusive. But they must exercise their judgment, and if it appears that they have not done so, but have substituted an arbitrary, inflexible rule instead of their judgment, their work cannot stand." In that case the board of public works assessed property according to a fixed rule, according to distance and area, without reference to how the respective lots might be affected by the improvement. To the same effect, see *State ex rel. Scotten v. Brill*, 58 Minn. 152, 59 N. W. 989. See also *State ex rel. Minnesota Transfer R. Co. v. Ramsey County Dist. Ct.* 68 Minn. 242, 71 N. W. 27. In the case of *Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117, the question of jurisdiction in special assessment proceedings for a local improvement being under consideration, the court says (Mitchell, J.): "The one essential to due process of law, in the exercise of the power of taxation, is that at some stage of the proceedings the parties concerned shall have notice and an opportunity to interpose any defense they may have as to either the validity or amount of the tax." In that case the assessment was sustained upon the ground that the owner had notice and an opportunity to be heard.

In all the cases involving the question of local assessment for public improvements which have been before this court, the statutes under consideration provided for the two essential elements: First, consideration and determination by some properly selected body of the benefits to accrue by the improvements; and, second, suitable notice to the owner of the property, and an opportunity to be heard on the question. And from the reference to those cases above made it will be seen that although the court has held that the legislature may delegate its power to make such assessments to the various bodies connected with municipal governments and that the action of such delegated body in reference thereto is final, except in case of fraud or demonstrable mistake of fact, the whole trend of the discussion has centered around those two safeguards of the property owner. And there can be no question that, if any of the statutes before the court had failed to provide a proper method of estimating the benefits

as a basis for the assessment and proper opportunity to the owner to be heard thereon, the court would have declared them prohibited by the state Constitution as to equality of taxation, notwithstanding the amendment to § 1, art. 9, authorizing assessments for local improvements upon the property fronting upon such improvements. In the recent case of *State ex rel. Wheeler v. Ramsey County Dist. Ct.* 80 Minn. 293, 83 N. W. 183, the powers and duties of the board of public work under provisions of the St. Paul charter were considered. The board had assessed the amount of the cost of paving a street upon the property fronting thereon, and found that each lot was benefited equally per front foot. Following the previous decisions of this court, it was held that the action of the board was final, inasmuch as it appeared that the members of the board had exercised their discretion in arriving at such conclusion. In the closing part of the opinion reference is made to the case of *Norwood v. Baker*, with the statement that it was not applicable to the case before the court.

Taking up, now, the act which is called in question, we find, from St. Paul charter, §§ 26, 27, *supra*: First. That no distinction is made in the class or kinds of water pipes; whether principal feed mains or branch supply pipes, all kinds, of whatever description, being subject to the tax. Second. Each lot in the city of St. Paul, no matter what its location or value or use, whether improved or unimproved, whether large or small, whether in the semicountry or in the city, whether adapted and used for pasturage or a business block,—each "lot" is treated in the same manner, and subject to the same tax, according to its lineal foot frontage. Third. The tax is not for one year or any specified time, but is to be levied annually, for all time, and is made obligatory on the board of public works. Fourth. This tax is not levied for any particular purpose. When collected, it is to be paid over to the city of St. Paul, for the use of the board of water commissioners; but the law is silent as to whether it is to be expended in repairing the main in front of the lots upon which the tax is levied, or to pay for money advanced by the board of water commissioners for the original construction of the main in front of the lots assessed, or whether it is to be used in payment of the current expenses of the board. Fifth. There is no provision for a hearing upon the question as to whether this tax is equitably distributed, or whether the property so assessed is benefited thereby. If the amount so assessed is not paid within the time prescribed by law, then this shall become a lien on said real estate, and such real estate shall be sold, as in other cases of delinquent taxes. At no stage of the proceedings is there a hearing or consideration by any lawfully constituted body on the question of the benefits to accrue to the property so assessed, nor is there provided any notice to or opportunity for the lotowner to be heard on the question of benefits. So 53 L. R. A.

far as the amount of the tax is concerned, it is specifically fixed, and the owner has no authority, under the provisions of Gen. Stat. 1894, § 1588, to call in question the amount of the tax, and a consideration of the equality, proportion, and benefits is necessarily excluded. In this case the owner of the property answered in the regular tax proceedings, and put in issue, the question of benefits, and the court received evidence upon that point, and found that the property was not specially benefited by the laying of such water pipes. Counsel for the state claim that the court had no jurisdiction to that extent, and no authority to make such finding; that the tax was made specific by the act, and was not subject to review. As already stated, such is our view of the statute and the law, and the finding of the court is immaterial in the disposition of the matter before us.

Applying, now, the test as announced in *Norwood v. Baker* to those sections of the charter above noted, must they stand or fall? In our opinion, they must fall. To stand against such test, having refused in this instance to delegate its powers to the municipal authorities as in other cases, and reserving to itself the imposition of the tax, it must appear from the act itself that the legislature exercised its judgment upon those questions which form the fundamental basis of the assessment. No valid tax could be levied for such purpose, except upon the theory that the property was by so much increased in value. In fixing this arbitrary amount to be applied in all cases, under all conditions, for an indefinite time, without opportunity for a hearing or review, is it not self-evident that the legislature did not consider the question of benefits at all? To our mind, the act is so drastic and arbitrary as to show upon its face a complete failure to exercise any judgment whatever upon that question. That a tract of farming land is benefited at all by the fact that a city water conduit is laid in the highway adjoining it is on its face a doubtful proposition. That such tract is equally benefited, according to frontage, with improved city property, is on its face absurd. Is a lot worth \$200 benefited to the same degree as a lot worth \$5,000, or is a vacant lot of equal frontage in the suburbs benefited to the same degree as a tenement block in the city proper? Again, such a tax results in the grossest inequality. The money collected is turned over to the water commissioners, and is presumably applied to a reduction of the annual cost of maintaining the water system. By so much would be reduced the cost of water to the consumers, and the landowner, who may have no use whatever for the water, is compelled to bear part of the cost to those who have.

Without dwelling upon the other arbitrary features of the statute, some notice should be given to the claim of the state that this law is within the doctrine of *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, and *Spencer v. Merchant*, 125 U. S. 345, 31 L.



ed. 763, 8 Sup. Ct. Rep. 921; that is, the legislature has prescribed a certain district within which it has authority to levy arbitrarily assessments to meet the cost of the improvement. It is true that the legislature may cut out a district, and levy the cost of certain improvements therein; but it is stated in *Spencer v. Merchant*: "In determining what lands are benefited, . . . the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others." "The question of special benefit and the property to which it extends is, of necessity, a question of fact, and, when the legislature determines it in a case within its general power, its decision must, of course, be final. . . . We are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits." The court there recognized the principle that there was a limit to the legislative power. The decision in *Parsons v. District of Columbia* rests upon the theory that the 14th Amendment does not apply to the national government, and that the power of Congress is practically unlimited as to taxation within the District of Columbia.

It may be granted, then, that, when the legislative judgment is properly exercised, the legislature may provide for a public improvement, as the construction of a highway or bridge, which naturally would be specially beneficial to some certain community, and may charge the cost and maintenance of the same upon the property of a certain defined district. But the provisions of the city charter make no attempt at such a purpose. This tax of 10 cents per foot on all pipes, present and future, has no reference to the adoption of, or construction of, a system of waterworks for the property owners along the line of the pipe. The district, if any be defined, is the city of St. Paul, and the beneficiaries are the inhabitants thereof.

The stake driven by the decision in *Norwood v. Baker* is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final, without regard to its justice. It is to be hoped that the highest court of the land has spoken finally, and will not recede from its position. For the reason that the statute in question embraces an arbitrary system of taxation, without regard to benefits, provides for no method of determining the question of benefits, and no opportunity to be heard in reference thereto, and for the reason that from the face of the act it appears that the legislature, in its adoption and passage, did not consider or take into account the benefits to accrue to the prop-

erty upon which such assessment was levied, we hold that the statute is invalid, because it is, in effect, a taking of private property, under the guise of taxation, without just compensation and without due process of law. The cause is remanded, with directions to the court to modify its order for judgment by deducting the amount of water-frontage tax.

A petition for rehearing having been filed, Lewis, J., on June 18, 1901, delivered the following additional opinion:

The only question before the court in this case was the bearing of the Federal Constitution upon Special Laws 1885, chap. 10, §§ 26, 27. The decision formerly reached by this court was based wholly upon what were believed to be the principles announced in the case of *Norwood v. Baker*, 172 U. S. 260, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. Those principles are that the exaction from private property of the cost of public improvements in substantial excess of the special benefits accruing is, to the extent of such excess, a taking of property under the guise of taxation, without compensation, and, further, that when the principle of assessment adopted by the legislature is without reference to the benefits and a just and equal distribution of the burden, no provision having been made for a hearing or review by the property owners, the act is void. Or, as expressed in the mandate issued in that case: "The judgment of the circuit court [enjoining the assessment is] . . . affirmed upon the ground that the assessment . . . was under a rule which excluded any inquiry as to the special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation." The principles thus announced do not seem to be in conflict with those declared in *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521, and *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921. In those and similar cases the legislative power was not recognized as arbitrary and without limit, but those cases rested upon the theory that the legislature does actually exercise its judgment with reference to the subject, which it might otherwise delegate to a proper body. It logically follows, in a case where the rule of assessment provided is arbitrary, without regard to benefits and without the right of review, that the act so providing is in contravention of the Federal Constitution. Tested by those principles, we held that the water-frontage tax could not be sustained; and now, after a careful reconsideration and review of the cases, were the question one of final jurisdiction in this court, we feel that we should adhere to the views expressed in the former opinion. But

in the recent case of *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, and other cases concurrently decided, the Federal Supreme Court has attempted to qualify and limit those principles as applied in *Norwood v. Baker*. While it does not appear that the court has directly denied the soundness of the rule announced, yet the purpose seems to be, in its later expressions, to hold that the principle will not apply when in conflict with the systems of taxation as adopted by a state, unless, in some special case, peculiar and extraordinary hardship is the result. In other words, it is not the principle or rule of assessment which is the test of the validity of the state act, but, rather, the effect of the application of the rule in particular cases. It may be a sound rule in one case, and not in another. It would be useless at this time to further attempt to define the position of the Federal court as expressed in its later decisions. It is sufficient to say that we are in doubt as to the effect of its holdings. Our state Constitution authorizes the special assessments provided by the statute, and such statute has been held valid, under the constitutional provision, by this court in *State v. Robert P. Lewis Co.* 72 Minn. 87, *sub nom. Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108. It is possible that this fact may cause the Federal court to sustain the statute, upon the theory that it is a system adopted by the state, and that the result of such an assessment cannot be extraordinary or of such unusual hardship as to come within the limitation applied in *Norwood v. Baker*. The views of the court, however, have not been expressed with sufficient clearness to warrant us in assuming that our understanding of its decision in *Norwood v. Baker*, and our former application of it to the state act, would now be sustained by that court. We have, therefore, decided to reverse our former decision; and we are influenced in this conclusion somewhat by the fact that the property owner may cause our conclusion to be reviewed by the proper final tribunal, whereas such privilege would be denied the city were the former ruling adhered to.

The decision heretofore filed is reversed, and the order of the Trial Court affirmed.

**Start, Ch. J.:**

I concur in the result, on the ground that the case is ruled by *State v. Robert P. Lewis Co.* 72 Minn. 87, *sub nom. Ramsey County v. Robert P. Lewis Co.* 42 L. R. A. 639, 75 N. W. 108, and *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

Petition for second rehearing denied July 3, 1901.  
53 L. R. A.

STATE of Minnesota, *Respt.*,  
v.

Jacob BARGE, *Appt.*

(.....Minn.....)

\*An ordinance of the city of Minneapolis relating to stalls, booths, or other inclosures in saloons construed, and held:

1. The city council had legislative authority, in its discretion, to enact the ordinance.
2. Courts have no power to declare an ordinance void because it is unreasonable, unless its unreasonableness is so clear as to indicate a mere arbitrary exercise of the power vested in the council.
3. An ordinance, like a statute, may be subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences.
4. This ordinance forbids the keeping of any inclosure in, or connected with, any room wherein intoxicating liquors may be sold by a licensed dealer, which is or can, by any ingenuity or pretense, be used as a lounging or drinking place, or for any immoral purpose; that, so construed and limited, the ordinance is not unreasonable, but valid.
5. The evidence sustains the judgment convicting the defendant of a violation of the ordinance.

(January 15, 1901.)

**A**PPPEAL by defendant from a judgment of the Municipal Court of Minneapolis convicting him of violating an ordinance regulating the sale of spirituous liquors, and from an order denying a motion for new trial. *Affirmed.*

The facts are stated in the opinion.

**Messrs. W. E. Dodge, Rome G. Brown, Charles S. Albert, and Henry Gjertsen,** for appellant:

Either there can be no offense without the sale of liquors in the booths, stalls, or inclosures, or else there can be. If no offense exists without the sale, then there is no offense shown. If the offense can exist without the sale, then clearly this is not a regulation either of the sale of liquors, the persons dealing in them, or the place wherein such intoxicating liquors are sold.

*Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14.

A municipal corporation possesses, and can exercise, the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, powers expressly granted; (3) those essential to declared objects and pur-

\*Headnotes by **START, CH. J.**

NOTE.—As to municipal power to prohibit screens in barrooms, see *Champer v. Greencastle* (Ind.) 24 L. R. A. 768, and *note*.

As to requiring curtains to front doors and windows of saloon to be raised, see, in this series, *Bennett v. Pulaski* (Tenn.) 47 L. R. A. 278.

As to prohibiting sale of liquor in dance cellars or places where women are employed, see *Ex parte Hayes* (Cal.) 20 L. R. A. 701.

poses of the corporation,—not simply convenient, but indispensable.

1 Dill. Mun. Corp. 3d ed. § 89; *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 35 L. R. A. 684, 45 N. E. 587; *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *St. Paul v. Laidler*, 2 Minn. 190, Gil. 159, 72 Am. Dec. 89; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 913; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14; *Smith v. Neuborn*, 70 N. C. 14, 16 Am. Rep. 766; *Mernaugh v. Orlando*, 41 Fla. 433, 27 So. 34; *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66, 44 N. E. 929; *Grand Rapids v. Hughes*, 15 Mich. 54.

Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 Dill. Mun. Corp. § 89; *St. Paul v. Laidler*, 2 Minn. 190, Gil. 159, 72 Am. Dec. 89; *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 35 L. R. A. 684, 45 N. E. 587; *Minturn v. Larue*, 23 How. 435, 16 L. ed. 574; *Bloom v. Xenia*, 32 Ohio St. 461; *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118, 12 S. W. 445; *Cooley, Const. Lim.* 233, 234; *Tiedeman, Mun. Corp.* 110.

Courts adopt a strict, rather than a liberal, construction of power.

*St. Paul v. Laidler*, 2 Minn. 190, Gil. 159, 72 Am. Dec. 89; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *State ex rel. Farnsworth v. St. Paul Municipal Ct.* 32 Minn. 329, 20 N. W. 243; *St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49; *State v. Hammond*, 40 Minn. 43, 41 N. W. 243; *State v. Johnson*, 41 Minn. 111, 42 N. W. 786; 1 Dill. Mun. Corp. §§ 91, 319, 320, and cases cited; *Shelbyville v. Cleveland, C. C. & St. L. R. Co.* 146 Ind. 66, 44 N. E. 929; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231; *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Ex parte Chin Yan*, 60 Cal. 78; *Davis v. Anita*, 73 Iowa, 325, 35 N. W. 244; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 57 N. W. 680; *Mcysers v. Chicago, R. I. & P. R. Co.* 57 Iowa, 555, 43 Am. Rep. 50, 10 N. W. 896; *Phillips v. Denver*, 19 Colo. 179, 34 Pac. 902; *Tiedeman, Mun. Corp.* § 110.

The power to pass by-laws under the general class does not enlarge or annul the power conferred by the special provision in relation to the various subject-matters.

1 Dill. Mun. Corp. § 315; *Mernaugh v. Orlando*, 41 Fla. 433, 27 So. 34; *Mount Pleasant v. Vansice*, 43 Mich. 361, 5 N. W. 378; *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558; *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *State v. Fay*, 44 N. J. L. 474; *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623; *New Hampton v. Conroy*, 56 Iowa, 498, 9 N. W. 417; *Strauss v. Pontiac*, 40 Ill. 301; *Sullivan v. Oneida*, 61 Ill. 242; *Goddard v. Jacksonville*, 15 Ill. 588; *Leonard v. Canton*, 35 Miss. 189; *State v. Ferguson*, 33 N. H. 424; *Walter v. Columbia City*, 61 Ind. 24; *Tuck v. Waldron*, 31 Ark. 462; *Harris v.* 53 L. R. A.

*Livingston*, 28 Ala. 577; *Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221; *Angerhoffer v. State*, 15 Tex. App. 613.

The police power resides in the state in its sovereign capacity, and can only be possessed and exercised by a municipal corporation by a delegation thereof to the municipality by the law-making power of the state.

*Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 28 N. E. 849; 15 Am. & Eng. Enc. Law, pp. 1166, 1167; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14.

The legislature of the state of Minnesota has not, by express terms, delegated to the municipality the power to pass the ordinance in question.

Unless statutory authority was given each municipality, specifying and designating with exactness the limits and powers of the corporation to cover the evils sought to be remedied, there did not exist in such municipality the power to pass a screen ordinance, closing ordinance, or wine-room ordinance,—either under the general welfare clause, the clauses giving the corporate body authority to suppress vice and intemperance, to preserve the health, good order, and peace of the community, or the clause to regulate either the sale of intoxicating liquors, the place where sold, or the persons dealing therein.

*Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 913; *Denver v. Domedian* (Colo. App.) 60 Pac. 1107; *Walker v. People*, 5 Colo. App. 37, 37 Pac. 29; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *St. Paul v. Troyer*, 3 Minn. 291, Gil. 200; *State v. Orth*, 38 Minn. 150, 36 N. W. 103.

The ordinance is void because the municipality had no power to enact it under the power "to regulate," or otherwise; it is not a reasonable regulation; is inconsistent with the laws and policy of this state; is arbitrary, oppressive, and unfair, an unnecessary interference with individual liberty, and tends to subject the vendors of liquors to unreasonable prosecution.

The enactment of statutes specifically authorizing the passage of screen ordinances was a tacit recognition by the law-making power that municipal corporations had no power to pass ordinances of that kind without a statute specifically authorizing the same.

*Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14; *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 278, 52 S. W. 913; *Gastineau v. Com.* 22 Ky. L. Rep. 157, 49 L. R. A. 111, 56 S. W. 705; *Re Maguire*, 57 Cal. 604, 40 Am. Rep. 125; *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623; *Bristol Door & Lumber Co. v. Bristol*, 97 Va. 304, 33 S. E. 588; *Ely v. Niagara County Supers.* 36 N. Y. 297; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, 14 S. E. 387; *Clinton v. Phillips*, 58 Ill. 102, 11 Am. Rep.

52; *Baker v. Municipal Council of Paris*, 10 U. C. Q. B. 621; *Newbern v. McCann*, 105 Tenn. 159, 50 L. R. A. 476, 58 S. W. 114; *Ward v. Greeneville*, 8 Baxt. 228, 35 Am. Rep. 700, and cases cited.

Messrs. **Kitchel, Cohen, & Shaw**, for respondent:

An ordinance may be adjudged unreasonable as applied to one set of circumstances, and reasonable as applied to others, although the general language covers both sets of circumstances.

*St. Paul v. Troyer*, 3 Minn. 291, Gil. 200; *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305, 67 N. W. 62; *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531; *Evison v. Chicago*, *St. P. M. & O. R. Co.* 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6; *Re Wilson*, 32 Minn. 148, 19 N. W. 723; *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350, 42 N. W. 24.

The Minneapolis wine-room ordinance is not unreasonable, even if applied to every booth and stall in the licensed "room."

The ordinance acts in the same line as the general law. It does not prohibit every inclosure, but, under the rule *ejusdem generis* (*Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31; *McCartney v. Ridgway*, 160 Ill. 129, 32 L. R. A. 555, 43 N. E. 826), forbids only such inclosures as are in the same class as stalls and booths.

The power to regulate the liquor traffic in the Minneapolis charter is a broad one.

*State v. Ludwig*, 21 Minn. 202; *Re Wilson*, 32 Minn. 145, 19 N. W. 723; *State v. Kuntler*, 33 Minn. 69, 21 N. W. 856; *Ex parte Byrd*, 84 Ala. 17, 4 So. 397.

The power "to regulate the persons" engaged in a certain business includes control of the place where the business is carried on and the manner of its prosecution in the designated place.

If the ordinance be unreasonable as to any booth or stall, such inclosure may be excluded from the operation of the ordinance without making it invalid, and the burden of the exclusion is on the defendant.

*State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531.

When the council has exercised its discretion and judgment, the ordinance which it passes is *prima facie* valid.

*Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106; *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 28 S. W. 528.

Messrs. **H. D. Dickinson** and **Frank Healy** also for the State.

**Start, Ch. J.**, delivered the opinion of the court:

The common council of the city of Minneapolis is given, by the charter of the city, power to "license and regulate . . . all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquors;" also, "full power and authority to make, ordain, publish, enforce, amend, or repeal all such ordinances for the government and the general order of the city, for the suppression of vice and intemperance, and 63 L. R. A.

for the prevention of crime, as it shall deem expedient." City Charter, pp. 47, 48. On April 13, 1900, the common council of the city passed an ordinance, the here material parts of which are these: "An ordinance regulating all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquor in the city of Minneapolis. The city council of the city of Minneapolis do ordain as follows: Section 1. No licensed liquor dealer shall construct, build, or maintain with screens, curtains, or partitions of any kind, any stall, booth, or other inclosure of any kind in or connected with any room or place in any building wherein any kind of intoxicating liquor is sold or disposed of by such licensed liquor dealer in the city of Minneapolis: provided, that nothing in this ordinance contained shall be construed to mean that a screen or partition cannot be maintained on the inside of the front door or entrance of a saloon or barroom." Section 2 provides the punishment for a violation of the ordinance. Section 3 declares that the ordinance shall be in force from and after July 2, 1900. The defendant was on September 7, 1900, by the municipal court of Minneapolis, found guilty of a violation of this ordinance upon a complaint that the defendant did unlawfully "maintain, with board partitions, an inclosure commonly called a stall, booth, or wine room, in and connected with a room wherein intoxicating liquor was then and there sold and disposed of by him, he being then and there a licensed liquor dealer under the ordinances of the city, the room being then and there what is commonly called a barroom or saloon." The defendant made a motion for a new trial, which was denied, and judgment convicting him of the offense, and imposing upon him a fine of \$25, was entered against him, and he appealed from the order and the judgment.

1. The defendant's contention first to be considered is to the effect that the city council was not authorized by the legislature to pass the ordinance in question. If the ordinance is not unreasonable, there can be no serious question as to the power of the council to enact it, and we hold the council was authorized, in its discretion, to enact the ordinance. The express legislative authority to "license and regulate . . . all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquors" carries with it, by necessary implication, authority to the city council to regulate, by ordinance, the traffic in intoxicating liquors, and to impose upon it, and all persons engaged in it, such reasonable conditions and restrictions as to the time, place, and manner the business may be conducted as the council may deem necessary or expedient to conserve the peace, order, and morals of the city. *St. Paul v. Troyer*, 3 Minn. 295, Gil. 200; *State v. Ludwig*, 21 Minn. 202; *Re Wilson*, 32 Minn. 145, 19 N. W. 723. In reaching this conclusion, we have not overlooked Sp. Laws 1887, chap. 13, prohibiting the licensing of the traffic in intoxicating liquors within certain specified territory of the city of Minneapolis. This statute in no manner

limits the power of the council previously granted to regulate the traffic outside of the prohibited district.

2. The defendant also contends that the ordinance is arbitrary, oppressive, and unreasonable; hence it is void. Courts have no power to declare an ordinance void for the reason urged, unless its unreasonableness is so clear, manifest, and undoubted as to amount to a mere arbitrary exercise of the power vested in the legislative body. *Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106. Now, in order to determine whether the ordinance in question is unreasonable within this rule, it is necessary first to find out what it means; that is, construe it. Ordinances, like statutes, must be construed in a reasonable and common-sense way, so as to give effect to the purpose of the legislative body in enacting them. It is not permissible to give to an ordinance a strained and unreasonable construction for the purpose of declaring it void; for if it may be fairly construed in either of two ways, one of which will render it valid and the other void, the former must be adopted. *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531; *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305, 67 N. W. 62; *State ex rel. Mincees v. Schoenig*, 72 Minn. 528, 75 N. W. 711. Again, the general terms of a statute or ordinance may be subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences; for it must be presumed that the legislature did not intend such results. *Hantzsch v. Massolt*, 61 Minn. 361, 63 N. W. 1069; *Duckstad v. Polk County Comrs.* 69 Minn. 202, 71 N. W. 933; *Sutherland*, Stat. Constr. § 246. The defendant, as a basis for the claim that the ordinance is void because it is unreasonable, construes the words, "or other inclosure," in the ordinance, as including every inclosure in the room covered by the license, including those which are not capable of a wrong use, but which are necessary to the legitimate prosecution of the liquor traffic, such as the bar, cigar counter, telephone inclosure, and toilet room. The ordinance forbids a licensed liquor dealer to maintain—that is, to keep—"any stall, booth, or other inclosure of any kind in or connected with" the room covered by his license. It is reasonably clear, and we so hold, that the rule of *ejusdem generis* applies to the words "or other inclosure," and that they include only such inclosures as are of the same kind as stalls and booths, with screens, curtains, or partitions, in any room wherein intoxicating liquor is sold by a licensed dealer. *Ott v. Great Northern R. Co.* 70 Minn. 50, 72 N. W. 833. Except for the proviso of the ordinance, it would be entirely clear that the words "or other inclosure" are used as the legal equivalent of "or other such like inclosure." It is possible to construe the proviso as excluding, by necessary implication, from the room covered by the license, every screen or partition, except one at the front door or entrance to the saloon. But when the ordinance is considered as a whole, and with

reference to the purpose of its enactment, we are satisfied that the construction we have given to the words "or other inclosure" is the correct one. This brings us to the question as to the scope and meaning of the words, "stall, booth, or other [such like] inclosure," as used in this ordinance. These words must be interpreted with reference to the general legislative policy of the state as to the regulation of the liquor traffic and the evils sought to be corrected by the ordinance. The localization of the business of selling intoxicating liquors at retail, and the giving to it the greatest publicity which is practicable, are the most efficient means for its regulation and policing. Such is the declared policy of the law, which requires that all licenses shall contain a description of the room where such liquors are to be sold, and forbids the selling of liquor other than at the room named in the license. The licensee must also give a bond not to sell at any place other than the room named in the license. Gen. Stat. 1894, §§ 2018, 2026. The word "room" is used in these sections of the statute in its ordinary sense, as meaning a single inclosure separated by partitions or other means from the other parts of a building. Now, if the room named in the license may be subdivided into inclosed drinking rooms, booths, or stalls, the declared policy and purposes of the law may be thereby wholly defeated. Nor is this all. It is a fact, of which we may take judicial notice, that opportunities for men and women, old or young, to lounge, drink, and carouse in secrecy, free from the observation of the police and of all other persons, are demoralizing in the extreme, and directly tend to drunkenness, licentiousness, and the corrupting of unwary youth. The existence of any drinking booth, stall, or other like inclosure, with screens, curtains, or partitions, within the room named in a license for the sale of intoxicating liquors, affords just such opportunities. The ordinance in question was intended to give effect to the general legislative policy of the state, of localization and publicity for the business of retailing intoxicating drinks, and to prevent the evils incident to secret lounging and drinking places, and it must be construed so as to give effect to such intentions. If so construed, and the words, "stall, booth, or other inclosure," be limited to inclosures which are or may be used as lounging or drinking places or for any immoral purpose, the ordinance is neither unreasonable nor unjust, but, if construed so as to include innocent and necessary inclosures, it would be otherwise. We therefore hold that the ordinance forbids the construction or the keeping of any booth, stall, or other inclosure, in or connected with any room or place wherein intoxicating liquor is or may be sold by a licensed dealer, which is or can, by any ingenuity, sham, or pretense, be used as a lounging or drinking place, or for any immoral purpose. So construed and limited, the ordinance is not unreasonable, but valid.

3. The defendant further claims that, even if the ordinance be valid, the evidence given

by the prosecution on the trial is not sufficient to support the judgment convicting him of a violation of the ordinance, for the reason that there was no evidence that the defendant sold any intoxicating liquor at the time or place alleged, or that any booth or stall was maintained by him in, or connected with, any room wherein liquor was licensed to be sold. The gist of the offense was not the selling of intoxicating liquor in the booth or stalls, but it was the permitting the existence of the stalls; that is, keeping them in the licensed room. While the evidence tended to show that some of the inclosures maintained by the defendant, such as the telephone booth, the toilet, and linen rooms, were innocent and necessary inclosures, yet the evidence is plenary that he kept other inclosures in the licensed room which were

adapted for use as secret lounging, drinking, and immoral places. The judgment is amply supported by the evidence.

4. The defendant assigns as error the ruling of the trial court in excluding evidence offered by him tending to show the value of the fixtures in the room described in the complaint and the damages he would sustain if required to remove them. There is no merit in the assignment. The ordinance is a valid exercise of the power of the council to regulate the business in which he voluntarily engages, and whatever fixtures he places in the licensed room are subject to such power of the council. *Kansas v. Ziebold*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

*Order and judgment affirmed.*

### UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Thomas BRADLEY, *Plff. in Err.*,

v.

John E. ANDRUS.

(107 Fed. 196.)

**Mere failure of an indorsee to present a check for payment** for eleven months, during which time the maker paid the amount to the payee on his assurance that the check was mislaid and that he would return it when found, will not estop him from enforcing payment, where the maker relied wholly on the word of the payee in making his payment.

(March 28, 1901.)

**NOTE.**—Effect on drawer's liability of delay in presenting check where drawee remains solvent.

- I. Necessity of loss to drawer's discharge.
- II. What loss sufficient to work discharge.

For release of indorser of check by delay in presenting it, see *note to Kirkpatrick v. Puryear* (Tenn.) 22 L. R. A. 785.

- I. Necessity of loss to drawer's discharge.

It is now established by the overwhelming weight of authority, and beyond contradiction, that delay, short of the period prescribed by the statute of limitations for an action on the check or the original consideration, in presenting a check to the drawee for payment, does not release the drawer from liability, either on the check or on the original consideration for which it was given, unless he is damaged or prejudiced by such delay. It has been so held in actions on the check by the following cases: *Serle v. Norton*, 2 Moody & R. 401; *Alexander v. Burchfield* (*obiter*) 7 Mann. & G. 1061; *Robinson v. Hawksford*, 9 Q. B. 52, 15 L. J. Q. B. N. S. 377, 10 Jur. 964; *Laws v. Rand*, 3 C. B. N. S. 442, 27 L. J. C. P. N. S. 76, 4 Jur. N. S. 74; *Keene v. Beard* (*obiter*) 8 C. B. N. S. 372, 29 L. J. C. P. N. S. 287, 6 Jur. N. S. 1248, 2 L. T. N. S. 240, 8 Week. Rep. 469; *Dion v. Lachance* (*obiter*) *Rap. Jud. Quebec*, 1, 14 C. S. 77; *Merchants' Nat. Bank v. State Nat. Bank* (*obiter*) 10 Wall. 604, 19 L. ed. 1008; *Bull v. First* 53 L. R. A.

**ERROR** to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to compel the maker to pay the amount alleged to be due on a check. *Affirmed.*

The facts are stated in the opinion.

Argued before *Gray*, Circuit Judge, and *Bradford* and *J. B. McPherson*, District Judges.

*Mr. Andrew J. Maloney*, for plaintiff in error:

A check must be presented for payment without delay. If the holder neglects to obey this rule he does so at his peril,—a peril in which no one else is involved.

*Nat. Bank*, 123 U. S. 105, 31 L. ed. 97, 8 Sup. Ct. Rep. 62; *Bowen v. Needles Nat. Bank* (*obiter*) 87 Fed. 430; *Industrial Trust Title & Sav. Co. v. Weakley* (*obiter*) 103 Ala. 458, 15 So. 854; *Watt v. Gana*, 114 Ala. 264, 21 So. 1011; *Hoyt v. Seeley*, 18 Conn. 353; *Deener v. Brown*, 1 MacArth. 350; *Daniels v. Kyle*, 1 Ga. 804; *Patten v. Newell* (*obiter*) 30 Ga. 271; *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 38 L. R. A. 749, 27 S. E. 979; *Springfield M. & F. Ins. Co. v. Tinscher*, 30 Ill. 403; *Howes v. Austin* (*obiter*) 35 Ill. 396; *Willets v. Paine*, 43 Ill. 432; *Stevens v. Park*, 73 Ill. 387; *Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10, *Reversing* 64 Ill. App. 300; *Allen v. Kramer*, 2 Ill. App. 205; *Maderom v. Heath & M. Mfg. Co. (obiter)* 35 Ill. App. 588; *Marshall v. Freeman*, 52 Ill. App. 42; *Thom v. Sinsheimer*, 68 Ill. App. 555; *Griffin v. Kemp*, 46 Ind. 172; *Henshaw v. Root*, 60 Ind. 220; *Fletcher v. Pierson*, 69 Ind. 281, 35 Am. Rep. 214; *Gregg v. George* (*obiter*) 16 Kan. 546; *Anderson v. Rodgers* (*obiter*) 53 Kan. 542, 27 L. R. A. 248, 38 Pac. 1067; *Smith v. Jones*, 2 Bush, 103; *Cawein v. Brownlisk* (*obiter*) 6 Bush, 461, 99 Am. Dec. 684; *Emery v. Hobson*, 63 Me. 32; *Pack v. Thomas*, 13 Smedes & M. 11, 51 Am. Dec. 135; *Parker v. Reddick*, 65 Miss. 246, 3 So. 575; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864; *Morrison v. McCartney*, 30 Mo. 183; *Graham v. Morstadt*, 40 Mo. App. 333; *Murray v. Judah*, 6 Cow. 490; *Conroy v. Warren*, 3 Johns. Cas. 259, 2 Am. Dec. 156; *Mohawk Bank v. Broderick* (*obiter*) 10 Wend. 304; *Gough v. Staats* (*obiter*) 12

*National State Bank v. Weil*, 141 Pa. 457, 21 Atl. 601; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008.

The maker of a check is entirely absolved from its payment if by reason of the neglect of the holder in presenting it for payment he would suffer loss.

A person receiving a check holds it for a month or two, or, in this case, eleven months, at his own personal risk. The holder must show that the drawer suffered no loss,—must affirmatively show it.

5 Am. & Eng. Enc. Law, 2d ed. p. 1045; Byles, Bills, 7th Am. ed. \*20, note 2; *Little v. Phenix Bank*, 2 Hill, 425.

It is a rare occurrence for a check to be held more than a few days, and consequently there has been seldom, if ever, an instance where the delay resulted in any loss other than that caused by failure of the bank; and

therefore in the decided cases this has been the question involved. At the same time the courts have almost uniformly expressly refrained from limiting it to such cases.

5 Am. & Eng. Enc. Law, 2d ed. p. 1044; Story, Promissory Notes, 7th ed. § 497, p. 692; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; Byles, Bills, Sharswood's ed. \*20; Norton, Bills & Notes, §§ 152-154 *et seq.*; Bouvier, Law Dict. Rawle's ed. title *Checks*, p. 318; *Smith v. Jones*, 2 Bush, 103.

Bradley was in no way negligent. He was not required to suspect a supposedly solvent and honorable business man of being a liar and a thief. The giving of a check has never been held to be payment. There is no payment until it is paid.

*Lancaster Bank v. Woodward*, 18 Pa. 357, 57 Am. Dec. 618.

Wend. 549; *Little v. Phenix Bank (obiter)* 2 Hill, 425 (affirmed in 7 Hill, 359, without passing on this point); *Griffin v. Riblet*, 6 N. Y. Legal Obs. 421; *Cowing v. Altman*, 79 N. Y. 167; *Syracuse, B. & N. Y. R. Co. v. Collins*, 3 Lans. 29; *Brust v. Barrett (obiter)* 16 Hun, 412; *Harbeck v. Craft*, 4 Duer, 122; *East River Bank v. Gedney*, 4 E. D. Smith, 582; *Elting v. Brinckenhoff*, 2 Hall, 459; *Church v. Farnham, Sheldon*, 393; *Reiners v. Davis*, 2 N. Y. City Ct. Rep. 215; *Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 43; *Taylor v. Sip (obiter)* 30 N. J. L. 284; *Scroggin v. McClelland (obiter)* 37 Neb. 644, 22 L. R. A. 110, 56 N. W. 208; *Morrison v. Bailey (obiter)* 5 Ohio St. 13, 64 Am. Dec. 632; *Stewart v. Smith*, 17 Ohio St. 82; *First Nat. Bank v. Linn County Nat. Bank*, 30 Or. 296, 47 Pac. 614; *Pierce v. Daniel*, 16 W. N. C. 35; *Fleming v. Denny*, 2 Phila. 111; *Planters' Bank v. Merritt*, 7 Helsk. 177; *Planters' Bank v. Keese*, 7 Helsk. 200; *Jackson Ins. Co. v. Sturges*, 12 Helsk. 344; *Bell v. Alexander*, 21 Gratt. 1; *Purcell v. Allemon*, 22 Gratt. 739; *Compton v. Gilman*, 19 W. Va. 317, 42 Am. Rep. 776; *(Overruling Ford v. McClung, 5 W. Va. 156, and Disapproving Harker v. Anderson, 21 Wend. 372)*; *Kinyon v. Stanton*, 44 Wis. 470, 28 Am. Rep. 601; *Jones v. Helliger (impliedly)* 36 Wis. 140.

And the same rule has been applied where the action was on the original consideration for which the check was given. *Hopkins v. Ware*, 38 L. J. Exch. N. S. 147, L. R. 4 Exch. 268, 20 L. T. N. S. 668; *Re Brown*, 2 Story, 502, Fed. Cas. No. 1,985; *Lowenstein v. Bresler*, 109 Ala. 326, 19 So. 860; *Heartt v. Rhodes*, 66 Ill. 351; *Marshall v. Freeman*, 52 Ill. App. 42; *Shackelford v. Clarke*, 43 Ill. App. 618; *Mordie v. Kennedy (obiter)* 23 Kan. 408; *Foster v. Paulk*, 41 Me. 425; *Selby v. McCullough (obiter)* 26 Mo. App. 66; *Wear v. Lee (obiter)* 26 Mo. App. 105; *Herider v. Phenix Loan Asso. (obiter)* 82 Mo. App. 427; *Bradford v. Fox*, 38 N. Y. 289, 39 Barb. 203; *Scott v. Meeker*, 20 Hun, 163; *Woodin v. Frazee*, 6 Jones & S. 190; *Kirkpatrick v. Puryear (obiter)* 93 Tenn. 409, 22 L. R. A. 783, 24 S. W. 1130; *Blair v. Wilson (obiter)* 28 Gratt. 171; *Cox v. Boone (obiter)* 8 W. Va. 500, 23 Am. Rep. 627.

The doctrine established by the foregoing citations was vigorously assailed by Cowen, J., in *Harker v. Anderson*, 21 Wend. 372. Nelson, Ch. J., and Bronson, J., refrained in that case from expressing any opinion on the point; but in the subsequent case of *Little v. Phenix Bank*, 2 Hill, 425, *supra*, they expressed themselves in favor of the doctrine heretofore stated, and rejected the view of Cowen, J. The latter adhered to the position taken by him in *Harker v.* 53 L. R. A.

*Anderson*, 21 Wend. 372, but, as is shown by the citations already made, the contrary view is as well established in New York as elsewhere. *Ford v. McClung*, 5 W. Va. 156, does not seem to deny that injury to the drawee is necessary to his discharge, but held that the law, in case of the failure to give notice of nonpayment of a check within a reasonable time, implies injury, and that there was nothing in the case to rebut such presumption. *Compton v. Gilman*, 19 W. Va. 317, 42 Am. Rep. 776, however, treated this case as holding that the drawer is discharged by delay in presentment whether any injury has been sustained or not, and overruled it, holding in accordance with the weight of authority that the drawer is not discharged unless injured.

*Scroggin v. McClelland*, 37 Neb. 644, 22 L. R. A. 110, 56 N. W. 208, *supra*, and *Brust v. Barrett*, 16 Hun, 412, while conceding the general rule that delay in presenting the check does not discharge the drawer unless he is injured, held that the drawer was discharged, without reference to injury, where the presentation of the check was delayed beyond the period prescribed by the statute of limitations for an action thereon.

## II. What loss sufficient to work discharge.

In most of the cases in which the right of the holder of a check to recover against the drawer is denied because of delay in presenting the check and the consequent damage or injury to the drawer, the loss or damage has been occasioned by the failure or insolvency of the bank between the time the check should have been presented and the time it was actually presented; but it does not necessarily follow that it is only a case of that kind in which the drawer will be discharged.

Some of the cases, however, use language intimating that it is only in such a case that the drawer will be discharged by reason of the delay.

Thus, in *Deener v. Brown*, 1 MacArth. 350, the court said: "It is quite true that the rule requiring the prompt presentation of bills of exchange is also the rule as to the presentation of checks upon bankers. But it means no more than this: that if the holder of a check retains it in his possession beyond the time prescribed by the rule, he discharges the indorsers, if there be any, or takes upon himself the risk of the continued solvency of the bank."

In *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864, *supra*, the court said: "Presentment within time above stated is only necessary to discharge the drawer when the banker has become

**Mr. Henry P. Brown**, for defendant in error:

Where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud.

*Dickerson v. Oolgrove*, 100 U. S. 578, 25 L. ed. 618; *Bradford v. Hanover F. Ins. Co.* 49 L. R. A. 530, 43 C. C. A. 310, 102 Fed. 48.

Andrus was under no obligation to Bradley to present the check within a reasonable time, and is not prejudiced by delay in doing so.

*Plemming v. Denny*, 2 Phila. 111; *MERCHANTS' Nat. Bank v. State Nat. Bank*, 10 Wall. 647, 19 L. ed. 1019; *Bull v. First Nat. Bank*, 123 U. S. 105, 31 L. ed. 97, 8 Sup. Ct. Rep. 62.

While it may have been true that Grable

insolvent or failed between the time when the check was received and the time it should have been presented." This statement is *obiter*, however, as the bank had failed.

So, also, the court in *Harbeck v. Craft*, 4 Duer, 122, said: "It may be doubted whether there is any case in which the drawer of a check who delivered it for value would be exonerated from its payment by a delay in its presentment, except when it appears that from the failure of the bank upon which it was drawn he sustained a loss of the funds that, but for the delay, would have been applied to its payment; in other words, it is doubtful whether the holder, by delaying his demand of payment, takes upon himself any other risk than that of the continued solvency of the drawee." This, too, is *obiter*.

In *Stewart v. Smith*, 17 Ohio St. 82, the court said that "ordinarily" the only loss arising from the delay for which the holder is held responsible is that occasioned by the insolvency of the drawee.

On the other hand, *Daniels v. Kyle*, 1 Ga. 804; *Springfield M. & F. Ins. Co. v. Tinscher*, 30 Ill. 403, and *Murray v. Judah*, 6 Cow. 490,—*supra*, say, in effect, that, in order that the drawer may be discharged by the delay the drawee must have failed, or he must, in some other way, have sustained injury by the delay in presentation.

*Pack v. Thomas*, 13 Smedes & M. 11, 51 Am. Dec. 135, *supra*, says the law will not presume an injury until it is shown, or until some circumstance is established, such as "the failure of the bank," from which it might be inferred.

It will also be observed that the refusal of the court to relieve the drawer in *BRADLEY v. ANDRUS* was not put upon the ground that the only injury resulting from the delay which would work his discharge would be the failure or insolvency of the drawee, but upon the ground that the loss which the drawer suffered was not, under the circumstances, the proximate result of the delay in presenting a check.

*Hopkins v. Ware*, 38 L. J. Exch. N. S. 147, L. R. 4 Exch. 268, 20 L. T. N. S. 668, *supra*, did not involve liability of the drawer of the check; but the facts in other respects are somewhat like those involved in *BRADLEY v. ANDRUS*. In that case the defendant was indebted to the plaintiff. The defendant's agent on the 11th of May sent the plaintiff his personal check for the amount of the debt. On the 16th of May the defendant, hearing of this action of the agent, paid the latter the difference between the amount of the defendant's funds, which the agent held, and the amount of the check. The check was not presented until June 9 and was 53 L. R. A.

could have brought suit against Bradley on the check if it had been lost, a judgment in such an action would have been controlled by the court, and execution of the judgment would have been restrained by the court until indemnity had been given to protect Bradley against the possibility of the check turning up in the hands of an innocent holder for value.

*Bisbing v. Graham*, 14 Pa. 14, 53 Am. Dec. 510; *Bigler v. Keller*, 8 W. N. C. 323; *West Philadelphia Nat. Bank v. Field*, 143 Pa. 473, 22 Atl. 829.

**Bradford**, District Judge, delivered the opinion of the court:

John E. Andrus, the defendant in error, brought an action of assumpsit in the court below against Thomas Bradley, the plaintiff in error, on a check dated February 18,

then dishonored, the agent having absconded. The agent never had funds in the bank to meet the check; but between May 11 and June 4 he had been allowed to overdraw his account, and it was found, as a fact, that if the check had been presented before the 4th of June there was a reasonable chance that it would have been paid. The action was on the original indebtedness, and it was held that the plaintiff could not recover because the defendant had suffered a prejudice from the delay in presenting the check, first, because of the loss of the chance referred to, and, second, because, if it had been presented before the agent went away, and had then been dishonored, the defendant would have had an opportunity of resorting at once to the agent, and might have made something out of him. The connection between the delay in the presentation of the check and the loss sustained in this case seems at least as remote as that between the delay and loss in *BRADLEY v. ANDRUS*.

Piece v. Daniel, 16 W. N. C. 35, was an action on a check by an indorsee against the drawer. The latter set up in his affidavit of defense that the check was given in part payment of another check given to him by the payee of the check in suit; that the check so given to him proved to be worthless; that the check in suit was held by the plaintiff for four days without presentation; that the defendant constantly inquired at the bank for it, and believes that if it had been presented promptly he would have been able to recover its amount from the payee of the check in suit, since he had further dealings with him during the delay. The affidavit was held to be insufficient, and rule for judgment for plaintiff was made absolute. The court said that the loss by delay in presenting the check was too remote.

Deener v. Brown, 1 MacArth. 350, *supra*, was an action by a bona fide purchaser of a check against the drawer. The check was given for the accommodation of the payee, and there was no consideration to the drawer. The plaintiff held it for five days before presenting it for payment. The court held that evidence that the payee of the check, for whose accommodation it was given, was solvent for three months after the giving of the same, and that the money could have been made out of him, and that subsequently and before the presentment of the check he became insolvent, was not admissible, and would constitute no defense. The court would not concede that the result would have been different if the accommodation character of the check had been known to plaintiff. As before shown, the court in this case apparently takes the position that the drawer,



1897, drawn by Bradley on the Security Trust Company of Philadelphia to the order of Francis C. Grable for \$12,500 and by Grable and Andrus indorsed in blank. The defendant having pleaded *non assumpsit*, payment, and set-off, and given notice of special matter of defense, the case went to trial before a jury. At the close of the testimony the counsel for the respective parties stipulated in open court as follows: "It is agreed by counsel in open court that a verdict shall be taken for the plaintiff for the sum of \$14,845.81, it being understood and agreed between them that the case shall be placed upon the proper list for argument upon the question reserved as to whether the defense which has been set up and shown by evidence is a valid defense. If the court shall be of opinion that it is a valid defense, judgment to be entered for defendant not-

withstanding the verdict. Otherwise judgment for plaintiff upon the verdict as rendered. The verdict is to be taken with interest from —, amounting to —, subject to the power of the court upon the argument hereafter to take place, to reduce the verdict by the amount of interest so included, if in the judgment of the court the interest should not have been made a part of the verdict."

Pursuant to this agreement and by direction of the court the jury returned a verdict for the plaintiff in the sum of \$14,845.81; whereupon the defendant moved for a new trial and also for judgment *non obstante veredicto*. Both motions were denied, but the court corrected an improper inclusion of interest in the verdict by reducing the latter to \$14,139.56, for which amount judgment was rendered. 102 Fed. 54. The

by delaying presentation, only assumes the risk of the continued solvency of the bank.

In *Harbeck v. Craft*, 4 Duer, 122, *supra*, a defense substantially like that involved in the preceding case was held not to be admissible. The court, after using the language quoted in connection with the previous citation of this case, continued: "But, admitting that other cases may be stated in which, from a delay of presentment, a drawer for value would sustain a loss that would operate to discharge him, it is still true that in those cases only in which he would be discharged that an accommodation drawer would be allowed to defeat the claim of a bona fide holder." The court in this case took the view that the plaintiff, being a holder for value, could not be affected by the fact that the check was given for the accommodation of the payee.

In *Stewart v. Smith*, 17 Ohio St. 82, a similar decision was made. The court said that if the drawer had been damaged, it arose from the failure of the parties for whose accommodation the check was given, and, as plaintiff, who was an indorsee, had no knowledge of the arrangement between them and the drawer, he could not be affected by any equities between them.

It will be observed that the two cases last cited determine the rights of the parties by applying the ordinary rule applicable to negotiable paper, *viz.*: that a bona fide holder is not affected by the equities between prior parties.

It seems doubtful whether the rule should be applied to such a situation. It is unquestionably the duty of the holder of the check to present it for payment within a reasonable time; but the courts, in order to relieve a negligent holder of a check from the hardship of losing the amount thereof when the drawer has suffered no loss by reason of the delay, have adopted the doctrine, which is peculiar to checks as distinguished from bills of exchange, that the drawer is not discharged unless damaged. This doctrine seems to be a matter of favor to the negligent holder, and, upon its face, is to be applied only when the drawer has suffered no loss. This being the case, ought the negligent holder to be allowed to invoke the rule as to bona fide holders in order to throw upon the drawer a loss that has resulted from the delay? The ordinary effect of this rule is merely to protect the holder against equities between prior parties, existing at the time the check is transferred. It seems an undue extension to apply it to save the holder from the consequences of his own neglect after the transfer. Again, this rule as ordinarily applied rests upon the supposition that the drawer has not been negligent, and fails when it appears,

as a matter of fact, that he has been negligent, *e. g.*, where he takes the check under suspicious circumstances without proper investigation.

In *Griffin v. Riblet*, 6 N. Y. Legal Obs. 421, the court held that the burden was on the holder of a check to negative loss to the drawer by delay in presentation. It appeared that the check was given for the accommodation of the payee, and was not presented for payment by the indorsee until two months after its date. The payee failed four months after the date of the check. The court said that the loss of two months' time within which to enforce the drawer's remedy against the payee was a material consideration; that it was not to be assumed that the drawer was not or could not be prejudiced by it. If it formed any presumption, it was that the drawer was placed by the delay in a worse situation as respects his remedy against the payee. The court therefore substantially held that if the drawer was in fact prejudiced with respect to his remedy against the payee by the delay in presenting the check, it would constitute a defense.

In *Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 399, which was an action by an indorsee of a check against the drawer, the court held that the drawer made a good defense by showing that the check was without consideration in the hands of the payee, the original object in giving it having failed. This decision, however, was upon the ground that the check was not transferred by the payee until twenty-six days after it was given, and that after the lapse of a reasonable time for the presentation of the check, at least after twenty-six days, without its having been presented, it becomes stale, and a purchaser takes it subject to the equities of the drawer.

In *Lancaster Bank v. Woodward*, 18 Pa. 357, 57 Am. Dec. 618, the defendant gave a check payable at a future date. The day before that date he paid the amount to the payee, but failed to get back the check. Long afterwards the check was deposited in a bank by the payee for collection, and forwarded by that bank to the drawee bank, which paid it, though the drawer's account was not then sufficient to meet it. In an action by the bank against the drawer for the amount of the check, it was held that the plaintiff could not recover. It was urged that the bank was an innocent indorsee without notice, but the court held that, the check being overdue, the bank must be presumed to have taken it on the credit of the indorser. It was further held that the custom of bankers to pay overdrafts did not affect the result.

In *Bull v. First Nat. Bank*, 128 U. S. 105, 31

plaintiff in error relies on the third assignment, which is "that the learned judge erred in denying defendant's motion for judgment *non obstante veredicto*." The purpose of the above stipulation of counsel was to submit the evidence as well as the law in the case to the decision of the court. The learned circuit judge accordingly found the facts as follows: "The defendant, Thomas Bradley, on February 18, 1897, gave to one Francis C. Grable a check for \$12,500 on the Security Trust Company of Philadelphia. Two or three weeks afterwards, when the bank book of Bradley was settled, he found that the check had not been presented for payment. He thereupon made inquiry of Grable, and was told by him that it was still in his possession, and that he would return it. On April 15, 1897, Bradley and Grable had a general settlement, and it then appeared that Bradley owed Grable \$19,416.67. In this last-mentioned amount, however, there was included the sum of \$12,500 for which Bradley's check of February 18, 1897, had been given. At this settlement Bradley was told by Grable that he had lost or mislaid that check, and that he would look for it, and if found return it. In addition to this oral assurance Grable gave to Bradley a statement in writing as follows:

"Philadelphia, April 15, 1897.

"I have in my possession check No. 1553, drawn on the Security Trust and Life Insurance Company, dated February 18, 1897, for twelve thousand five hundred dollars, drawn

to my order and signed by Thomas Bradley, which I am to return to Mr. Bradley as settlement has been made, and it will not be presented for payment. Francis C. Grable.

"Witness: E. I. P. Grubb."

"Relying on this statement Bradley paid Grable the full amount of \$19,416.67, instead of only \$6,916.67, which latter was the true amount due by Bradley to Grable, and the only amount which would have been paid if it had been known by Bradley that his check of February 18, 1897, was then outstanding, as presently to be stated. Subsequently, on October 20, 1897, Bradley gave notice to the Security Trust Company not to pay the check, and when it was thereafter presented, as will presently be mentioned, the Trust Company, in obedience to that notice, refused payment, and the check was protested. The statements made by Grable to Bradley were false and fraudulent. The fact is that Grable had passed the check to John E. Andrus, the plaintiff in this case, upon the day after he (Grable) had obtained it from Bradley. Andrus had no knowledge of any fraud or contemplated fraud on the part of Grable, but took the check innocently and gave cash for it to the amount of its full face value. At Grable's request, Andrus held the check instead of presenting it, but subsequently passed it to one William J. Arkell for certain stocks or bonds. And Arkell, in January, 1898, presented it for payment, which, as has been stated, was refused. Arkell thereupon brought suit upon

L. ed. 97, 8 Sup. Ct. Rep. 62, *supra*, however, it was held that the fact that checks which were dated October 15, 1881, were not transferred to plaintiff until March 24, 1882, did not make them subject to the equities of the drawer against a prior holder.

Lester v. Given, 8 Bush, 360, also holds that the holder of a check, though taken some days after its date, takes it free from all equities.

In Allen v. Kramer, 2 Ill. App. 205, *supra*, the check was presented for payment on Monday, December 3. The bank refused to cash it because of doubt as to the genuineness of the signature. The check was then protested and notice given to the drawer. The drawee suspended payment December 6. The court held that even if the check should have been presented Saturday, December 1, there was no evidence to show that it would have been paid, and therefore held that the drawer could not escape liability, because it did not appear that any loss resulted from the delay.

In Church v. Farnham, Sheldon, 393, the check was drawn in a firm name by one of the partners, who appropriated the proceeds to his own use. During the delay in the presentation of the check the firm was dissolved. The court held that, even if it could be proved that the settlement of the partnership affairs was made on such terms that, in view of the insolvency of the partner who drew the check and used the proceeds, the other partner (who was defending) would lose the amount thereof, that fact would not discharge him from liability on the check. The decision, however, was upon the ground that the delay in presenting was at the request of the partner who drew the check, and that in making such request he represented the firm.

In Kinyon v. Stanton, 44 Wis. 479, 28 Am. Rep. 601, the check was drawn on August 2. The drawee bank suspended payment August 53 L. R. A.

10, at 1:30 o'clock P. M. The drawer's account was good for the check at all times until August 10, when, hearing of the unsafe condition of the bank, he drew out his deposit by a check in favor of a third person for a part thereof, and in his own favor for the remainder, which was less than the amount of the check. The bank was adjudged a bankrupt, and the assignee in bankruptcy subsequently recovered the amount drawn out by the check in defendant's own favor the day of the suspension. The court held that, if the drawer had left funds sufficient to pay the check in the bank until its failure, the laches in presenting the check would have discharged him; but having drawn the deposit out, he remained liable; and the fact that he was subsequently obliged to pay to the assignee in bankruptcy a portion of the amount withdrawn did not affect his liability, and would not, even if that amount had been sufficient to pay the check.

In Planters' Bank v. Merritt, 7 Helsk. 177, the check if promptly presented would have been paid; but when it was presented payment was refused for the alleged reason that the funds of the drawer had been paid over under military orders to the commander of the Federal troops. It appeared, however, that the entire amount to the credit of the drawer was not paid over; but that a balance remained more than sufficient to have paid the check, and that such balance was subsequently recovered from the drawee by the drawer. The court held, under the circumstances, that the holder had rebutted the presumption of injury to the drawer from the delay.

Planters' Bank v. Keese, 7 Helsk. 200, is to the same effect as the last case.

In Smith v. Jones, 2 Bush. 103, the check was drawn on a New Orleans bank and was dated April 12, 1862. It was drawn for a specified sum of money, but the court held that

it, but that suit was discontinued, the check was returned to Andrus, and this present action instituted."

No assignment of error questions the authority of the court below to find the facts pursuant to the above stipulation of counsel or the regularity of such procedure, nor has any such question been suggested by counsel on either side. We must therefore give to the finding by the court below conclusive effect in this court as to the facts so found. That finding expressly negatives fraud on the part of Andrus, the learned judge saying: "Andrus had no knowledge of any fraud or contemplated fraud on the part of Grable, but took the check innocently and gave cash for it to the amount of its full face value." Andrus in holding the check from February 19, 1897, until the latter part of January, 1898, without presenting it for payment, certainly was not diligent in the assertion of his rights. He omitted seeking payment for an unreasonable time. But mere delay for eleven months, though unreasonable, in presenting the check for payment at the bank on which it was drawn, could not of itself defeat in whole or in part the right of Andrus, as its bona fide holder, to recover from the drawer, unless funds of the latter applicable to the check were in the interim lost through the insolvency or failure of the bank. It is admitted, however, that the bank was solvent during all that period, and thereafter continued so, and, further, that the check when presented would have been

promptly paid by the bank had it not been for the notice given by Bradley to the bank October 20, 1897, not to pay it. If Bradley has any defense to the action it must rest on some other ground than the mere omission by Andrus to present the check for payment within a reasonable time after he received it. Undoubtedly, if Andrus on receiving the check had promptly presented it at bank, Bradley would not have paid its amount to Grable in the settlement of April 15, 1897. But while the delay on the part of Andrus to present the check prior to such settlement was the condition, it was not the proximate cause, of such overpayment by Bradley to Grable. Bradley was induced to make such payment, not by the fact that the check had not been presented, but through his imprudent reliance on the false and fraudulent representation made to him by Grable that the check, though mislaid, was still in his possession and that he would return it. He could have insisted on full indemnity from Grable before including the amount of the check in the settlement, or have refused, in the absence of the check, to pay its amount. Had he secured such indemnity he would have been saved from the loss with which he is now visited. Or had he refused to pay, any judgment which might have been recovered against him for the amount of the check would have been within the control of the court rendering it, and execution could have been restrained until proper indemnity was given against any

confederate bonds intrusted by the payee to the drawer for exchange into money was the only consideration and the only fund drawn on. At the time the check was drawn, and for nearly a month afterward, the payee if reasonably diligent could have presented the check and received the amount of it. At the time it was presented, however, the city had fallen into the hands of the federals, the bonds were almost worthless and could not be drawn from the bank, or exchanged, or circulated within the confederate lines consistently with the national policy or law. The court held that under the circumstances the loss must fall on the payee, and that he could not recover on the check.

In *Willets v. Paine*, 43 Ill. 432, the check was not presented until after the failure of the drawee; but it appeared that if it had been duly presented it would have been paid only in depreciated currency. The court held that the burden of negating loss was upon the holder, and that to discharge such burden he must show, not merely that the funds on deposit were depreciated at the date of the check, but that they were depreciated at the time of the deposit, and that therefore the drawer had no right to draw the check or to expect its payment in par or current funds. The court said that if the check had been duly presented and payment refused and notice given to the drawer he would have been able to take steps for his own protection.

In *St. Johns v. Homans*, 8 Mo. 382, it appeared that during the delay in presenting the check the bills of state banks that the drawer had on deposit depreciated. When the check was presented payment was refused except in these depreciated bills. The court held that, even if it were necessary to show loss or injury in order to discharge the drawer, it appeared in this case that he had been injured, as the loss might have been saved if the check

had been promptly presented. The judgment below seems to have been for the value of the currency as of the time of the presentation of the check; but the judgment was reversed, apparently on the ground that the holder was not entitled to recover at all.

In *Bell v. Alexander*, 21 Gratt. 1, *supra*, the check was drawn April 17, 1862, and was not presented for payment until April 27, 1863, when payment was refused, the drawer in the meantime having withdrawn his deposit. It was claimed that, by the understanding of the parties and the custom of the time, the check was payable in confederate currency. It was held, in effect, that if the check was payable in confederate currency the plaintiff could only recover the value of the confederate currency as of the date of presentation. This would, of course, throw upon the holder of the check any loss resulting from the depreciation of that currency between the time it should have been presented and when it was presented. The jury, however, found for plaintiff for the whole amount of the check, with interest from date, and the judgment based on that verdict was upheld; but this was upon the ground that the jury had, in effect, found that the check was not payable in confederate currency and therefore, in effect, that the drawer sustained no injury by the delay.

The foregoing review of the cases seems to show that the drawer is not discharged, either on the check or the original consideration, unless he is damaged by the delay; and that the loss or damage that is essential to his discharge need not, necessarily, be that resulting from the failure or insolvency of the drawee during the delay, but that any loss or damage that proximately results from the delay is sufficient, excepting, perhaps, the instances of accommodation checks above referred to.

claim by a bona fide holder for value. But he did not demand indemnity nor exercise any reasonable precaution. He wholly relied on the word of Grable, and in making payment to him of the amount of the check he must be held to have assumed the risk of his falsity. Bradley cannot successfully invoke the doctrine of estoppel. It is an elementary principle of the law of estoppel that he who claims the benefit of an equitable estoppel or estoppel *in pais* on the ground that he has been misled through the acts, conduct, or representations of another, must not have been misled through his own want of reasonable care and circumspection. Had Bradley observed the caution to be expected from an ordinarily prudent man in similar circumstances he would have required something more than the mere assurance of Grable before paying to him the amount of the

check. Even if the other essential elements of an estoppel *in pais* were present the lack of reasonable care on the part of Bradley would negative the existence of an estoppel. We think that the doctrine of estoppel is wholly inapplicable to the case. Andrus might have suffered loss by failure of the bank before presentation of the check, but he did not owe any legal duty to Bradley to present it. Bradley through his improvidence made the overpayment, and while great hardship has resulted to him from the fraud of Grable in connection with his own want of circumspection, yet as between Andrus and Bradley the latter must be treated as the author of his own misfortune. We perceive no ground on which the motion for judgment *non obstante veredicto* could have been granted.

*The judgment below is affirmed.*

### MISSOURI SUPREME COURT.

Simon STERNBERG, *Appt.*,

v.

Pauline LEVY, *Respnt.*

(159 Mo. 617.)

1. A statement by the clerk, in the transcript, that motions were filed for judgment on the pleadings, is not sufficient to bring the motions before the appellate court for consideration if they do not appear in the transcript, and were not made part of the record.
2. A motion for a new trial is not necessary to preserve the right to have a review in the appellate court of the action of the trial court striking out on motion a portion of a pleading.
3. A man residing with and supporting his sister and her children is entitled to the exemptions allowed by statute to the head of a family.
4. Under a statute giving a woman an insurable interest in her brother's life, a sister who, with her children, is living with and supported by her brother, is entitled to the benefit of a statute permitting him, as head of a family, to expend a certain sum each year for insurance for their benefit free from the claims of his creditors.
5. In case a man expends more than the amount allowed by statute for insurance for the benefit of his family to the exclusion of claims of creditors, the courts will not apportion the insurance money thereby obtained between the family and the creditors, but will give the latter only the amount of excessive premiums paid, with interest.
6. It is no fraud for a man who is the head of a family composed of his sister and her children to apply his wages which are exempt by statute from the reach of creditors, or his other exempt property, to the procuring of insurance for her benefit.

7. A motion for judgment on the pleadings is not part of the record, and can only be made part of the record, so as to be considered on appeal, by a bill of exceptions.

(February 12, 1901.)

**C**ERTIFICATE of dissent by the St. Louis Court of Appeals to obtain the opinion of the Supreme Court after reversal of a judgment of the St. Louis Circuit Court in favor of defendant in a proceeding to reach the proceeds of a life insurance policy for application upon debts of the insured. *Original judgment affirmed.*

The facts are stated in the opinion.

*Messrs. W. C. Jones, J. C. Jones, and Giles Filley Jones*, for respondent in court of appeals:

The certificate in question was effected without fraud, and valid when taken out, and must remain so as long as the assessments are paid in full.

*Pullis v. Robison*, 5 Mo. App. 548.

The interpleader, Sternberg, is not entitled to recover assessments paid by deceased while insolvent.

*Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Burroughs v. State Mut. Life Assur. Co.* 97 Mass. 359; *Unity Mut. Life Assur. Asso. v. Dugan*, 118 Mass. 219; *Ashby v. Costin*, L. R. 21 Q. B. Div. 401; *Bofenschon's Succession*, 29 La. Ann. 711; *Mullins v. Thompson*, 51 Tex. 7; *Bacon*, Ben. Soc. 312.

Though, if entitled to recover at all, the recovery should be limited to the amount of the assessments paid during insolvency, to wit, \$290, with interest.

**NOTE.**—As to rights of creditors generally in proceeds of insurance policies, see earlier cases in this series as follows: *Hubbard, P. & Co. v. Turner* (Ga.) 30 L. R. A. 593; *Rose v. Wortham* (Tenn.) 30 L. R. A. 609; *Carson v. Vicksburg Bank* (Miss.) 37 L. R. A. 559; *Fisher v.* 53 L. R. A.

*Donovan* (Neb.) 44 L. R. A. 383; *Roberts v. Winton* (Tenn.) 41 L. R. A. 275; and *Lehman v. Gunn* (Ala.) 51 L. R. A. 112.

As to life insurance as assets of bankrupt or insolvent, see *Morris v. Dodd* (Ga.) 50 L. R. A. 33, and *note*.

Bacon, Ben. Soc. 2d ed. § 312; *Pence v. Makepeace*, 65 Ind. 345; *Stone v. Knickerbocker L. Ins. Co.* 52 Ala. 589; *Stigler v. Stigler*, 77 Va. 163; *Levy v. Taylor*, 66 Tex. 652, 1 S. W. 900; *Ftina Nat. Bank v. United States L. Ins. Co.* 24 Fed. 770; *Central Nat. Bank v. Hume*, 3 Mackey, 360, 51 Am. Rep. 780; *Thompson v. Cunliff*, 11 Bush, 567; *Connecticut Mut. L. Ins. Co. v. Ryan*, 8 Mo. App. 535; *Mutual L. Ins. Co. v. Sandfelder*, 9 Mo. App. 285; *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83; *Felrath v. Schonfeld*, 76 Ala. 199, 52 Am. Rep. 319; *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203; *Unity Mut. Life Assur. Asso. v. Dugan*, 118 Mass. 219.

Interpleader Sternberg cannot recover at all, for the Western Commercial Travelers' Association, one of the original defendants herein, is a fraternal beneficial society, organized under Mo. Rev. Stat. 1879, § 972, p. 179, and the funds accumulated by such societies are limited to certain classes of beneficiaries, among which persons in the position of interpleader Sternberg (i. e., creditors of the members) are not included.

*Supreme Lodge K. of H. v. Nairn*, 60 Mich. 44, 26 N. W. 826; *Supreme Council, A. L. of H. v. Perry*, 140 Mass. 580, 5 N. E. 634; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166; *Duwall v. Goodson*, 79 Ky. 224; *National Mut. Aid Asso. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11; *State ex rel. Atty. Gen. v. Central Ohio Mut. Relief Asso.* 29 Ohio St. 399; *Wagner v. St. Francis Xavier Ben. Soc.* 70 Mo. App. 161; *Masonic Benov. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Bacon*, Ben. Soc. 2d ed. § 312; *Hysinger v. Supreme Lodge, K. & L. of H.* 42 Mo. App. 627; *Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 533; *Fenn v. Lewis*, 10 Mo. App. 478.

Interpleader Sternberg cannot recover in this case, for the further reason that under no circumstances could the funds payable upon the death of the member have been made payable to his estate, and thus have become liable for his debts.

*Keener v. Grand Lodge, A. O. U. W.* 38 Mo. App. 543; *Unity Mut. Life Assur. Asso. v. Dugan*, 118 Mass. 219; *Fenn v. Lewis*, 10 Mo. App. 478; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166.

*Messrs. Clopton & Trembley*, for appellant in court of appeals:

As against plaintiff, an existing creditor, Joseph Levy had no legal right to pay assessments for the purpose of keeping a beneficiary certificate in force for the benefit of his adult sister. The payments made by him for that purpose after he became insolvent were presumably fraudulent as against plaintiff, an existing creditor.

*Snyder v. Free*, 114 Mo. 360, 21 S. W. 847; *Mutual L. Ins. Co. v. Sandfelder*, 9 Mo. App. 285; *Hoffman v. Nolte*, 127 Mo. 120, 29 S. W. 1006.

Inasmuch as \$290 of the \$569 paid by Joseph Levy to keep the certificate in force were paid after he became insolvent, and with money which should have gone to plaintiff as his creditor, plaintiff is entitled, under the law and the facts disclosed by the 53 L. R. A.

first count of plaintiff's interplea, to 290/569 of the proceeds of the certificate, or \$2,038.66.

*Pullis v. Robison*, 73 Mo. 201, 39 Am. Rep. 497.

*Marshall, J.*, delivered the opinion of the court:

This is an interpleader between the plaintiff, as a judgment creditor of Joseph Levy, and the defendant, as the sister of Joseph Levy, for \$2,500 benefits payable by the Western Commercial Travelers' Association upon the death of Joseph Levy to Pauline Levy, his sister. There was a judgment in favor of Pauline Levy in the St. Louis circuit court. Plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed, and the cause remanded to the circuit court, with directions to enter a judgment for the plaintiff for the amount of his claim. Biggs, J., dissented, and certified that the judgment was in conflict with controlling decisions, stated, of this court; and thereupon the cause was transferred to this court, under § 6 of the amendment of 1884. It is therefore our duty to hear and determine the cause as if this court had original jurisdiction of this appeal.

The Western Commercial Travelers' Association is a corporation organized under Rev. Stat. 1889, art. 10, chap. 42, relating to benevolent, fraternal, beneficial companies. Under its by-laws \$4,000 is paid upon the death of a member to the beneficiary named in his certificate, or, failing such beneficiary, to the heirs of the member. On the 31st of December, 1880, Joseph Levy became a member, and designated his sister, Pauline Levy, as his beneficiary. He was then solvent, and continued so until 1891. During these eleven years he paid \$279 in contributions to the death fund. In 1891 he failed, and the plaintiff and others obtained judgments against him. After 1891 and until his death, on the 16th of December, 1897, Levy paid \$290 in contributions to the death fund. Upon his death the plaintiff brought suit against his beneficiary, Pauline Levy, and the association, seeking to have the \$4,000 applied to the payment of plaintiff's judgment against Levy. Upon a stipulation between plaintiff and defendant the association paid the \$4,000 into court and was discharged. The sum of \$100 was allowed to the attorneys of the association for services. The court ordered \$1,400 paid to Pauline Levy, and that the plaintiff and defendant interplead for the \$2,500, which they did, Pauline Levy's interplea sets out the character of the association; its by-laws, etc., above referred to; the fact that she is the beneficiary named in the certificate; the death of her brother,—and prays judgment. The plaintiff's interplea sets out the same general facts, with the additional allegation as to the recovery of judgments aforesaid, the payment of the \$279 by Levy while he was solvent, and of the \$290 after he became insolvent, and then pleads separately the following: "Further interpleading, this inter-

pleader says that after the rendition of said judgments against said Joseph Levy, and while he was insolvent, as stated in the first count hereof, the said Joseph Levy, while residing with his said sister, Pauline Levy, and her children, gave her from his earnings, for the shelter, support, maintenance, clothing, and other expenses of the said Pauline Levy, and for the shelter, support, maintenance, clothing, education, and other incidental expenses of her minor children, large sums of money, to wit, the sum of at least \$1,750 per year, aggregating for said six and one half years intervening between the date of the rendition of said judgments and the date of the death of said Joseph Levy the sum of at least \$11,375; that the said sum of money so given to said Pauline Levy was not given her as a contract price for board and accommodation, but was given to her from time to time for the shelter, support, maintenance, and other expenses of herself and children, and for the education of her said children as aforesaid; which sum so given to said Pauline Levy during said six and one-half years was at least \$5,500 in excess of the sum which similar board and accommodations were worth, and for which they could have been procured by the said Joseph Levy for himself, individually, elsewhere. This interpleader further states that the said Pauline Levy has spent the said sums of money so given to her by the said Joseph Levy; that the said Pauline Levy is now insolvent; and this interpleader cannot by garnishment or other proceeding at law against said Pauline Levy compel her to satisfy this interpleader's said judgments out of the moneys so given her by the said Joseph Levy in fraud of his said creditors as aforesaid." Pauline Levy moved to strike out of plaintiff's interplea the matter specifically quoted, as surplusage, irrelevant, immaterial, and, if true, having no bearing on the claim of either party to the fund in controversy. The court sustained this motion on the 4th of April, 1898. Plaintiff filed a motion to vacate the order sustaining said motion on the 8th of April, 1898. In the transcript certified by the clerk there is a statement by the clerk that both parties then filed motions for judgment on the interpleas as they stood; but no such motions appear in the transcript, or appear to have been made a part of the record by any bill of exceptions, and therefore the recital of the clerk is of no avail (*State ex rel. Malin v. Merriam*, 159 Mo. 655, 60 S. W. 1112), and no such motions are before us for consideration. The court on April 26, 1898, rendered judgment for the defendant. The judgment, after reciting the appearance of the parties, sets out: "And the several motions of the said parties for judgment upon the pleading having been submitted to the court, and the allegations in the said several interpleas being undenied and admitted, and the court being fully advised of and concerning the premises," etc., it awarded the fund in court to the defendant. No motion for new trial was filed. Thereafter, on the 21st of May, 1898, the plaintiff filed his bill of ex-

ceptions, and appealed to the court of appeals. The bill of exceptions simply sets out the portion of the plaintiff's interplea challenged, the motion to strike it out, the ruling of the court sustaining the motion to strike out, the motion to vacate the order sustaining the motion, and exceptions properly saved to all said matters. Then, as stated, the case was appealed to the St. Louis court of appeals, and by that court certified to this court, for the reasons stated.

1. The plaintiff has properly saved the right to have the action of the trial court on the motion to strike out reviewed by this court. No motion for a new trial was necessary to preserve this right. "It is not usual or necessary to file a motion for a new trial for the mere purpose of having the court to twice hear the same motion or demurrer." *O'Connor v. Koch*, 56 Mo. loc. cit. 262; *Butler v. Lawson*, 72 Mo. loc. cit. 244. The substance of the matter struck out is that, while residing with his sister, Joseph Levy gave her from his earnings, for the shelter, support, maintenance, clothing, and other expenses of herself and children, the sum of \$1,750 a year for the six and one half years after he became insolvent, and before his death, aggregating \$11,375; that it was not given to her as a contract price for board, but "was at least \$5,500 in excess of the sum which similar board and accommodations were worth, and for which they could have been procured by the said Joseph Levy for himself, individually, elsewhere;" that Pauline has spent the money and is insolvent; that such payments were a fraud on the plaintiff, and therefore he asks to compel Pauline to pay his judgment out of these benefits accruing to her from her brother's membership in the fraternal, beneficial association. Under the facts stated, Joseph Levy was the head of a family composed of himself, his sister, and her children. He had a right to support them, although he could not be compelled to do so. As such head of a family he was entitled to the exemptions allowed by statute to the head of a family. The identical question was decided by this court in *Wade v. Jones*, 20 Mo. 75, and has been the law in this state ever since. *Broyles v. Cox*, 153 Mo. loc. cit. 248, 54 S. W. 488. Rev. Stat. 1889, § 5851, permits a married woman to insure the life of her husband and hold the insurance free from the claims of his creditors, but provides that, "when the premiums paid in any year out of the funds or property of the husband shall exceed five hundred dollars, such exemption from such claim shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess, with interest thereon, shall inure to the benefit of his creditors." In *Pullis v. Robison*, 73 Mo. 201, 39 Am. Rep. 497, it was held that, if the husband's money was paid both before and after he became insolvent, "so much of the insurance as was the product of the premiums paid by the husband while he was solvent" went to the wife, and that the creditors were entitled to "so much as

was the product of the premiums paid by him after he became insolvent." But in *Judson v. Walker*, 155 Mo. 166, 55 S. W. loc. cit. 1088, it was pointed out by Valiant, J., that after the decision in *Pullis v. Robison*, 73 Mo. 201, 39 Am. Rep. 497, the legislature amended the statute as it was when the *Pullis Case* was decided, and provided that the creditor is entitled only to the excess over \$500 paid as premiums in any year, with interest thereon, and not to the product of the premiums paid, as was held in the *Pullis Case*. And this is not only the plain mandate of the statute, but is consonant with reason; for, as aptly said in the *Judson Case*: "Proceeds of life insurance, therefore, are not the product of premiums alone, but of premiums united with the beneficiary's insurable interest. After the transfer of the policies we are now considering, they rested no longer on the insurable interest of Walker in his own life, in which his creditors were concerned, but depended for their validity upon the insurable interest of the wife and children in the life of their husband and father. Without that interest, the insurance, standing as it did in their name, would have been invalid; it would have been no insurance, and there would have been no proceeds. Therefore, while the creditors have some right to money that was used for premiums, and to the value of the old policies converted, they have no further right in the proceeds of the insurance." It is argued, however, that this applies only to a wife, and not to a sister, and that the rule in the *Pullis Case* applies to a sister. This contention is based upon the theory that it is not the duty of a brother to support his widowed sister and her children. But, while it is not his duty, he has a right to do so; and, if he resides with them and he provides for them, he is the head of a family, and entitled to the same exemptions as if he had a wife living with him. Rev. Stat. 1889, § 5853, gives a sister an insurable interest in her brother's life. Without this provision this policy of insurance would be void, and, no matter how many premiums were paid, neither the sister nor the brother's creditors would be able to collect a cent of the insurance after his death. So here, as in the *Judson Case*, the proceeds of this insurance "are not the product of premiums alone, but of premiums united with the beneficiary's insurable interest." For this reason alone it is clear that the rule laid down in the case of *Pullis v. Robison*, 73 Mo. 201, 39 Am. Rep. 497, is not the true rule now, and was not the true rule even under the statute as it stood then. But if a man is entitled to his salary and certain exemptions as the head of a family, which his creditors cannot touch, and if he chooses to spend a part of his salary in premiums for life insurance for the benefit of his family after he is gone, his creditors are not thereby defrauded, for he has withdrawn no part of his property which his creditors could touch. Hence the provision added to the statute in 1879 did not change the right of a head of a family under the exemption laws. Under

the law as it stood when the *Pullis Case* was decided, the head of a family could use his salary and his exempt property, up to the value of \$300, to pay the yearly premiums on insurance for his family without defrauding his creditors. Such a use of his exempt property no more defrauded his creditors than if he had spent it in riotous and high living, or than if he had paid necessary expenses or had given it away. The statute at that time was simply declarative of a right he had before. The amendment of 1879 raised the limit of exemptions, *pro hac vice*, from \$300 to \$500, but it did not change the principle involved. Afterwards, as before, it was a fraud for an insolvent to withdraw the excess of his property over his exemptions from the reach of his creditors and invest it in insurance for his family; and such excess, representing the extent of the fraud, with interest, the creditors can reach. But as the premiums did not alone produce the proceeds of the insurance, and it required also an insurable interest to produce such proceeds, and as there is no legal formula for apportioning the proportion of such excess that should be credited to the payment of premiums and the portion that should be credited to insurable interest, the courts take the only practical course, and do not attempt to work out such a formula of distribution, but award the creditor the known sum so fraudulently withdrawn from the reach of the creditors,—the excess over the exemption,—and restore it to the creditor, with interest. Thus the creditor is placed in the same position that he would have been in if the fraud had not been perpetrated. He gets all the property of the debtor that he has a right to touch, and the interest allowed is the legal measure of his damages for not getting the money when he should have gotten it. Rev. Stat. 1889, § 5853, giving a sister an insurable interest in a brother's life, does not contain a similar proviso to that contained in § 5851 as to the wife paying the premiums out of her husband's money, or his doing so for her; but, in view of what has herein been said, this difference is immaterial, except as to the amount of the exemption. The statutes of exemption (§ 4903) make the exemptions to a head of a family, who, as shown, need not necessarily be a married man. And Rev. Stat. 1889, § 5220, exempts from garnishment wages of the head of a family for the last thirty days' service. Hence it is no fraud for a brother who is the head of a family composed of himself, his sister and her children to apply his wages or his exempt property to the procuring of insurance for her benefit; for his creditors cannot touch the wages or property, and have no right to complain if he uses it thus providently and properly, instead of wasting it. Therefore § 5853 is as effective for a sister so situated as § 5851 is to a wife, except as to the former only the wages and \$300 can be used, and as to the latter the wages and \$500 can be used, to buy insurance. What is said in the plaintiff's interplea as to the amount contributed by Joseph Levy to his sister being \$5,500 in

excess of what he could have procured similar board for elsewhere is of no consequence. The laws of our country give no court power to determine how much a man may spend for board, nor to inquire whether he paid too much or too little therefor, and to make the landlord refund the excess to his creditors if it was too much, or to allow the landlord for the difference if it was too little. However, this case does not depend upon any such considerations; for, as shown, Levy was not a boarder, but the head of the family. The motion to strike out the designated part of the plaintiff's interplea was properly sustained.

2. It is claimed that the motion for judgment on the pleadings is a demurrer, and hence is part of the record proper, and therefore no motion for new trial or bill of exceptions was necessary, but that the court will review the judgment upon the record so constituted. A motion for judgment on the pleadings is not a demurrer. It partakes of some of the qualities of a demurrer, but it is not a demurrer, and hence it is not a part of the record. It is a matter of exception, and can only be made a part of the record by a bill of exceptions. It partakes of the nature of a demurrer, in that it admits all facts that are well pleaded; and if it is overruled the order overruling it is not a final judgment from which an appeal will lie, but the party may plead over, or proceed to trial on the issues joined. On the contrary, if it is sustained judgment goes at once, whereas if a demurrer is sustained the order is not a final judgment, the party has a right to plead over, and it is only in case of refusal to plead over that final judgment can be rendered on demurrer. There is no motion for judgment on the pleadings contained in this record. The bill of exceptions filed does not call for any such motion, and therefore there is no such question open to review in this case.

3. But if a motion for judgment on the pleadings could be treated as a demurrer, and hence a part of the record, without being made so by a bill of exceptions, it would avail the plaintiff nothing in this case, for the reason that the transcript does not contain any such motion, and therefore *quoad hoc* there is no such record in this case.

4. Aside from all this, however, if the motion for judgment was a demurrer, and had been made a part of the record, and if the whole case appeared to this court just as plaintiff contends the facts show the status of the controversy to be, the judgment of the circuit court would have to be affirmed. It is claimed that between the time Joseph Levy became insolvent, in 1891, and his death, in 1897 (a period covering six and one half years), he paid \$290 in premiums (properly speaking, assessments) to the association, to preserve his right to benefits therein. If this be conceded, it was \$10 less than the \$300 exemptions which he had a right to spend in that manner. There was no excess over the amount exempted to him (not taking his salary into account at all) that was invested in this way, and, as shown, 53 L. R. A.

the creditors are only entitled to recover the excess, with interest, over the amount he is entitled to spend every year for this purpose. Here the total spent for six and one half years was \$10 less than he was entitled to spend for insurance for the benefit of his sister every year, no matter how insolvent he may have been.

For these reasons the judgment of the Circuit Court is affirmed.

All concur.

City of WESTPORT, Appt.,  
v.

J. W. MULHOLLAND, Resp't.

(159 Mo. 86.)

**The extension of the limits of a municipality over a road on which street railway tracks have been laid under authority of the county will make such road subject to an existing ordinance forbidding the tearing up of streets without consent of the municipal authorities, and no contract between the county and the railway company is thereby impaired so far as the ordinance merely requires the tearing up of streets to be under reasonable police restrictions.**

(December 18, 1900.)

**TRANSFERENCE** by the Kansas City Court of Appeals for the opinion of the Supreme Court of an appeal by plaintiff from a judgment of the Criminal Court for Jackson County reversing a judgment of a police magistrate in its favor in a proceeding for the violation of a municipal ordinance. *Reversed.*

The facts are stated in the opinion delivered in division 1 by **Valliant, J.**, as follows:

"Defendant was convicted and fined in the police court of the city of Westport upon a charge of violation of a city ordinance, of which the first section is: 'No person or persons shall tear up, dig up or ditch or otherwise interfere with any of the streets or alleys within the limits of the city of Westport without the permission first obtained from the board of aldermen of said city.' The second section prescribed the penalty for the violation. Upon appeal to the criminal court of Jackson county the cause was tried on an agreed statement of facts, upon which there was a judgment of acquittal, and the city appealed to the Kansas City court of appeals. The cause was transferred to this court because it involves

NOTE.—On the general question of the privilege of using streets as a contract within the constitutional provision against impairing obligation of contracts, see *Clarksburg Electric Light Co. v. Clarksburg* (W. Va.) 50 L. R. A. 142, and note.

As to the validity of an exercise of the police power in respect to the use of streets for electric wires as impairing the obligation of a contract, see *State ex rel. Laclede Gaslight Co. v. Murphy* (Mo.) 81 L. R. A. 798, and note.



a construction of the Constitution. The facts are that in 1887 the county court of Jackson county granted the Grand Avenue Railway Company the right to construct and maintain its street railway on Rosedale avenue, then a county road under the jurisdiction of the county court, and under that grant the railway company constructed, and has since maintained and operated, its railway. In April, 1891, the city of Westport extended its limits, and took in Rosedale avenue, and with it the railroad. Afterwards, in November, 1891, the defendant, in the service of the railway company, without permission of the board of aldermen, dug up and tore up the street, in reconstructing a switch that was necessary for the operation of the railroad; and that is the offense for which he was tried. The city ordinance was passed several years before the city extended its limits, and was in force at the time of the alleged violation by defendant. The whole defense in the case is that the county court, when it had the authority to do so, in 1887, having granted the railroad company the right to lay and maintain its railroad on the public road, which grant included the right to do what the defendant in this instance did, the railroad company could not, under that provision of the Constitution which forbids laws impairing the obligation of contracts, be deprived of that right or limited in its exercise. That is the only proposition in the case.

"That the city could not by its ordinance deprive the railroad company of its franchise, or impair the obligation of its contract with the county court, treating the grant of the franchise and its acceptance as a contract, is a proposition of law that has not been gainsaid in this country since the decision in the *Dartmouth College Case* in 1819. 4 Wheat. 518, 4 L. ed. 629. But that, in the exercise of a franchise affecting the safety or well-being of the public, the grantee is under the control of the police powers of the state, is a proposition equally well settled. The question then is, Is the authority of the municipality asserted under that ordinance the impairment of the contract, or only a reasonable regulation of its exercise? In construing the ordinance for the purpose of testing its validity under the Constitution, we must accord to it a reasonable and lawful purpose, if it is susceptible of such, and must assume that in its exercise a wise discretion will be used by the city officials, either of their own will, or under compulsion of the courts. It is undoubtedly true that, in maintaining and operating its railroad, repairs will be required which will necessitate the digging and tearing up of the street, more or less, and the right to do this, under reasonable police regulations, is implied in the grant of the franchise; and if this ordinance is construed to mean that it is left with the city officers to say, arbitrarily, whether or not the railroad company may tear up the streets to make repairs, it would be equivalent to subjecting the existence of the fran-

chise to the will of the board of aldermen, and would be in violation of the Constitution. But if it means that when repairs of the railroad become necessary, requiring the tearing up of the street, and rendering it for the time being unsafe or inconvenient for travel, the railroad people must, before doing so, report to the city authorities, and proceed in the matter under such reasonable police restrictions as they may prescribe, then it impairs no contract and violates no provision of the Constitution; and we may add that, if that is what it means, the courts will hold the city to it, if it should attempt to use it to impair the railroad company's rights. It will not do for the railroad company to say that it has now the same rights that it had before it was taken into the city, for that is so only under conditions. The rights are the same, but they are to be adjusted to the changed situation, just as by the same rule are the rights of the people whose homes are embraced in the new city limits. Their vested titles are not violated, but in the manner in which they may use their property the city has something to say. As was said by our Kansas City court of appeals in this case, per Ellison, J.: 'Grant that before the extension the company had as much right to dig into and tear up the street as a citizen has to build a frame house anywhere on his land which is outside of a city; yet, in the like case, if the citizen's land becomes a part of a city by the extension of the limits, his right may become extinguished by the extension of the fire limits.' In a wise exercise of the police power of the state is shown one of the highest traits of good government. The supreme court of Wisconsin has said: 'The charter of a corporation in no sense exempts it from police supervision and regulation. Such an exemption could never be implied from a mere grant of power, and would not be valid if expressly conferred. It is frequently and rightly said that sovereign authority cannot divest itself of its ordinary police power over persons, whether natural or artificial, any more than it can of the power to make laws or to punish crime.' *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 422, 72 N. W. 1123. And again, in the same case, it is said: 'The tendency of modern development is in the direction of greater, rather than more restricted, use of police power; and necessarily so, in order to meet the new dangers and increase of old dangers constantly occurring as natural incidents of advancing civilization.' As early as 1855 the supreme court of Vermont, speaking through Redfield, Ch. J., said: 'But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to everything materially affecting their interest, and where there is no express reservation in their charters.' Then, after learned discussion of that subject, the court further said: 'We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the

country, which resides in the lawmaking power of all free states. . . . That is a responsibility which legislatures cannot divest themselves of, if they would.' *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625. And in 1837 the Supreme Court of the United States, per Taney, Ch. J., said: 'The continued existence of a government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations.' *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 548, 9 L. ed. 824. The supreme court of Nebraska has expressed the law thus: 'Under the general police power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the safety of the people and for the public good, although the power to do so may not be reserved in the charter. . . . Of course, under the guise of the police power, property of corporations or individuals cannot be confiscated.' *State ex rel. Lancaster County v. Chicago, B. & Q. R. Co.* 29 Neb. 417, 45 N. W. 470. In *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, loc. cit. 33, 24 L. ed. 989, 992, per Bradley, J., the court said: 'Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. The legislature cannot by any contract divest itself of the power to provide for these objects.' In *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, the plaintiff was a corporation chartered by the legislature of Illinois, authorized to locate its works in Cook county at a certain point, and manufacture fertilizer from the carcasses of dead animals. The location was an uninhabited spot when the corporation established its works and engaged in its peculiar industry. Afterwards the village of Hyde Park grew up, and extended its limits to include the fertilizer works. Then the village passed an ordinance forbidding the hauling of offensive matter through the village, which very materially interfered with the exercise of the corporation's franchise. The question before the court was as to the validity of the ordinance. The court said (97 U. S. loc. cit. 667, 24 L. ed. 1039): 'We cannot doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction.' The same principle has been declared by this court. *State ex rel. Laclede Gaslight Co. v. Murphy*, 130 Mo. 10, 31 L. R. A. 798, 31 S. W. 594. In that case the

Laclede Gaslight Company claimed the right, under its charter, to excavate the streets of the city to lay electric wires underground, but the city interposed and forbade its doing so until it should comply with certain ordinances passed to regulate such matters. This court, per Macfarlane, J., said (130 Mo. loc. cit. 23, 24, 31 L. R. A. 809, 31 S. W. 597, 598): 'The grant by the state to relator, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis. Under its general police power, the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.'

'The briefs of counsel are rich with learning on this subject, but we have quoted sufficient to show the state of law, and to guide us to a conclusion in this case. The ordinance in question is clearly a police regulation to protect the streets of the city. It was enacted before the city extended its limits, but when the limits were extended the ordinance covered all the territory taken in, and the inhabitants thereof, both natural and artificial. *Hickman v. Kansas City*, 120 Mo. 126, 23 L. R. A. 658, 25 S. W. 225. The city is charged with the duty of preserving its streets in a reasonably safe condition for the public use; the lives of its inhabitants and the safety of their property demand the performance of that duty, and the city could not divest itself of it if it desired to do so. If we say that the railroad company has a right to tear up the streets, without regard to the city's authority, then we have a power turned loose in the streets inconsistent with the particular sovereign power delegated by the state to the city, and liable to be destructive of the public safety. A private citizen sometimes has the right to dig up the street,—for example, if it be necessary to connect or repair a broken connection with a water main, a gas main, a sewer; and that right the city authorities cannot arbitrarily refuse, but the citizen must comply with the reasonable regulations, and obtain permission, and do the work as the ordinance requires. The corporation has as much right as the citizen, but no greater; that is, it has the right to dig up the street when necessary for its business, but, like the citizen, it must apply to the constituted authorities for leave, and act under reasonable regulations. It is argued by the learned counsel for the railroad corporation that the power to grant permission implies the power to refuse it, and thus puts the franchise at the mercy of the city authorities. But there is a law over the city authorities as well as over the railroad corporation, and the ordinance is to be construed as designed to effectuate a lawful, and not an unlawful, purpose. It means that the railroad company cannot dig up the streets without permission of the board of aldermen, but it also means that the board of aldermen cannot refuse permis-

sion, under reasonable regulations, when the railroad company needs it.

"Under the agreed statement of facts, the defendant should have been held guilty of violation of the ordinance. The judgment is reversed, and the cause remanded to the criminal court of Jackson county to be proceeded with according to the law as herein laid down.

"All concur."

**Mr. R. B. Middlebrook**, for appellant:

When one devotes his property to a use in which the public has an interest he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control.

*Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co. v. Cutts*, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Railroad Commission Cases*, 116 U. S. 307, *sub nom. Stone v. Farmers' Loan & T. Co.* 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1101; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *State use of School Fund v. Wabash, St. L. & P. R. Co.* 83 Mo. 149.

The ordinance is a proper exercise of the police power of the city.

*Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 317, 29 N. E. 1109; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 422, 72 N. W. 1118; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *State ex rel. Lancaster County v. Chicago, B. & Q. R. Co.* 29 Neb. 417, 45 N. W. 469; *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386, 10 Atl. 113; *People ex rel. Kimball v. Boston & A. R. Co.* 70 N. Y. 569; *State ex rel. St. Paul, M. & M. R. Co. v. Hennepin County Dist. Ct.* 42 Minn. 247, 7 L. R. A. 121, 44 N. W. 7; *State v. Missouri P. R. Co.* 33 Kan. 176, 5 Pac. 772.

The Kansas City ordinance is not open to attack because it is vague or uncertain in its provisions.

*Louisville, N. A. & C. R. Co. v. Smith*, 91 Ind. 119; *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 74, 42 L. ed. 954, 18 Sup. Ct. Rep. 513; *State use of School Fund v. Wabash, St. L. & P. R. Co.* 83 Mo. 144; *State ex rel. Muncie v. Lake Erie & W. R. Co.* 83 Fed. 285; *Indianapolis & C. R. Co. v. State ex rel. Lawrenceburg*, 37 Ind. 489; *Cincinnati, H. & I. R. Co. v. Claire*, 6 Ind. App. 390, 33 N. E. 918; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L. R. A. 450, 19 N. E. 310.

The railroad company must so improve and maintain the crossing as reasonably to subserve the growing needs of the public.

*Lake Erie & W. R. Co. v. Smith*, 61 Fed. 885; *Louisville, N. A. & C. R. Co. v. Smith*, 91 Ind. 119; *National Waterworks Co. v. Kansas*, 28 Fed. 921; *Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743; *Little Miami R. Co. v. Greene County Comrs.* 31 Ohio St. 338; *State ex rel. Min-* 53 L. R. A.

*neapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; *English v. New Haven & N. Co.* 32 Conn. 240; *Atchison, T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 Pac. 576.

Grants of rights and privileges in streets are construed strictly against grantees, and liberally in favor of the public.

*State ex rel. Walker v. Payne*, 129 Mo. 468, 33 L. R. A. 576, 31 S. W. 797; *Ransom v. Citizens' R. Co.* 104 Mo. 375, 16 S. W. 416; *St. Louis v. Missouri R. Co.* 13 Mo. App. 524, 87 Mo. 151.

**Mr. A. S. Marley** also for appellant.

**Messrs. D. B. Holmes, Frank Hagerman, and Willard P. Hall**, for respondent.

#### Per Curiam:

The foregoing opinion delivered by **Valiant, J.**, in division No. 1, is adopted as the opinion of the court in banc, all the Judges concurring.

Rehearing denied.

Ella E. JONES *et al.*, Appts.,  
v.

Annie E. BROWNLEE, *Respt.*

(.....Mo.....)

**Naming a person with whom plaintiff has committed adultery**, in a cross bill in a divorce proceeding before a court having jurisdiction of the parties and subject-matter, is absolutely privileged.

(March 26, 1901.)

**A** PPEAL by plaintiffs from a judgment of the Circuit Court for Knox County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

Statement by **Gantt, J.**:

This is an action for libel alleged to have been made by respondent, Mrs. Brownlee, in an answer and cross bill filed by her in a suit brought by her husband, E. C. Brownlee, against her for divorce, in the circuit court of Knox county, in this state. The alleged libel consists in the following averment in the answer and cross bill of defendant in said divorce proceeding: "And for further cause of divorce defendant says and charges it to be a fact that since the marriage aforesaid the plaintiff (meaning the said E. C. Brownlee) has been guilty of consorting and cohabiting with other women, including Mrs. Ella Jones." The petition avers that said charge was wantonly, wilfully, and maliciously made by defendant without any evidence to sustain it, and when defendant well knew of her own

NOTE.—As to privilege of defamatory words in pleading, see *Randall v. Hamilton* (La.) 22 L. R. A. 649, and note; also *Sherwood v. Powell* (Minn.) 29 L. R. A. 153.

knowledge that she had no evidence to sustain it; that said charge was false and untrue, and was not made in good faith with any intention of attempting to sustain it by proof; that defendant, knowing she could not sustain said answer by proofs, subsequently withdrew the same, and let judgment go for her husband without contesting the same; that said libelous words were not privileged, and plaintiff was injured and damaged in her reputation as a wife and mother in the sum of \$2,500 actual damages and \$2,500 for exemplary and vindictive damages. Defendant, in her answer, admits that she was formerly the wife of E. C. Brownlee; that he sued her for divorce, and in her answer she used the words charged and quoted in plaintiff's petition. She denied all the other allegations. Defendant further answered that she made the said allegation of consorting and cohabitation in the divorce suit to which she was a party in a court of competent jurisdiction; that it stated a statutory cause of divorce, and was pertinent and relevant to the issues in said divorce suit, and was therefore a privileged communication, and as such is a full defense to this action. She further answered that said statement was made in her answer in a suit against her by her husband for divorce in a court of competent jurisdiction; that she was compelled to and did employ counsel to take charge of and conduct her defense; that she fully and frankly stated to her said counsel all the facts within her knowledge, and all the facts which, with reasonable diligence, she could learn, as to the guilt or innocence of plaintiff of the said accusation; that all her communications in that regard were made in good faith to her said counsel, with a view to obtain their advice, and her said attorneys advised her that said accusation should be made in her said answer in said divorce suit; that at the time she had reason to believe and did believe she could sustain said allegation by evidence on the trial of said suit, and that said allegation was true; that said allegation was pertinent to the issues in said suit, and was made in full expectation at the time that she would go to trial upon it; that, pending said suit, she filed a motion for alimony, which motion was overruled, but while said motion was pending her husband filed a bill in equity to set aside a conveyance he had made to her to property of the value of \$2,000, claiming that in filing her said motion she had violated the agreement upon which he had deeded the same to her, and, fearing she might lose said equity suit and said land, and being perplexed, and to obtain the dismissal of said suit, she agreed to and did withdraw her answer, and made no further appearance in said suit. The reply charged that said answer was not filed in good faith, and constituted no defense, and was not a privileged communication. The case was tried to a jury under the theory that the alleged libel was a qualified privileged communication, and defendant liable if express malice was shown in making said

53 L. R. A.

accusation against plaintiff. On behalf of plaintiff the evidence tended strongly to show that the charge was false, and that she was innocent; that Dr. Brownlee, the husband of defendant, was a dentist at Edina, Missouri, that plaintiff was married to her coplaintiff in Kansas City, where her parents lived at the time; that several years later her father purchased a farm near Edina, and plaintiff and her child, a little girl, were in the habit of spending the summer months on the farm with her parents; that she employed Dr. Brownlee to treat her teeth, and became acquainted with his wife, the defendant, and they were good friends; that plaintiff and her husband afterwards moved to St. Louis, where her husband was engaged as salesman in a large mercantile house; that plaintiff continued to visit her parents in the summer, and her husband would come up and spend his vacation. The evidence of plaintiff, Dr. Brownlee, and plaintiff's father and mother fully substantiated her innocence of any improper conduct with Dr. Brownlee. Defendant did not justify, but introduced evidence of information she received from other persons upon which she based her allegations in the answer. She testified that she had no malice towards plaintiff, and she and her attorneys testified that she disclosed all the information she had when she filed her answer. This evidence was largely hearsay, and very inconclusive. Many exceptions were saved to the admission and rejection of evidence and to the giving and refusal of instructions.

*Messrs. O. D. Jones and C. D. Stewart,*  
for appellants:

It is not filing a pleading containing a libel that makes it privileged. It is stating it as a relevant, pertinent part of a cause of action or defense, to be a matter of investigation on the trial.

The words of the libel, to avail in the divorce suit, must have been repeated by defendant or her witnesses as oral slander. If untrue, making the assertions with respect to a chaste woman is a crime under the laws of this state. Rev. Stat. 1889, §§ 3868-3870. Would any court of this state hear any person in his behalf assert, as an excuse for the commission of a crime, that he had reasonable or probable cause to do it?

The excuse or reason for dismissing and denying plaintiff a trial that would determine in a court whether she was guilty adds insult to injury. That motive is positive evidence of bad purpose and intent and express malice as to plaintiff, in law. And from this standpoint, on the face of the answer, in the light of the allegations of the petition and answers, the plea of privilege was and is not good.

*Union Mut. L. Ins. Co. v. Thomas*, 28 C. C. A. 96, 48 U. S. App. 572, 83 Fed. 803.

If the charge was false and made in express malice, defendant is liable, although in the absence of such motive the occasion would be privileged.

*Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205.

To charge adultery as a ground for divorce, "the particulars of time, place, person, and circumstances, as far as known, should be alleged; the allegation of place and person being the most important."

5 Am. & Eng. Enc. Law, p. 782, notes 10, 11; *Miller v. Miller*, 20 N. J. Eq. 216; *Black v. Black*, 27 N. J. Eq. 664; *Hoffman v. Hoffman*, 43 Mo. 547; *Owen v. Owen*, 48 Mo. App. 208.

Whether the facts charging the libel were sufficiently stated to make a relevant and pertinent issue to be investigated by evidence on the trial is a question of law for the court.

*Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875; *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020.

The complainant must know enough to make a specific charge, and he cannot allege adultery generally, with the intention of picking up the evidence as he goes along.

*Wood v. Wood*, 2 Paige, 113.

The reasonable and probable cause which will relieve a prosecutor from liability is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man.

*Vansickle v. Brown*, 68 Mo. 635; *Sharpe v. Johnston*, 76 Mo. 660.

Whether an occasion or matter in a pleading is relevant and privileged is a matter of law for the court.

*Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875.

Whether the occasion is such as to make the communication one of privilege is always a question of law for the court, when there is no dispute as to the circumstances under which it was made.

*Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020.

*Mr. L. F. Cottey*, for respondent:

Where the occasion and circumstances of the speaking and publishing are privileged (for example, in a court of competent jurisdiction) a malicious intent is not presumed; but even then the plaintiff may recover damages if able to show that the slanderous words were not relevant and pertinent to the issues, and were spoken in express malice. Malice is a question for the jury, and the burden is on plaintiff to prove actual or express malice.

*Sullivan v. Strathan-Hutton-Evans Commission Co.* 152 Mo. 277, 47 L. R. A. 859, 53 S. W. 912; *Weaver v. Hendrick*, 30 Mo. 506; *Hancock v. Blackwell*, 139 Mo. 451, 41 S. W. 205; 13 Am. & Eng. Enc. Law, pp. 411-427; *Townshend, Slander & Libel*, 2d ed. § 209; *Orecelius v. Bierman*, 59 Mo. App. 523.

The alleged libel was absolutely privileged, and hence it follows that the petition does not state facts sufficient to constitute a cause of action.

13 Am. & Eng. Enc. Law, pp. 406-410; *Townshend, Slander & Libel*, 2d ed. §§ 220-222; *Rubelman v. Luehman*, 14 Mo. App. 53 L. R. A.

601; *Hyde v. McCabe*, 100 Mo. 418, 13 S. W. 875; *Orecelius v. Bierman*, 59 Mo. App. 523; *Callahan v. Ingram*, 122 Mo. 365, 26 S. W. 1020; *Sullivan v. Strathan-Hutton-Evans Commission Co.* 152 Mo. 278, 47 L. R. A. 859, 53 S. W. 912; *Garr v. Selden*, 4 N. Y. 91; *Marsh v. Ellsworth*, 50 N. Y. 309; *Thorn v. Blanchard*, 5 Johns. 522; *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518; *Hartsock v. Reddick*, 6 Blackf. 255, 38 Am. Dec. 141; *Henderson v. Broomhead*, 4 Hurlst. & N. 569; *Hardin v. Cumstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427; *Allen v. Crofoot*, 2 Wend. 515, 20 Am. Dec. 647; *Vausse v. Lee*, 1 Hill, L. 197, 26 Am. Dec. 168.

*Gantt, J.*, delivered the opinion of the court:

This cause was tried in the circuit court on the theory that the alleged libelous allegation in defendant's answer and cross bill to her husband's suit against her for divorce was a qualified or conditionally privileged communication, and not absolutely privileged. The finding was for defendant, and counsel for defendant now urge that, if the communication was in fact absolutely privileged, then the judgment must be affirmed, even if error occurred in other respects. Some of the questions presented by this appeal have not been decided by this court. The general proposition was involved in *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875, but the majority of the court held in that case that the libelous matter contained in an affidavit in opposition to another affidavit made as a basis for a rule requiring security for costs was not sufficiently relevant or pertinent to afford the affiant a privilege. As said in that case, there are occasions on which written or spoken words otherwise libelous and defamatory are not actionable as a libel. The rule is founded upon reasons of public policy. At common law it was broadly ruled that no action for libel could be maintained for any defamatory matter contained in a pleading in a court of civil jurisdiction. Thus, *Townshend, Slander & Libel*, 4th ed. § 221, lays it down that, "in a civil action, whatever the complainant may allege in his pleading as or in connection with his grounds of complaint can never give a right of action for libel. The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleading by way of defense to the charge brought against him or by way of countercharge, counterclaim, or set-off can never give a right of action." In *Seaman v. Netherclift*, L. R. 1 C. P. Div. 540, Lord Coleridge, Ch. J., said: "Now, a long course of authorities, of which perhaps the best known, as the most remarkable, is the case of *Astley v. Younge*, 2 Burr. 807, has decided that no action of slander can be brought for any statement made by the parties either in the pleadings or during the conduct of the case. The law is also stated very clearly by Lord Eldon in *Johnson v. Evans*, 3 Esp. 32. It is so stated also—

not, indeed, with absolute certainty—in a note to the well-known case of *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, the author of which note, we learn from Baron Alderson in *Gibbs v. Pike*, 9 Mees. & W. 358, to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity." While the English courts so hold, the American courts quite generally modify the rule to this extent: of holding that the pleading must be in a court having jurisdiction of the subject-matter, and the defamatory words must be pertinent or relevant to the matter in hand, or, as sometimes said, must not be irrelevant to the subject-matter of the action or suit before the court. It may, we think, be safely asserted that, according to the English decisions, the parties to a civil suit are not liable to an action for libel, however libelous and malicious the language may be, whether in reference to the opposite parties or to strangers. *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49, was an action of libel brought by a plaintiff against the defendant for defamatory language in a cross interrogatory propounded to a witness in a former suit between the parties. It was held there were two classes of privileged communications; one absolutely privileged, the other conditionally. The first affords absolute immunity from suit; the other removes the presumption of malice which follows from slanderous words, and requires proof of express malice. Among absolute privileged communications are words spoken or written in the due course of legal proceedings which are relevant and pertinent to the issues therein. From the report of *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875, we think such was the conclusion reached by this court in that case, but, as the court held the libelous words were irrelevant and gratuitous libels, an action could be maintained on them if shown to have been falsely and maliciously uttered or written. In the determination of the relevancy or irrelevancy of the defamatory words which are the basis of this action, we must necessarily keep in view that they were part of a pleading filed by defendant in an action brought by her husband against her in the circuit court of Knox county to obtain a divorce from her. That court had jurisdiction of that class of cases and over the parties to that suit. If, as alleged in that answer, the defendant's husband was guilty of consorting and cohabiting with other women, it would not only have defeated his suit for divorce, but, if defendant was herself without fault, it would have justified the court, under our laws, in awarding her a divorce from plaintiff. The defamatory words, then, constituted a charge which the court was authorized to consider in rendering its judgment, and was therefore pertinent. In *Hawley v. Wolverton*, 5 Paige, 53 L. R. A.

522, the chancellor, in passing upon the relevancy of a statement in the bill, said: "And where any allegation or statement contained in the bill may thus affect the decision of the cause if admitted by the defendant or established by proof, it is relevant, and cannot be excepted to as impertinent." In *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598, a young lady, a third person, was charged to be a common prostitute, and the court held the allegation was relevant. And in a most luminous and exhaustive discussion of this whole subject in *Johnson v. Brown*, 13 W. Va. 71, it was ruled that whether, in such a case, libelous matters, if contained in the pleadings in a cause, are or are not pertinent to the cause, is a question of law which ought to be decided by the court, and not a question of fact to be submitted to a jury,—citing with approval *State v. Williams*, 30 Mo. 365; and that such a course does not invade the province of a jury to find a particular publication is or is not a libel, but is simply performing the duty which devolves upon a court to determine all pure questions of law in any and all cases. In *Sullivan v. Strathan-Hutton-Evans Commission Co.* 152 Mo. 208, 47 L. R. A. 859, 53 S. W. 912, it was ruled that whether or not words used in a letter were privileged was a question of law for the court. In *State v. Williams*, 30 Mo. 365, it was held error to submit to a jury whether certain words were material in a prosecution for perjury. And it is generally held that on demurrer it is the province of the court in the first instance to determine whether a cause of action is based upon an absolutely privileged communication. *Forbes v. Johnson*, 11 B. Mon. 48; *Strauss v. Meyer*, 48 Ill. 385; *Garr v. Selden*, 4 N. Y. 91.

The petition having alleged the pendency of the divorce case between plaintiff's husband and herself in a court of competent jurisdiction, and having shown on its face that her answer was a pleading in that civil case, and it appearing to us that, tested by the rules of law, the said answer, whether true or false, or whether definite enough in its averments, was relevant to the issues in that case, in our opinion it was a privileged communication, for which an action for libel cannot be maintained, unless the fact that plaintiff was not a party to said divorce suit takes her case out of the principles already announced. At common law, we think, it was established that the fact that a third party was scandalized would not change the principle of public policy upon which the privilege is founded. In *Henderson v. Broomhead*, 4 Hurlst. & N. 569, it was held that an action of libel would not lie against a party who, in the course of a civil cause, made an affidavit in support of a summons taken out in said cause which was scandalous, false, and malicious, though the person scandalized and who complained was not a party to said cause: all the judges concurring. And to the same effect, *Johnson v. Brown*, 13 W. Va. 136. With the exception of *Ruohs v.*

*Backer*, 6 Heisk. 39 5, 19 Am. Rep. 598, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken as to one not a party to the suit. We think, with Judge Green in *Johnson v. Brown*, 13 W. Va. 71, that such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to a suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained. To the argument made in all these cases that no person should be privileged to do injury to another, Lord Penzance, in *Dawkins v. Rokeby*, L. R. 7 H. L. 744, answered: "This mode of stating the question assumes the untruth and assumes the malice. If, by any process of demonstration free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law should give damages to the injured man. . . . Whether the statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet, in the eyes of a jury, be open to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with

that free and open mind which the administration of justice demands. These considerations have long since led to the legal doctrine that a witness in the courts of law is free from any action, and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present." Holding, as we do, that the same policy should govern when reference is made to third party in a relevant and pertinent pleading as to the parties themselves, we see no reason why we should not hold that the communication which is made the basis of this suit is absolutely privileged. According to the great weight of authority, it appears to us to be clearly within that class. This being so, the defendant was not liable, even though her charge was false; and, as the verdict was in her favor, it ought not to be disturbed. With this view of the law on the fundamental question in the case, it is deemed unnecessary to examine and determine each exception saved in the circuit court. The question was not whether plaintiff was guilty of the misconduct charged in defendant's answer, but whether, however false it may have been, it was privileged. We have held that it was, and, however grievous it may appear to plaintiff that she has no remedy for the aspersion cast upon her, such is the law, according to our best judgment. The defendant did not plead justification, or the truth of the libelous words, and only offered evidence to show she made the allegation upon what appeared to her at the time as reasonable grounds for so doing. Conceding all she proved, it did not establish the truth of said allegation; but this failure to maintain the averments of her answer did not deprive her of absolute privilege which the law secures to her.

It results that the judgment of the Circuit Court must be and is affirmed upon this ground alone.

All concur.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

Martin ROSENBAUM, *Piff. in Err.*,  
v.

UNITED STATES CREDIT SYSTEM COMPANY.

(.....N. J.....)

\*1. A covenant not to engage in a particular business will not invalidate

\*Headnotes by COLLINS, J.

the contract of which it is part, if such contract has otherwise a legal consideration. The case of *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606, approved.

2. A New Jersey corporation engaged in the business of indemnifying against losses on credits contracted with the plaintiff to act as its agent in Massachusetts for a term of years, and forthwith the plaintiff entered upon his duty as such agent; the insurance commissioner of Massachusetts

NOTE.—A very peculiar case is presented above, holding that an agent employed by an insurance company to do business in another state where the business was at that time held lawful by the authorities is not precluded from recovering for breach of the contract caused by the subsequent insolvency of the company, by the fact that the courts afterwards held the

business unlawful in that state. Stress is laid on the fact that the contract was broken by the company, not because the business was held illegal, but because of its insolvency. It seems to be held that the agent's rights under the contract would cease only from the time when the courts held the business unlawful.

setts having decided that it was lawful for him to do so. During the prescribed term the corporation became insolvent, and for that reason the contract was broken. Subsequently the supreme court of Massachusetts decided, as is alleged, that the business was unlawful in that state. *Held*, that such illegality is no defense to the plaintiff's suit for breach of the contract. It can affect only the extent of recovery.

(*Magie, Chancellor, and Van Syckel and Hendrickson, JJ., dissent.*)

(January 25, 1901.)

**E**RROR to the Supreme Court to review a judgment granting a new trial after verdict in plaintiff's favor at the Essex County Circuit in an action brought to recover damages for breach of contract to employ plaintiff to represent defendant as agent in the state of Massachusetts. *Reversed.*

The facts are stated in the opinion.

**Messrs. Cortlandt Parker and Richard Wayne Parker**, for plaintiff in error:

A partial illegality of consideration, involving nothing *contra bonos mores*, does not avoid the whole contract.

*Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606.

The defendant guaranteed to the plaintiff that it would take all proper measures, under the law of Massachusetts, to qualify itself for business, and to qualify its agents to perform it. Its failure so to do was clearly, of itself, a breach of the contract, and did not bar the plaintiff.

The business of credit-system insurance was not unlawful under the act by which insurance companies may be formed "to act as surety on official bonds and for the performance of other obligations." The insurance of a debt is the insurance of the performance of the obligation of that debt.

*Bouvier*, Inst. 3, 16; *Sturges v. Crowninshield*, 4 Wheat. 197, 4 L. ed. 549; *Ogden v. Saunders*, 12 Wheat. 318, 337, 6 L. ed. 642, 648.

At the time the contract was entered into, Rosenbaum was a resident of Illinois, and had never lived in Massachusetts. He was not chargeable with any knowledge of Massachusetts law. When the company agreed to make him its agent for Massachusetts, it was an integral part of its agreement that it then was, and continuously would be, able to constitute and maintain such agency. If it was not, or failed to continue, so able, it is liable for breach of its agreement.

*Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Cammerer v. Muller*, 38 N. Y. S. R. 583, 14 N. Y. Supp. 511, Affirmed in 133 N. Y. 623, 30 N. E. 1147; *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353; *King v. Doolittle*, 1 Head, 77; *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132.

If a thing promised is impossible of performance because of the law of a foreign state, it is impossible, not in law, but in fact.

*Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287, 36 Conn. 242, 4 Am. Rep. 58; *Cain v. 53 L. R. A.*

*State*, 55 Ala. 170; *United States v. Van Fossen*, 1 Dill. 406, Fed. Cas. No. 16,607, *Devine v. State*, 5 Sneed, 623; *Withrow v. Com.* 1 Bush, 17; *State v. Horn*, 70 Mo. 466, 35 Am. Rep. 437.

If one agrees to do a thing it is no answer for a failure to do it to say that the performance is impossible in fact.

*Public Schools v. Bennett*, 27 N. J. L. 513; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Waugh v. Morris*, L. R. 8 Q. B. 202; *Favor v. Philbrick*, 7 N. H. 326; *Barker v. Hodgson*, 3 Maule & S. 267; *Spence v. Chodwick*, 10 Q. B. 517.

Ignorance of foreign law is mistake of fact.

*Leslie v. Baillie*, 2 Younge & C. Ch. 96; *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218.

**Mr. Howard W. Hayes**, for defendant in error:

The contract, the breach of which is the foundation of the plaintiff's claim for damages, is illegal as contravening the laws of Massachusetts, and no estoppel can arise that will prevent the defendant from urging that illegality as a defense to the action for damages.

Credit insurance is unlawful in the state of Massachusetts.

*Clafin v. United States Credit System Co.* 165 Mass. 501, 43 N. E. 293.

The courts of this state follow the construction placed upon the statute of another state by the courts of that state.

*Watson v. Lane*, 52 N. J. L. 550, 10 L. R. A. 784, 20 Atl. 894.

A contract to be performed in a certain place is considered to be made in that place.

*Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102.

Plaintiff cannot recover in the courts of this state damages for breach of this illegal contract.

*Rosenbaum v. United States Credit System Co.* 60 N. J. L. 303, 37 Atl. 595; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *Wagner v. Breed*, 29 Neb. 720, 46 N. W. 286; *Waugh v. Morris*, L. R. 8 Q. B. 202.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party if he discovers that intention at any time before the contract is executed.

*Pollock, Contr.* 318; *Bank of Chillicothe v. Dodge*, 8 Barb. 233.

The validity of a contract is determined by the *lex loci contractus*, and the courts of other states should give the contract the same effect, and none other, as would be given if it were the case before the courts of that state.

*Kennedy v. Cochrane*, 65 Me. 594.

Even admitting that the officers of the defendant corporation knew that the contract was illegal, that the plaintiff was ignorant of that fact, and that the defendant's officers, knowing of the plaintiff's ignorance, remained silent and permitted him to enter into the contract, still, no action will lie therefor against the corpora-



tion. If any action can lie for such a tort, it must be in the nature of an action for deceit.

Plaintiff's claim for damages is founded entirely on the alleged wrong done him by the concealment from him by the officers of the corporation of the Massachusetts law.

In purchase or sale, if there be no designed misrepresentation by words or deeds, and no active intentional concealment, and no intentional silence where there is a duty to speak, an action for deceit will not lie.

*Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Peck v. Gurney*, L. R. 6 H. L. 377.

If it is admitted that an action for deceit can arise on account of a *suppressis veri*, it can only be where one party is under a legal, not merely moral, obligation to impart information to the other. That obligation never arises in an ordinary business transaction. It requires fiduciary relations to raise it.

*People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481; *Dambmann v. Schulting*, 75 N. Y. 55.

The contract is illegal and unenforceable because in unreasonable restraint of trade.

*Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 43 Atl. 723.

The illegal agreement not to carry on business is part of the consideration of the company's promise, damages for the breach of which are sought in this action. As part of the consideration of the company's promise is illegal, the entire promise falls, and no part of it can be enforced.

1 Parsons, Contr. 457.

As the contract on the part of the company is not divisible it fails altogether on account of the illegality of part of the consideration.

*Triet v. Ohild*, 21 Wall. 441, *sub nom. Burke v. Child*, 22 L. ed. 623; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Saratoga County Bank v. King*, 44 N. Y. 87; *Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 677; *Snyder v. Willey*, 33 Mich. 483; *Widow v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Featherston v. Hutchinson*, Cro. Eliz. pt. 1, p. 199; *Waite v. Jones*, 1 Bing. N. C. 656, 5 Bing. N. C. 341; *Erie R. Co. v. Union Locomotive & Exp. Co.* 35 N. J. L. 240; *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606.

**Collins, J.**, delivered the opinion of the court:

On December 1, 1892, the defendant, a New Jersey corporation engaged in the business of indemnifying against losses on credits, made a written contract with the plaintiff, appointing him its agent in and for the state of Massachusetts for the term of five years, for a percentage on the amount of business secured, as his compensation. The plaintiff on his part in said written contract agreed to act as such agent for the term named, and to procure business to an

extent stated each quarter, failing which the defendant might, at its option, terminate the contract, and further agreed that, should he cease to be the defendant's agent, he would not engage in like business for three years thereafter. On September 4, 1894, the defendant was adjudged insolvent, and a receiver was appointed for its creditors and stockholders. On October 2, 1894, its charter was forfeited, except for the purpose of collecting and distributing its assets. The plaintiff presented to the receiver a claim for damages for breach of said contract. The claim being disputed, the chancellor authorized an issue or issues at law to determine its validity. The supreme court overruled a demurrer by the plaintiff to a plea of such insolvency and forfeiture, but on writ of error it was adjudged by this court that there was a breach of the contract, and that the forfeiture of the defendant's charter would not bar recovery of damages for such breach. *Rosenbaum v. United States Credit System Co.* 61 N. J. L. 543, 40 Atl. 591, Reversing 60 N. J. L. 294, 37 Atl. 595. The supreme court had also decided to overrule the plaintiff's demurrer to a plea that the business of the defendant was unlawful in Massachusetts; but after the announcement of the decision that plea was withdrawn, as were also certain other pleas held to be faulty, so that the judgment reviewed went only on the plea of insolvency and forfeiture. After the reversal the pleadings were recast and the cause proceeded to issue of fact. Trial was had in the Essex circuit, resulting in a verdict for the plaintiff, which was set aside and a new trial ordered by the supreme court in banc. The report of the decision is in 64 N. J. L. 34, 44 Atl. 966. Legal questions only were discussed—First, whether the plaintiff's agreement not to engage in business like that of the defendant for three years after he should cease to be its agent invalidated the entire contract; and, second, the effect of alleged unlawfulness in Massachusetts of such business, a plea of that purport having been renewed. The first question was decided in favor of the plaintiff on the authority of *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606. The second question was decided in favor of the defendant. Under the pleadings as recited in the opinion read by Mr. Justice Van Syckel, the unlawfulness alleged was not disputed. The court's decision was merely that the plaintiff's ignorance of it gave him no right of action for breach of the contract, but that concealment from him by the defendant of its knowledge of it would entitle him to damages in tort, under pleadings to be molded accordingly. Before the new trial, now the subject of review, I judge that new replications and subsequent pleadings were filed. In the present record the first plea is *non est factum*, on which issue is joined. The second plea is that the contract is void because a part of the consideration for the defendant's agreement was an agreement by the plaintiff not to engage, for three years after he should cease to be agent for the de-

fendant, in any business like that of the defendant, which restriction is alleged to be unreasonable. The replication is that the restriction was reasonable, and on this issue is joined. The third plea sets out *in extenso* the statute of Massachusetts herein-after referred to, and avers that the business of the defendant for which the plaintiff was agent was at the time of the contract unlawful in that state. To this plea there are four replications. The first avers that at the time of the contract the plaintiff was a resident of Illinois, and ignorant of the laws of Massachusetts; the second avers to the same effect, and also that the defendant was cognizant of those laws, and had been refused a license to transact its business in Massachusetts, which matters it fraudulently concealed from the plaintiff; the third avers that the defendant knew, and the plaintiff was ignorant of, the laws of Massachusetts; and the fourth avers that defendant's business was not unlawful in that state. Issue is tendered on these several replications by divers rejoinders concluding to the country, and accepted by formal similiter. At the new trial the evidence at the former trial was used by consent. The plaintiff moved to mold the pleadings so as to present an issue of tort, but the learned trial judge refused to make order to that effect, and his ruling, being discretionary, is not reversible. Verdict in favor of the defendant was directed on the third plea, and the bill of exceptions of the plaintiff presents this direction for our review, under the present writ of error brought on the consequent judgment against him. On the first plea a case was made by the plaintiff that the defendant did not attempt to confute, and no support for the direction of a verdict is claimed under that plea. The issue raised on the second plea was ignored by the trial judge, but the plea is now pressed, and must be considered.

How far the ancient doctrine that contracts in general restraint of trade are void has been modified, need not be discussed. The modern doctrine seems to be that the restraint may properly be made as extensive as the reasonable need of protection. The subject may be profitably considered in the light of its excellent presentation by Mr. George Stuart Patterson in his monograph on "The Law of Contracts in Restraint of Trade," published by the University of Pennsylvania in 1891, where many decisions are collected and analyzed, and of the intimation of the chancellor in his opinion read in the decision of this court in the case of *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 43 Atl. 723. The reasonableness of an agreed restraint is a court question, and should be deducible from facts and circumstances recited in the contract or averred in pleadings. *Mallan v. May*, 11 Mees. & W. 653. In the present case the parties have framed an issue under a general replication of reasonableness. It was testified at the trial that the defendant's business was conducted in nearly every state of the Union, and was capable

of indefinite extension. If it be proper to so raise the question, this was evidence requiring consideration; but, even if not, I think that the case has an aspect that precludes a decision in favor of the defendant. The contract between the parties was based on sufficient reciprocal consideration, apart from the plaintiff's restrictive agreement. Both parties must be presumed to have known the law as to contracts in restraint of trade, and therefore the restrictive covenant, if invalid, ought not to be held to avoid the valid covenants. Contracts in undue restraint of trade are loosely spoken of in the books as "illegal contracts." It is more accurate to style them "unenforceable contracts." It is not against the law to make such a contract, or illegal to perform it. As was said by Pollock, C. B., in *Green v. Price*, 13 Mees. & W. 695: "It is not like a contract to do an illegal act. It is merely a covenant which the law will not enforce, but the party may perform it if he chooses." In the case cited there was a covenant to pay £1,500 liquidated damages if the vendor of a London business should engage in like business in the cities of London and Westminster, or within 600 miles from them, respectively. The restriction as to the cities was held good, and the stipulated damages were awarded the plaintiff, although the other restrictions was held void as unreasonable. On affirmance in the exchequer chamber in *Price v. Green*, 16 Mees. & W. 346, Petteson, J., said: "The restriction as to 600 miles from London and Westminster is only void, not illegal, and therefore the rest of the restriction would have formed a sufficient consideration for the agreement to pay £1,500." The same distinction underlies this court's decision in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 43 Atl. 723, where a covenant by vendors not to engage in a like business to that sold in any state or territory except Nevada and Arizona was held disjunctive and separable as to place. Being good as to New Jersey, where the vendors had their factory, this court compelled by injunction its performance here, and refused to inquire into the validity of the restraint elsewhere. It is evident that, if the invalidity in any part of the covenant would avoid it utterly, the court would have been obliged to pass on that question.

The case in hand stands thus: The defendant, desiring the service of the plaintiff as its agent, agreed, in consideration of his covenant to serve it for five years, to employ him for that period; exacting from him, also, a covenant not to engage in like business for three years after his service should end. It was not wrong or illegal for the plaintiff to perform this covenant. If he could not be compelled to perform it, the defendant must be presumed to have known that this was so, and to have taken the chance that he would act honorably. To deprive the plaintiff of his contract of employment because of the possibility that he might repudiate his collateral engagement would be neither sound law nor good moral.

In *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606, the supreme court held that the receiver of the present defendant must perform its agreement to purchase a business, although the contract contained an agreement that the vendor would not engage in a like business. We approve that decision, and the reasoning of Beasley, Ch. J., on which it is based. In most of the cases in which it has been held that if a promise forming part of the consideration of a contract is illegal the whole consideration is void, it will be found that to do the thing promised was illegal or immoral. A failure to perceive the distinction between such cases and those where the promise is merely void has led text writers and some judges to include contracts in undue restraint of trade as within the doctrine stated, but, as pointed out in *Fishell v. Gray*, 60 N. J. L. 5, 37 Atl. 606, this view is untenable. The only case directly asserting it to which we have been referred by counsel for the defendant is *Saratoga County Bank v. King*, 44 N. Y. 87, the reasoning of which, in the light of what has been said, is its own refutation. The direction of verdict for defendant cannot stand on the second plea. Nor do I think such direction can stand on the case made under the third plea, which alone moved the learned trial judge to give it. The covenant of the defendant was not broken because of any supposed unlawfulness of the business contracted for, but because of the defendant's insolvency. Nor was it proved that the business was in fact unlawful. Of course, it was not immoral, or, in the broad sense, illegal, but it is claimed that in Massachusetts it was prohibited by the statute pleaded. That statute [Stat. 1887, chap. 214, § 3] defines a contract of insurance as "an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured upon the destruction . . . of something in which the other party has an interest," and provides that it shall be unlawful for any company to make or any agent to solicit "any contract of insurance upon or concerning any property, or interests, or lives in this commonwealth, or with any resident thereof, . . . unless and except as authorized" under the provisions of the act, which then proceeds to authorize the formation of insurance companies for various purposes named. Foreign companies and their agents are put on the same footing as domestic companies and their agents, upon compliance with certain requirements; certificates of authority to transact business being then issuable by the insurance commissioner. The proof at the trial was that before the defendant began its operations in Massachusetts the insurance commissioner had ruled that its business was not insurance, within the definition of the statute, and that no certificate of authority to transact it was necessary, and that the plaintiff entered upon his agency as soon as appointed, and, without interference on the part of the Massachusetts authorities, 53 L. R. A.

transacted a business of large volume for the defendant, down to the time of its becoming insolvent. I think, therefore, that the plaintiff was entitled to have a jury say whether, if the defendant had not become insolvent and ceased to do business, he would not have been permitted to continue in his agency, and on that ground award him damages. Suppose the term of the contract had expired, and the suit brought was for the agreed compensation; surely an unlawfulness merely theoretical would afford no defense to the action. I see no reason why it should do so, when the breach of contract arises only from insolvency. For all practical purposes, the defendant's business was lawful in Massachusetts. Nor can I see that it was theoretically unlawful. One of the purposes for which the formation of insurance companies is authorized by the statute pleaded is "to guarantee the fidelity of persons in positions of trust, private or public, and to act as surety on official bonds and for the performance of other obligations." It seems to me that the acting as surety for the performance of obligations is exactly the defendant's business, which is therefore within both the definition and the permission of the statute. If this view be correct, certificates of authority for the company and its agent to transact it were necessary. Those it behooved the defendant to procure, and it cannot set up its failure to do so as an excuse for the breach of its contract with the plaintiff. But we are referred to the reported case of *Clafin v. United States Credit System Co.* 165 Mass. 501, 43 N. E. 293, decided April 1, 1896, in which, it is alleged, the supreme court of Massachusetts has interpreted the statute in question, and has held that the business of defendant is, in that state, unlawful. If this be so, the plaintiff's suit is not thereby defeated. No doubt, after such a decision the business could no longer be transacted in Massachusetts, and the plaintiff's profits would cease, but the only effect in the present suit would be on the extent of his recovery. It is not needful to go further for the purposes of this writ of error, but it should be pointed out that the decision cited is not authoritative beyond the point that the business of the defendant was insurance within the definition of the Massachusetts statute. In its application of that adjudication to the case then in hand, the opinion read for the court is ambiguous. The suit was brought upon one of the defendant's contracts of indemnity, and recovery was contested on grounds not stated in the report of the case. The court *ex mero motu* avoided the contract, saying: "The contract sued on seems to be made unlawful by the provisions of Stat. 1887, chap. 214, § 3, both for the reason that the defendant had not been admitted to transact insurance here, and because insurance of credits or accounts is not authorized by the statute." One of these reasons might be good, but both could not be. If credit insurance was unlawful, the defendant could not have been admitted to transact it. If the fact

that defendant was not so admitted influenced the decision, the other reason assigned for it was mere *dictum*. Of course, a plain decision of the supreme court of a state, interpreting one of its statutes, should, after its rendition, control judicial interpretation elsewhere; but I think the decision cited leaves the matter in hand still unsettled. The question involved was not argued, and no reference is made in the opinion to the authority to form an insurance company to act as surety for the performance of obligations. It is possible that that provision of the statute, blended as it is with another subject, was overlooked. If before the retrial of this action an authoritative judgment of the supreme court of Massachusetts that credit insurance is in that state unlawful shall be pronounced, its effect on the plaintiff's recovery must then be considered. I shall vote to reverse the present judgment and award a *venire de novo*.

**Magie**, Chancellor, dissenting:

I am constrained to dissent from the opinion of the majority of the court in this case. The ground of my dissent is this: Rosenbaum by this action seeks to liquidate and fix the damages which the defendant company, an insolvent corporation, should be charged with for the nonperformance of a contract made by it with him. The contract contemplated the procurement by

Rosenbaum of contracts in the state of Massachusetts for the insurance by the company of accounts and credits. Such contracts have been judicially declared by the courts of that state to be unauthorized and unenforceable. In my judgment, it is immaterial whether the lack of authority to make such contracts was properly predicated upon the omission of a legislative grant or not; for it was distinctly decided that, if such authority has been given, its exercise in that state was unlawful, unless the contracting company had been admitted to transact such business within that state in the manner required by its laws. *Clafin v. United States Credit System Co.* 165 Mass. 501, 43 N. E. 293. As it appears that the defendant company was not thus admitted to transact business in that state, its contracts were properly held to be unlawful. Damages for being prevented by the insolvency of the company from procuring contracts which the company had no lawful authority to make cannot, in my judgment, be recoverable. It is proper to add that the question before us was not involved in the previous decisions reported in 60 N. J. L. 294, 37 Atl. 595, or 61 N. J. L. 543, 40 Atl. 591. I therefore vote to affirm the judgment.

**Van Syckel and Hendrickson, JJ.**, concur.

#### OREGON SUPREME COURT.

**J. A. ELLIS, Respt.,**  
v.

**William FRAZIER, Appt.**

(.....Or.....)

1. A statute imposing a tax on bicycles in certain counties of the state only, which shall be used for the construction of bicycle paths, contravenes a constitutional provision against special or local laws for laying, opening, or working on highways.
2. The setting apart of four fifths of a tax imposed upon bicycles as a fund for the purpose of constructing and maintaining bicycle paths shows that it was primarily designed as a means of raising revenue, and the burden imposed must be treated as a tax, and not as a license.
3. A bicycle path constructed with the proceeds of a tax on bicycles is a highway for bicyclists and pedestrians.
4. The imposition of a uniform tax upon bicycles, regardless of their value, for the construction of bicycle paths, violates a constitutional provision requiring uniform and equal rates of taxation and the prescribing of regulations to secure a just valuation for the taxation of all property.
5. The imposition, for the construction

of bicycle paths, of a tax of a specified amount on all bicycles, which class of property is included in the terms of the statute imposing general taxes on personal property, subjects such property to a burden from which other classes are exempt, in contravention of a constitutional requirement that all taxation shall be equal and uniform.

(January 28, 1901.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Multnomah County, Department 2, in favor of plaintiff in an action brought to recover possession of a bicycle which had been seized by defendant for nonpayment of a tax. *Affirmed*.

Statement by **Moore, J.**:

This is an action to recover the possession of a bicycle, or the sum of \$10 as its value, in case possession thereof cannot be had, and the further sum of \$5 damages for its alleged unlawful seizure and detention. The facts are that the defendant, as sheriff of Multnomah county, appointed one J. W. Johnson as bicycle tax collector therein, who on June 22, 1900, by reason of the plaintiff's failure to pay a special tax of \$1.25 levied upon all bicycles used in said county, seized plaintiff's bicycle, and refused to surrender it, except upon the payment of said tax, and the further sum of \$1 as a fine for having

**NOTE.**—As to validity of tax on bicycles, see *Davis v. Petrino* (Ala.) 36 L. R. A. 615; also cases in note to *Taylor v. Union Traction Co.* (Pa.) 47 L. R. A. 289.

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neglected to pay the same. The complaint is in the usual form, and also alleges that the act of the legislative assembly under which such seizure was made is violative of certain provisions of the Constitution, particularly enumerating them. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, and the defendant declining to plead further, judgment was given as demanded, and the defendant appeals.

**Messrs. George E. Chamberlain and Robert G. Morrow**, for appellant:

The act in question is not violative of § 20, art. 1, of the Constitution. It gives the same rule to all persons placed in the same circumstances.

*Re Oberg*, 21 Or. 408, 14 L. R. A. 577, 28 Pac. 130; *State v. Randolph*, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201; *People ex rel. New York & H. R. Co. v. Havemeyer*, 47 How. Pr. 511; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

The act is not violative of § 32, art. 1, of the Constitution, for a tax is not unconstitutional for lack of uniformity, even when levied for local purposes, if it is equal and uniform throughout the taxing district.

*Cook v. Port of Portland*, 20 Or. 580, 13 L. R. A. 533, 27 Pac. 263; *Chicago, B. & Q. R. Co. v. Otoo County*, 16 Wall. 676, 21 L. ed. 381.

The act is not violative of § 23, art. 4, of the Constitution, nor of subdivisions 2 and 7 thereof, for it is not a law for opening or working highways, nor a local or special law for the punishment of misdemeanors.

*Simon v. Northup*, 27 Or. 488, 30 L. R. A. 171, 40 Pac. 560; *Northern Counties Trust v. Sears*, 30 Or. 388, 35 L. R. A. 188, 41 Pac. 931.

The act is not violative of § 1, art. 9, of the Constitution. It provides for an equal and uniform rate of taxation throughout the taxing district constituted by the act.

*East Portland v. Multnomah County*, 6 Or. 62; *Cooley, Const. Lim.* 494, 502.

The act in question is not violative of § 18, art. 4, of the Constitution. It is not for the purpose of raising a revenue within the meaning of this provision.

*Northern Counties Trust v. Sears*, 30 Or. 401, 35 L. R. A. 188, 41 Pac. 931; *Brownfield v. Houser*, 30 Or. 539, 49 Pac. 843; *United States ex rel. Michels v. James*, 13 Blatchf. 207, Fed. Cas. No. 15,464; *Story, Const.* § 880; *United States v. Norton*, 91 U. S. 569, 23 L. ed. 455; *United States v. Hill*, 123 U. S. 684, 31 L. ed. 276, 8 Sup. Ct. Rep. 308; *United States v. Broadhead*, 127 U. S. 212, 32 L. ed. 147, 8 Sup. Ct. Rep. 1191; *The Nashville*, 4 Biss. 188, Fed. Cas. No. 10,023; *Dundee Mortg. Trust Invest. Co. v. Parrish*, 11 Sawy. 92, 24 Fed. 200; *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *Harper v. Elberton Comrs.* 23 Ga. 571; *Cur-* 53 L. R. A.

*ryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *Fletcher v. Oliver*, 25 Ark. 289.

**Mr. R. A. Leiter**, with **Messrs. Fenton & Muir**, for respondent:

The act violates art. 4, § 23, particularly subdivisions 7 and 10, of the Constitution, being a special and local law for laying, opening, and working on highways, and for the assessment and collection of taxes for road purposes.

*Macwell v. Tillamook County*, 20 Or. 495, 26 Pac. 803; *Manning v. Klippel*, 9 Or. 367; *Crawford v. Linn County*, 11 Or. 498, 5 Pac. 738; *Northern Counties Trust v. Sears*, 30 Or. 397, 35 L. R. A. 188, 41 Pac. 931; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Healey v. Dudley*, 5 Lans. 115; *Simon v. Northup*, 27 Or. 500, 30 L. R. A. 171, 40 Pac. 560; *Wanser v. Hoos*, 60 N. J. L. 482, 38 Atl. 449; *People ex rel. Clauson v. Newburgh & S. Pl. Road Co.* 86 N. Y. 7; *Ferguson v. Ross*, 126 N. Y. 464, 27 N. E. 954; *Re Henneberger*, 155 N. Y. 425, 42 L. R. A. 132, 50 N. E. 61.

The act violates § 1, art. 9, of the Constitution, because it does not provide a uniform and equal rate of assessment and taxation, or prescribe regulations so as to secure just valuation for taxation of the property of the same class owned by all citizens of the state.

*Bright v. McCullough*, 27 Ind. 223; *Weeks v. Milwaukee*, 10 Wis. 243; *Knowlton v. Rock County Supers.* 9 Wis. 410; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Smith v. County Comrs. Ct.* 117 Ala. 196, 23 So. 141; *State v. Tucker*, 56 S. C. 516, 35 S. E. 216; *Kiowa County Comrs. v. Dunn*, 21 Colo. 185, 40 Pac. 357; *Pittsburgh, C. & St. L. R. Co. v. State*, 49 Ohio St. 189, 16 L. R. A. 380, 30 N. E. 435; *Zanesville v. Richards*, 5 Ohio St. 589.

The act violates art. 1, § 32, in that it imposes taxation which is not equal and uniform.

*Chicago v. Collins*, 175 Ill. 458, 49 L. R. A. 408, 51 N. E. 907; *Livingston v. Paducah*, 80 Ky. 657; *Cooley, Taxn.* 2d ed. p. 227; *Sims v. Jackson Parish*, 22 La. Ann. 440.

The act in question violates § 20, art. 1, of the Constitution in attempting to grant to citizens and classes of citizens privileges and immunities which, upon the same terms, do not belong equally to all citizens of the state.

*Chicago Sanitary Dist. v. Bernstein*, 175 Ill. 218, 51 N. E. 720; *Devine v. Cook County Comrs.* 84 Ill. 591; *Lippman v. People*, 175 Ill. 106, 51 N. E. 872; *Nichols v. Walter*, 37 Minn. 271, 33 N. W. 800; *Davis v. Clark*, 106 Pa. 385; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356; *Wanser v. Hoos*, 60 N. J. L. 482, 38 Atl. 449; *Canfield v. Davies*, 61 N. J. L. 26, 39 Atl. 357; *State ex rel. Richards v. Hammer*, 42 N. J. L. 440; *State, Closson, Prosecutor, v. Trenton Bd. of License & Excise*, 48 N. J. L. 439, 5 Atl. 323; *State, Alsbath, Prosecutor, v. Philbrick*, 50 N. J. L. 581, 15 Atl. 579; *Atlantic City Waterworks Co. v. Consumers' Water Co.* 44 N. J. Eq. 431, 15 Atl. 581; *Lassen County v. Cone*, 72 Cal. 388, 14 Pac. 100;

*Rauer v. Williams*, 118 Cal. 408, 50 Pac. 691; *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Darcy v. San José*, 104 Cal. 642, 38 Pac. 509; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803.

The act violates § 18, art. 4, of the Constitution. It originated in the senate, being senate bill 143, and did not originate in the house of representatives. The said act pretends to raise revenue, and is a revenue law.

*Northern Counties Trust v. Sears*, 30 Or. 401, 35 L. R. A. 188, 41 Pac. 931; *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585; *Dundee Mortg. Trust Invest. Co. v. Parrish*, 11 Sawy. 92, 24 Fed. 200.

Moore, J., delivered the opinion of the court:

The question presented for consideration is whether the act of the legislative assembly approved February 18, 1899 (Laws 1899, p. 152), imposing in certain counties a tax of \$1.25 upon bicycles, contravenes the Constitution of the state, thereby rendering any of the provisions of said statute void. It may be safely said that a court of last resort, in construing a statute, will place its decision upon other grounds if possible, rather than to annul the act of a co-ordinate department of the government; the rule being well settled in this state that an act of the legislative assembly will not be declared void, in whole or in part, unless its incompatibility with the organic law is apparent and free from doubt, every reasonable intentment being invoked to uphold the validity of the statute. *King v. Portland*, 2 Or. 146; *Cline v. Greenwood*, 10 Or. 230; *Oresap v. Gray*, 10 Or. 345; *Crowley v. State*, 11 Or. 512, 6 Pac. 70; *Cook v. Port of Portland*, 20 Or. 580, 13 L. R. A. 533, 27 Pac. 263; *Deane v. Willamette Bridge Co.* 22 Or. 167, 15 L. R. A. 614, 29 Pac. 440; *State v. Shaw*, 22 Or. 287, 29 Pac. 1028; *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *Simon v. Northrup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560.

The opinion of Mr. Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, has forever set at rest the principle that a written constitution enacted by the sovereign power is the supreme law of the land, and binding alike upon each department of the government, and, however delicate the task may be, the duty of declaring the supremacy of the organic law is imposed upon the judiciary whenever, in an appropriate manner, the repugnance of the statute is made a material issue by a party who has sustained, or will incur, injury by its enforcement. Keeping these rules of construction in view, we will examine the case made by the complaint, in which it is alleged, *inter alia*, that the act of the legislative assembly, under which the plaintiff's bicycle was seized and detained, violates subdivision 7 of § 23 of art. 4 of the Constitution of the state.

The provision of the organic law, invoked to annul the act in question, is as follows: "The legislative assembly shall not pass spe-

cial or local laws in any of the following enumerated cases, that is to say: . . .

(7) For laying, opening, and working on highways, or for the election or appointment of supervisors." The act in question, the validity of which is challenged by the judgment complained of, provides, in effect, that the county court or board of county commissioners of each county shall, on or before the 1st day of March of each year, levy a special tax of \$1.25 upon each bicycle within its or their jurisdiction, except such as are kept for sale, and have not been sold, loaned, traded, or in any manner previously disposed of. Section 1. Immediately after said levy the sheriff shall appoint a bicycle tax collector (§ 2), who shall collect said tax, and issue tags, which shall be attached to the bicycles of the persons paying the taxes thereon. Section 4. The absence of such tag from any bicycle is deemed prima facie evidence that the tax has not been paid, and upon the discovery thereof the tax collector may seize and hold all such bicycles until said tax and the further sum of \$1 as a fine have been paid. Section 5. For the collection of said tax there shall be allowed not to exceed 25 cents of each and every tax collected. Section 8. The money collected in pursuance of the levy of said tax shall be deposited in the county treasury, and known as the "path fund," which shall be used to construct, maintain, and repair, along the public highways, "and such other places as may be thought advisable by the county court or board of county commissioners within the county, such suitable paths for the use of bicycles and pedestrians as may be determined upon by the county court or board of county commissioners." Section 9. "The provisions of this act shall not apply to the counties of Baker, Clatsop, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Morrow, Polk, Sherman, Union, Umatilla, Wallowa, and Wheeler." Section 13.

As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is not inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations. *Ex parte Montgomery*, 64 Ala. 463; *Ex parte Miranda*, 73 Cal. 365, 14 Pac. 888; *Baker v. Cincinnati*, 11 Ohio St. 534. The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516. "The distinction between a demand of money, under the police power, and one made under the power to tax," says Judge Cooley, "is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for reve-

nue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power." *Cooley*, Taxn. 396. It was held, in the case of *Re Wan Yin*, 10 Sawy. 532, 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expenses attending the regulation of the business, the burden is a tax, and not a license. So, too, in *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462, the common council of St. Paul having passed an ordinance requiring a license fee of \$25 from every peddler of vegetables in the streets of the city, and no regulation or restraint having been imposed upon the manner of conducting the business, it was held that the exaction, being so much in excess of the reasonable expense of issuing the license, was a tax levied upon the business for revenue. "It is therefore conclusive," says Mr. Tiedeman, in his work on *State and Federal Control of Persons and Property* (vol. 1, p. 495), in commenting upon the distinction between a tax and a license, "that the general requirement of a license, for the pursuit of any business that is not dangerous to the public, can only be justified as an exercise of the power of taxation, or the requirement of a compensation for the enjoyment of a privilege or franchise." The production of a revenue, however, is not conclusive evidence of an exercise of the taxing power; for it has been held that the legislative assembly may authorize municipal corporations to issue licenses which incidentally result in securing revenue. *Cooley*, Const. Lim. 5th ed. \*201; *Ex parte Miranda*, 73 Cal. 365, 14 Pac. 888; *Leavenworth v. Booth*, 15 Kan. 627; *Vansant v. Harlem Stage Co.* 59 Md. 330; *State, Flanagan, Prosecutor, v. Plainfield*, 44 N. J. L. 118; *State v. Bean*, 91 N. C. 554. The use of a bicycle by its owner as a means of cheap and speedy locomotion in attending to his business or promoting his enjoyment by reasonable exercise, thereby contributing to his health and prolonging his life, cannot well be classed as an occupation; and if it were it is not necessarily dangerous to the public, unless the absence of noise in its operation, and consequent liability to come in contact with pedestrians, make it so. The act in question does not attempt, in any manner, to regulate the speed of bicycles, or to require a bell to be attached thereto to be rung when approaching travelers, or to carry a lighted lantern at night to avoid collisions, and hence it cannot be said that the statute was enacted for protection.

Whatever the rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily

tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of \$1 more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license.

Referring to the principal objection urged against the statute, it will be seen that the act applies only to the counties of Benton, Clackamas, Columbia, Jackson, Marion, Multnomah, Tillamook, Wasco, Washington, and Yamhill, and hence the first inquiry which is naturally evoked by the clause of the Constitution to which attention has been called is whether the act under consideration is a local law. A local act is confined in its operation to the property and persons of a limited portion of the state. *People v. O'Brien*, 38 N. Y. 193. "A local act," says Earl, J., in *People ex rel. Clauson v. Newburgh & S. Pl. Road Co.* 86 N. Y. 1, "is one operating only within a limited territory or specified locality." In *Mamuel v. Tillamook County*, 20 Or. 495, 26 Pac. 803, Mr. Justice Lord, in defining the term, says: "Statutes are sometimes distinguished as general or local, according to whether they are intended to operate throughout the entire jurisdiction, or only within a single county or other division or place. A law which applies only to a limited part of the state, and the inhabitants of that part, is local." The provisions of the bicycle tax law are operative only in ten of the thirty-three counties of the state, and, under the definition of the term as adopted by this and other courts of last resort, the act in question is undoubtedly a local law.

The next inquiry is whether the act provides for laying, opening, or working on highways. A way may be public, though suitable only for footmen and horses, or when not suitable for all carriages (*King v. Salop County*, 13 East, 95; *King v. Lyon*, 5 Dowl. & R. 497; *Tyler v. Sturdy*, 108 Mass. 196; *Boston & A. R. Co. v. Boston*, 140 Mass. 87, 2 N. E. 943); and hence a bicycle path is a highway for bicyclists and pedestrians. It will be remembered that § 9 of the act in controversy, not only authorizes the construction of bicycle paths along the public highways, but also in such other places as may be thought advisable by the county court or board of county commissioners. If the construction of a bicycle path along the public highway be deemed a reasonable use of an existing right (*Simon v. Northrup*, 27 Or. 487, 30 L. R. A. 171, 40 Pac. 560) the location of these paths in such other places as may be thought advisable by the county court or board of county commissioners would seem to be the laying out of a highway by means of a local law, which is, in that respect, at least, inhibited by the

Constitution (*Maxwell v. Tillamook County*, 20 Or. 495, 26 Pac. 803). But, however this may be, the question is not necessarily involved herein; for it does not appear that any portion of the fund arising from the bicycle tax was being expended in laying out paths in any other places than along the public highway.

It is alleged in the complaint that the act in question is violative of § 1 of art. 9 of the Constitution, which, so far as applicable herein, is as follows: "The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," etc. The value of the bicycle the possession of which is sought to be recovered in this action is alleged to be the sum of \$10. The transcript does not show whether the value thus alleged is greater or less than ordinary prices charged for bicycles by dealers therein, but, as the use of these vehicles must tend to their destruction, we think it may be safely assumed that the price of a bicycle depends upon its age, pattern, condition, workmanship, and the material of which it is composed, and that its value, being dependent upon so many elements, must necessarily be variant. The act under consideration imposes a tax of \$1.25 upon each bicycle in use, irrespective of its value, and it remains to be seen whether such a burden is equal and uniform. In *Bright v. McCullough*, 27 Ind. 223, under a clause of the Constitution of Indiana prescribing that the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, etc., it was held that a specific tax of 1 cent on each acre of taxable land in a certain township, levied in pursuance of an act of the general assembly, which pretended to authorize the assessment of a tax not to exceed 1½ cents on each acre of taxable land for road purposes, was inhibited by the organic law of that state. In *Smith v. County Comrs. Ct.* 117 Ala. 196, 23 So. 141, it was held that an act of the legislative assembly levying a tax of \$1 per annum upon each road wagon in Marshall county, for the benefit of the public roads, violated the constitutional provision of Alabama prescribing that all taxes shall be assessed in exact proportion to the value of such property. In *Kiowa County Comrs. v. Dunn*, 21 Colo. 185, 40 Pac. 357, it was held that an act of the legislative assembly of Colorado, providing that nonresidents grazing cattle in any county of that state should pay 50 cents per head therefor in lieu of taxes, was void, as being in conflict with the Constitution of that state, which prescribed that all taxes should be uniform. In *Pittsburgh, O. & St. L. R. Co. v. State*, 49 Ohio St. 189, 16 L. R. A. 380, 30 N. E. 435, it was held that an act of the legislature of Ohio, requiring every corporation or company operating any part of a railroad within the state to pay the

commissioner of railroads and telegraphs a fee of \$1 per mile for each mile of track operated within the state, contravened the Constitution of that state, which declared that laws should be passed taxing by a uniform rule all moneys, credits, investments, and also all real and personal property, according to its true value in money. The value of all bicycles not being the same, the tax of \$1.25 levied upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted.

It is also alleged in the complaint that the act in question contravenes § 32 of art. 1 of the organic law, which reads as follows: "No tax or duty shall be imposed without the consent of the people or their representatives in the legislative assembly; and all taxation shall be equal and uniform." The statute makes it the duty of the assessor of each county to procure from the county clerk a blank assessment roll at the proper time, and to assess every person in the county in which he resides, on the 1st day of March of the year when the assessment shall be made, for real and personal property then owned by him within such county. Laws 1893, p. 6. Invoking the presumption that official duty has been regularly performed [Hill's Anno. Laws (Or.) § 776, subd. 15], plaintiff's bicycle was assessed for the year 1900, thereby rendering him personally liable for the state, county, school, and other taxes imposed thereon. In *Johnston v. Macon*, 62 Ga. 645, it was held that the city of Macon, having taxed the property of the people doing business therein, did not prohibit the imposition of a special tax upon the business of such persons, but that a tax on a wagon kept for private use, and not employed in the business of its owner, was not a tax on the business, but on the property, rendering such tax void on account of its duplicity. In *Livingston v. Paducah*, 80 Ky. 656, it was held that a specific tax imposed upon all vehicles used in conducting or in connection with the regular business of the person or persons so running such vehicles was a proper exercise of the power to license an occupation, but that the statute pretending to authorize the common council of the city of Paducah to impose a tax upon all vehicles kept for family use, and which property had been regularly assessed and was liable to ad valorem taxes, was a double taxation of that class of property, rendering the clause of the charter in that respect void. So, too, in *Chicago v. Collins*, 175 Ill. 445, 49 L. R. A. 408, 51 N. E. 907, it was held that an ordinance passed in pursuance of a clause of the city charter authorizing the common council to regulate the use of the streets, whereby a license fee was imposed upon all bicycles irrespective of their value, and used for private purposes exclusively as a means of locomotion, and which had been regularly assessed, and the owners thereof made liable for taxes thereon, was double taxation, and therefore void. The exaction of \$1.25 imposed upon all bi-



cycles, in addition to the *ad valorem* tax levied thereon, subjects such property to a burden from which other classes are exempt, and in this respect the double tax contravenes the clause of the Constitution last adverted to.

From these considerations, it follows that the judgment is affirmed.

Barbara STAGER, *Respt.*,  
v.

TROY LAUNDRY COMPANY, *Appt.*

(.....Or.....)

1. A servant operating a mangle in a laundry does not, as matter of law, assume the risk of her hand passing under the guard rail into the rollers, where the rail is adjusted by the employer so as to afford some protection, the employee is forbidden to interfere with the adjustment, and the improper adjustment is not obvious.
2. Ignorance of an employer of the technical mechanism of a machine, which prevents his releasing an employee who has been caught therein through his own negligence, as quickly as he otherwise could have done, whereby the injury to the employee is aggravated, will not render him liable for the injury if he did all he could to effect the release.

(January 28, 1901.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Wolverton, J.:**

This is an action to recover damages for injuries received by plaintiff while in the employ of the defendant, and engaged in the service of feeding textile fabrics through a mangle for the purpose of drying and smoothing them. The action is based upon the alleged negligence of the managing agents of the defendant, in adjusting or placing the guard plate too high, thereby allowing too much space or too large an opening between the guard and the table, and in their want of knowledge touching the mechanism of the machine, particularly in the use of the tension screws for raising and lowering the rollers upon the cylinder. The defense is that the danger was obvious and incident to the service in which the plaintiff was engaged, the risk was one which she assumed in her employment, and therefore that the defendant is not liable for the injury sustained. Judgment was for the

plaintiff, and the defendant appeals. John Tait, a witness in behalf of the plaintiff, testified, in substance, that he was manager of the company, and had been for four and one-half years; that it had a machine, known as the "Wendell Annihilator," in operation twelve days before the accident, which occurred May 14, 1898; that what knowledge he had of the machine was obtained from seeing it set up by the agent, who was a practical man in the business, and from seeing one of the same make operated for an hour in San Francisco, but that there were other machines built practically upon the same principle, with which he had had experience for the last ten years. The plaintiff testified: That she had been living in Portland about twenty-three years, had been in the employ of the laundry company four years, and at the time of the accident was feeding the Wendell Annihilator. That her fingers came in contact with the rollers, and, because the guard was no protection whatever, it allowed her hand to get caught, so that it was burned and crushed. That, if the guard had been any protection, it would have skinned the whole back of her hand before it could have come in between the rollers, and that the guard should not have been any higher than would allow a sheet or tablecloth to go through. That after her hand was in there was plenty of help present, but they did not know how to release her. That Mr. Sherman, president of the company, afterwards said that, if they had properly understood the machine, her hand would not have been burned so badly; that the machine was a new one, and they did not fully understand it, and after examination he found it could have been loosened quicker if he had known how to do it. That, in her estimation, the guard rail was too high, and allowed her hand to get caught in the machine, and, if it had been any protection, the accident would not have happened. That she could not say just how high the guard was, but it should not have been any higher than was necessary to let the fabrics go under. That her hand was in the mangle from three to five minutes, and before she could be released they had to get a crowbar and pry the roller up. That she had been operating the mangle about two weeks. On cross-examination she testified that she had worked on other mangles used by the company five or ten minutes at a time, off and on, during her employment; that these were not protected, and she did not realize the danger with this machine, because there was a guard rail for protection; that during the time she was at work the guard was taken off for about an hour, at the request of her immediate superin-

NOTE.—For some cases on the general rule as to assumption of risk by servant, see *notes to Foley v. Pettee Mach. Works (Mass.)* 4 L. R. A. 51; *Hunter v. New York, O. & W. R. Co. (N. Y.)* 6 L. R. A. 246; *Georgia P. R. Co. v. Dooly (Ga.)* 12 L. R. A. 342; and *Kehler v. Schwenk (Pa.)* 13 L. R. A. 374; also *Coyle v. A. A. Griffling Iron Co. (N. J. L.)* 47 L. R. A. 147.

For earlier cases in this series as to assumption of risk from unsafe machinery, see *Dartmouth Spinning Co. v. Achard (Ga.)* 6 L. R. A. 190; *Roux v. Blodgett & D. Lumber Co. (Mich.)* 13 L. R. A. 728; *Hinckley v. Horazdowski (Ill.)* 8 L. R. A. 490; *Knisley v. Pratt (N. Y.)* 32 L. R. A. 367; *Illinois Steel Co. v. Mann (Ill.)* 40 L. R. A. 781; and *O'Maley v. South Boston Gaslight Co. (Mass.)* 47 L. R. A. 161.

tendent, and with Mr. Sherman's consent, but when Mr. Tait came back he said it was too dangerous, and directed it to be put back; that the machine worked about the same with the guard off as with it on, all the difference being that in the one case the goods passed directly between the rollers, and in the other they passed beneath the guard; that her hand rested up against the guard, but in no way touched it while it went under; that, from her information, the guard was adjusted by tension screws; that Mr. Sherman had charge of it, and the operators were not permitted to change the adjustment. Reuben Francis described the important features of the mangle. It consists of a large cylinder, 8 feet long and 4 feet in diameter, heated by steam, above which revolves a set of small rollers. A table is arranged in front, and against the cylinder; and a guard plate, consisting of an iron bar convex in form,  $1\frac{1}{4}$  inches in width, the length of the machine, attached at the ends by means of bolts passing through slots, so as to be adjustable, is placed in front of the line of contact between the cylinder and the first roller. At the time witness saw it the lower edge was set about an inch and a half above the table, and about the same distance from the aperture or line of contact, the oval side being towards the operator. When the mangle is in motion the cylinder revolves upward from the operator, and the rollers towards him. The fabrics are fed to the machine under the guard rail. Thence they come in contact with the cylinder, which carries them upward between the rollers, and are dried and ironed by the heat and pressure applied. This is, in substance, all the evidence introduced by the plaintiff. When she rested her case, defendant moved for a nonsuit, which was overruled, and such action of the court is assigned as error.

**Messrs. Dolph, Mallory, Simon, & Gearin**, for appellant:

Where the negligence of the plaintiff is the proximate cause of the injury there can be no recovery.

*Grant v. Baker*, 12 Or. 333, 7 Pac. 318; *Moakler v. Willamette Valley R. Co.* 18 Or. 102, 6 L. R. A. 656, 22 Pac. 948; *Haase v. Oregon R. & Nav. Co.* 19 Or. 363, 24 Pac. 238; *Pyle v. Clark*, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744; *Bunnell v. Rio Grande Western R. Co.* 13 Utah, 314, 44 Pac. 930; *Payne v. Chicago & A. R. Co.* 129 Mo. 405, 30 S. W. 148, 31 S. W. 888; *Guthrie v. Missouri P. R. Co.* 51 Neb. 746, 71 N. W. 723; *Beach*, *Contrib. Neg.* § 35, p. 45.

A servant assumes all the risks ordinarily incident to his employment, and also all additional or unusual risks which he may knowingly and voluntarily undertake, and all obvious risks.

*Brown v. Oregon Lumber Co.* 24 Or. 315, 33 Pac. 557; *Stone v. Oregon City Mfg. Co.* 4 Or. 52; *Gibson v. Oregon Short Line R. Co.* 23 Or. 493, 32 Pac. 295; *O'Hare v. Keeler*, 22 App. Div. 191, 48 N. Y. Supp. 376; *Norfolk Beet Sugar Co. v. Preuner*, 55 Neb. 53 L. R. A.

656, 75 N. W. 1097; *Collins v. Laconia Car Co.* 68 N. H. 196, 38 Atl. 1047; *Ruchinsky v. French*, 168 Mass. 68, 46 N. E. 417; *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 47 N. E. 506; *Omielowski v. Moltenhauer Sugar Ref. Co.* 11 App. Div. 111, 42 N. Y. Supp. 936; *Batterson v. Chicago & G. T. R. Co.* 53 Mich. 125, 18 N. W. 584; *Wormell v. Maine C. R. Co.* 79 Wis. 397, 10 Atl. 49; *Bailey, Master's Liability for Injuries to Servant*, p. 158; *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279, 72 N. W. 735; *Luebke v. Berlin Mach. Works*, 88 Wis. 442, 60 N. W. 711.

Upon the facts as shown by the record in this case appellant's motion for a nonsuit should have been allowed.

*Scott v. Oregon R. & Nav. Co.* 14 Or. 211, 13 Pac. 98; *McPherson v. Pacific Bridge Co.* 20 Or. 486, 26 Pac. 560; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Johnson v. Chesapeake & O. R. Co.* 36 W. Va. 73, 14 S. E. 432; *Nutt v. Southern P. Co.* 25 Or. 291, 35 Pac. 653; *Walsh v. Commercial Steam Laundry Co.* 11 Misc. 3, 31 N. Y. Supp. 833; *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469; *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 344; *Greef Bros. v. Brown*, 7 Kan. App. 394, 51 Pac. 926; *Lowcock v. Franklin Paper Co.* 169 Mass. 313, 47 N. E. 1000; *O'Connor v. Whittall*, 160 Mass. 563, 48 N. E. 844; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Hoyle v. Excelsior Steam Laundry Co.* 95 Ga. 34, 21 S. E. 1001; *Jones v. Roberts*, 57 Ill. App. 56; *Coffey v. Chapal*, 19 N. Y. S. R. 61, 2 N. Y. Supp. 648; *Berger v. St. Paul, M. & M. R. Co.* 39 Minn. 78, 38 N. W. 814; *Chandler v. Atlantic Coast Electric R. Co.* 61 N. J. L. 380, 39 Atl. 674; *Disano v. New England Steam Brick Co.* 20 R. I. 452, 40 Atl. 7; *Linton Coal & Min. Co. v. Persons*, 15 Ind. App. 69, 43 N. E. 651.

**Mr. Henry E. McGinn** for respondent.

**Wolverton, J.**, delivered the opinion of the court:

A servant is understood to assume the ordinary risks incident to the particular service in which he voluntarily engages, to the extent those risks are known to him at the time of his employment, or should be readily discernible to a person of his age and capacity in the exercise of ordinary care and prudence. Where the employment is obviously dangerous and hazardous, and conducted in a way fully known to the servant at the outset, he assumes the risk incident to the conduct in that way or manner, although a safer method was known or could have been adopted. *Shearm. & Redf. Neg.* 5th ed. § 185. Compensation is supposed to be adjusted with reference to the hazardous nature of the service, and the employment is entered upon with a view to the discharge of a particular duty; hence the risks incident are assumed by an implied stipulation under the employment. The same considerations, however, do not apply to risks which arise subsequent to the employment and during the course of the service. These the employee may avoid by quitting the serv-

ice. If he voluntarily continues, however, without complaint or objection, after knowledge or notice of their existence, under conditions by which he is chargeable with an appreciation of the danger, and where ordinary prudence would require of him a different course, he is held also to take upon himself the responsibility entailed by the risk he continues to incur; and this applies to perils engendered by defects in appliances due to the master's fault. *Shearm. & Redf. Neg. 5th ed. §§ 209, 209a.* The rule is clearly stated by Mr. Justice Devens in *Leary v. Boston & A. R. Co.* 139 Mass. 580, 584, 52 Am. Rep. 733, 2 N. E. 115, 116. He says: "The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." The rationale of this latter rule is not entirely settled, but the opinion, which appears to be adequate to the purpose, is that, where two negligent acts conduce to an injury, the responsibility attaches to the one that stands as the proximate or immediate cause. Thus, if a master culpably suffers defects in appliances to exist, that may be a contributory cause to an injury ensuing by reason of the use of such appliances; but if a servant, being cognizant of their defective character, voluntarily consents to continue in their use, his act is one of negligence, also, and, being the nearest, constitutes the proximate cause, which shifts the liability from the master, and the servant will not be heard to complain. In such a case he cannot hold the master responsible, although culpable, because his own negligence is the direct and immediate cause of the injury. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 29 N. E. 464. It will be observed in this connection (and for which the case just cited is authority) that one does not voluntarily assume a risk who merely knows that there is some danger, without at the same time appreciating the danger to which he is subjecting himself by accepting or continuing in the service, while, on the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. Sometimes the circumstances may show, as a matter of law, that the risk is understood and appreciated. At other times they may present a question of fact for the jury. It is always the duty of the master to provide his servant reasonably safe tools and appliances with which to work. If he fails in this, he may be charged with culpability, unless he is relieved by the act of the servant in accepting or continuing in the service, with adequate knowledge of defects and a due appreciation of the attending danger. Risks which are incident to the business must not be confounded with such as are denominated "obvious." The former sort comprises those which accom-

pany or arise from the natural or usual method of conducting the particular business, and has more special relation to perils which attend the business generally, while the latter includes such as are manifest to the sense of observation, open and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective or unsafe appliances. Now, it is urged that the risk to which plaintiff subjected herself was both an incident to the business and obvious. The authorities appear to be uniform and conclusive that, where a machine similar to the Wendell Annihilator in principle is operated without a guard plate, the operator assumes the risk; for in such case the method of operation is known, and the peril patent. *O'Connor v. Whittall*, 169 Mass. 563, 48 N. E. 844; *Hanson v. Hammell*, 107 Iowa, 171, 77 N. W. 839; *Greef Bros. v. Brown*, 7 Kan. App. 394, 51 Pac. 926; *Jones v. Roberts*, 57 Ill. App. 56; *Berger v. St. Paul, M. & M. R. Co.* 39 Minn. 78, 38 N. W. 814; *Hoyle v. Excelsior Steam Laundry Co.* 95 Ga. 34, 21 S. E. 1001; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286. In the case at bar there was a guard plate, which was evidently designed to lessen, if not to obviate, the danger incident to feeding fabrics within the aperture between the rollers, and, if properly adjusted, would, no doubt, have afforded some protection; and it was the duty of the master to see that it was properly adjusted. *Woods v. Long Island R. Co.* 11 App. Div. 16, 42 N. Y. Supp. 140. Indeed, the manager of the defendant realized as much, for he had forbidden the employees to regulate the machine in any form. The evidence of the plaintiff tends to show that the guard was set an inch and a half above the table, and an inch and a half in front of the aperture. She says her hand went under the guard without touching it, and that, if it had been properly adjusted, it would have skinned the whole back of her hand. If such was the adjustment, the guard was little protection, except as it may have served as a warning that there was danger behind it, for a woman's hand will readily pass within the space of an inch and a half as far as the plaintiff's was shown to have been drawn in. She further testified that in her estimation the guard was too high, and that, if it had been in any manner a protection, her hand would not have been caught; that she had worked at other mangles without the guard rail on, and did not realize the danger with this machine, because of this guard plate for protection. Thus the testimony presents the question as to whether the guard plate was properly adjusted. It is insisted, however, that, whether it was or not, the danger behind it was so apparent and obvious that the court should say, as a matter of law, that the plaintiff assumed the risk attending the service. If the guard plate was so adjusted as to give absolutely no protection at all, and this was at once apparent, the case would not be different from one where there was no attachment of the kind,

and the risk would be obvious. But, if the adjustment does in fact give some protection, a prudent person would be led to place more or less reliance upon its availability; and, the nearer perfect the adjustment, the less would be the danger in operating the machine. It may or may not remove the danger entirely. If it does, then implicit reliance may be placed upon it, and no one need apprehend any danger from the service. So, therefore, the danger becomes a matter of degree, depending upon the manner of the adjustment of the guard plate, which, being attached, the plaintiff affirms, she supposed was a protection, and therefore did not appreciate the real danger. Under these conditions, we cannot say, as a matter of law, that she assumed the risk by accepting or continuing in the service, and the question was properly left to the jury for their determination. True, the plaintiff operated the machine for an hour or so with the plate detached, but the manager directed it to be put back, saying it was too dangerous. The fact, however, was not calculated to warn her of the danger with the guard on. If it had any tendency, it was rather to lead her to believe that the guard would protect her, and thus cause her to pay less heed to the real danger. So we conclude the nonsuit was properly denied.

The next question in the case arises upon an instruction given to the jury as follows: "If in this case the plaintiff brought this injury upon herself by her own fault, there having been negligence on the part of this defendant or not, as the case may be, if it has been shown by a preponderance of the testimony that through some other acts of the defendant it failed to minimize it,—failed to lessen the effects of the injury, whereby the plaintiff sustained an additional injury than otherwise would have been incurred,—that would offer a claim for consideration, which should be regarded by the jury." This instruction is clearly erroneous, for the jury are thereby told that, even

if plaintiff was at fault and brought the mischief upon herself, she was nevertheless entitled to recover, if the defendant failed to do any other act that would minimize her injury. We presume this was given in view of the testimony adduced from which it is argued that the defendant's managers were not sufficiently acquainted with the technical mechanism of the mangle to be able to release the plaintiff's hand as quickly as they would if better informed in relation thereto, thus prolonging her suffering and adding to her injury. Proprietors and managers are not required to possess themselves of technical and exact knowledge of the detailed mechanism and workings of machinery, with a view to extricating persons from perils to which they may subject themselves through their own folly or negligence. So that it cannot be charged against the defendant that it was guilty of negligence in not having a person possessed of such knowledge convenient when the peril arose, so as to extricate the plaintiff from her dilemma. It is unusual to anticipate accident, and to provide for the most speedy relief when such an exigency arises. There is no intimation, either by the evidence or the argument of counsel, that the defendant's managers willfully or wantonly prolonged the sufferings of the plaintiff, while it must be conceded that they did all they could, with their knowledge of the machinery, to extricate the plaintiff as quickly as possible. We do not desire to be understood as intimating that they did not possess adequate knowledge to have relieved her in the most speedy manner possible, under the attending circumstances of the accident; but it seems plain that they did all they could, and hence are not chargeable with negligence in prolonging her suffering and thereby adding to her injury.

For this error the judgment will be reversed, and the cause remanded for a new trial.

## OHIO SUPREME COURT.

### UNION CENTRAL LIFE INSURANCE COMPANY, *Plff. in Err.*,

*v.*

Jonathan V. HILLIARD, Admr., etc., of  
John Strawn, Deceased.

(63 Ohio St. 478.)

\*1. A policy of life insurance issued on the life of a minor, payable to him if living at maturity, and to his executors, ad-

\*Headnotes by the Court.

NOTE.—Validity of life insurance to secure debt to insurer.

I. In general.

II. Usurious transactions.

I. In general.

Ordinarily where the validity of life insurance to secure a debt to the insurer has been 53 L. R. A.

ministrators, or assigns in case of death before maturity, is not absolutely void; nor are notes given by him for premiums void, although the insured has power to elect to avoid both on arriving at majority; nor is his written assignment of such policy during minority necessarily void.

2. The obligation on the part of the company to pay the amount of the policy on the happening of the event contemplated furnishes a sufficient consideration to support the promise to pay premiums, whether such promise is made by the insured alone or by another jointly with him. And

questioned it has been on the ground of usury. This defense does not seem, however, to have been set up in United Security Life Ins. & T. Co. v. Ritchey, 187 Pa. 173, 40 Atl. 978, which, although not in form an insurance to secure a loan, had the effect of such a transaction. In this case the insurance company gave the insured the full amount of insurance at the time the contract was entered into, instead of after

such insurance contract is not invalid as a wagering contract, though it is induced by one who has no insurable interest in the life of the insured, and who joins in a promise, evidenced by promissory notes, to pay premiums.

2. Where an applicant for a loan of money from a life insurance company obtains the same upon a lawful rate of interest, giving a real-estate mortgage as security, and also procures the issue by the company of an insurance policy to one in whose life he has no insurable interest, and its assignment to the company as collateral security upon the loan, and signs premium notes with the insured in order to give value to the policy as collateral, such policy being upon the usual terms and conditions, the premiums paid and agreed to be paid thereon will not be regarded as additional interest for the loan, and usurious.

(*Minshall, J., dissents.*)

(December 18, 1900.)

payment of the insurance premiums in full, taking back a mortgage as security, from which mortgage the insured was to be discharged upon his death before the maturity of the policy, which by its terms was to mature in fifteen years, during which time monthly premiums were to be paid, the policy in other respects being similar to an ordinary endowment policy, and the company having the option, on a failure to pay any premium, of either collecting the premiums as they should fall due, or of demanding repayment of the amount of insurance advanced. The court held that the contract was not unfair or unconscionable, and that, while possibly offering a temptation to the needy or adventurous in the possession of ready money, it was valid.

## II. Usurious transactions.

All the cases agree that if the requirement that the borrower shall take out a life-insurance policy is intended as a shift or device to cover usury the transaction will be illegal. In determining, however, whether such is the intent there is a conflict of opinion. The courts of New York, New Jersey, and Ohio hold that the mere fact that such a requirement is made does not render the transaction usurious, while the Federal courts and those of North Carolina hold that such a requirement makes the transaction usurious *per se*; and those of Minnesota hold the transaction usurious where the lender has the life of the borrower insured for a less amount than is charged by it for guaranteeing his life during the continuance of the loan. The greater number of cases seem to hold such a transaction illegal regardless of the rate of premium charged.

Thus, *Washington L. Ins. Co. v. Paterson Silk Mfg. Co.* 25 N. J. Eq. 160, holds that the fact that the borrower is required, as a condition of obtaining the loan, to take out a policy on his life with the lender, the latter retaining the amount of the premium, is not evidence of a usurious transaction, where it is taken out at the usual rate, and it does not appear in any other way that it was designed as a cover for unlawful interest.

And the transaction is not illegal where one borrowing from a life insurance company is required, as a condition of obtaining the loan, to take out a policy, the first premium of which is deducted from the loan, where the rate of premium charged is the same, or very nearly the same, as is usually charged for the kind of policy taken, and it does not otherwise appear

**E**RROR to the Circuit Court for Licking County to review a judgment affirming a judgment of the Court of Common Pleas, which in turn affirmed a judgment of the Probate Court disallowing a portion of the claim of the Union Central Life Insurance Company upon the assets of the estate of John Strawn, deceased, in a proceeding to sell real estate to pay debts. *Reversed.*

Statement by *Spear, J.:*

The plaintiff in error, the Union Central Life Insurance Company, is a corporation organized under the laws of Ohio, having its principal place of business at Cincinnati. The defendant in error, J. V. Hilliard, is the administrator of the estate of John Strawn, deceased, and the other defendants in error are the heirs at law of said Strawn. The action below was a proceeding in the probate court of Licking by the administrator to sell the lands of John Strawn, deceased,

to have been a cloak for usury. *Homeopathic Mut. L. Ins. Co. v. Crane*, 25 N. J. Eq. 418, Affirmed in 27 N. J. Eq. 484. In this case there was some evidence, but not sufficient in the opinion of the court, to warrant the conclusion that it was understood and agreed that the policy should not be continued after the payment of the first premium, the court seeming to hold the opinion that such an agreement would have rendered the transaction usurious.

And in *Washington L. Ins. Co. v. Lane*, 46 N. J. Eq. 317, 19 Atl. 618, Affirming 46 N. J. Eq. 316, 19 Atl. 617, the borrower claimed that the person with whom she dealt, and who charged a bonus of \$400 for securing a loan of \$8,000, required, as a condition of making the loan, that the borrower should take out a life-insurance policy in the company making the loan, and that the contract was therefore usurious. The court held that the defense was not made out, as it was not proved that the company made the taking out of a policy a condition of the loan, or that it had any interest in, or knowledge of, the bonus charged. The advisory master also stated that under the decisions in the two preceding cases, with which he stated that he did not disagree, the transaction would not have been usurious, even if the taking out of the policy had been made a condition of granting the loan.

And *John Hancock Mut. L. Ins. Co. v. Nichols*, 55 How. Pr. 393, holds that a life insurance company may, as a condition of granting a loan, require the insured to take out a policy with it, stating that the company must invest its surplus funds, and that to confine its loans to its own patrons is no more than fair reciprocity, and that, while there might be cases where the issuing of policies of life insurance was resorted to as a mere shift or device to cover up a usurious transaction, such was not the case here.

And in *Union Cent. L. Ins. Co. v. Morrow*, 18 Ohio C. C. 351, Affirmed without opinion in 61 Ohio St. 661, 57 N. E. 1133, the borrower was required to take out a ten-payment policy of \$2,500 as a condition of obtaining a loan of \$1,000 payable in five years, and to give a note and mortgage for \$1,564.88, the \$564.88 being for premiums on the policy. The court held that the question of usury was not properly before it, as it had not been pleaded, but did consider the question, and held that, although the loan and the insurance constituted one transaction in a certain sense, yet, as the company would have been liable on the policy if the insured had died immediately after the policy was

in that county, to pay debts; the petition also declaring upon a certain mortgage given by the deceased in his lifetime to Hilliard individually, and making the life insurance company, mortgagee, and the heirs at law of the deceased, parties defendant. In its answer and cross petition the company set up and asked to recover upon a note for \$10,500, and others not in controversy here, signed by said John Strawn, less certain payments credited, and to foreclose a mortgage on the premises described in the petition given by Strawn to secure the same; also upon two notes for \$532 each, signed by one Edward L. Roberts and John Strawn, being two of a series of four notes for like amount, and to foreclose a mortgage on the same premises, given by Strawn to secure the last-mentioned notes. Issue was taken by the administrator and by the heirs contesting wholly the last-mentioned claim of the company, and insisting that its recovery should be confined to the sum of \$12,500 and some interest, less divers payments alleged to have been received by the com-

pany, particularly stated in their answer. Trial in the probate court resulted in a judgment and decree substantially as claimed by the administrator and heirs, from which the company appealed to the common pleas. In the latter court a separate finding of facts and law was had, and a judgment and decree of similar legal effect to that of the probate court was rendered, from which error was prosecuted by the company to the circuit court, where the judgment was affirmed, and the company brings error here. Additional facts will be stated in the opinion.

**Messrs. Charles Follett and Maxwell & Ramsey**, for plaintiff in error:

The insurance company might lawfully require the borrower to take out insurance upon his own life and for his own benefit, as a condition of loaning money to him, and such a transaction would not be usurious, although the full legal rate of interest was charged for the loan.

*Union Cent. L. Ins. Co. v. Morrow*, 16 Ohio C. C. 351, 61 Ohio St. 661, 57 N. E.

issued, the subject-matter of the contract was divisible, and the transaction was not usurious. The court below said in 7 Ohio Dec. 118, that the transaction was usurious, but that it was not available to the borrower, as usury had not been pleaded.

And in *UNION CENT. L. INS. CO. v. HILLIARD* the borrower, who was too old to take out insurance on his own life, took out with the lender, as a condition of obtaining the loan, an insurance on the life of his grandson to whom it was made payable, the borrower signing the premium notes with the grandson, and the policy being assigned to the company as security in addition to a real-estate mortgage given, the legal rate of interest being charged. The court held that, as the policy was not an unusual one, and the customary rates of premiums and terms were imposed, the requirement that the policy should be taken out in addition to the charge of legal interest did not make the transaction usurious, even if the borrower was considered as not having an insurable interest in the grandson's life. In the court below, 16 Ohio C. C. 434, the opinion being written by Smyser, J., the same judge who wrote the opinion in *Union Cent. L. Ins. Co. v. Morrow*, 16 Ohio C. C. 351, *supra*, the transaction was held to be usurious on the ground that neither the borrower nor the insurance company had an insurable interest in the grandson's life, and therefore the insurance company was in effect obtaining the amounts of the premiums paid in excess of the legal rate of interest.

In *Craig v. McMullin*, 9 Dana, 311, a loan was made to enable a slave, who had obtained his freedom, to purchase his son, who was still a slave, the lender taking a bill of sale of the son as security, and it was agreed that, on redeeming the son from the borrower, a reasonable allowance not exceeding 10 per cent per annum on the amount of the loan should be made for the risk of the son's death during the period before redemption. The court held that the contract for the stipulated amount for the insurance of the son's life was not usurious, and that it must be paid as a condition of redemption.

On the other hand, several cases hold that a requirement that the borrower shall take out with the lender an insurance on his life renders the transaction usurious *per se*.

Thus, where a corporation organized to loan 53 L. R. A.

money and insure lives requires, as a condition of granting a loan on which the highest legal rate of interest is charged, that the borrower shall take out with it a policy on his own life or that of another person, and keep the premiums paid up, and that a failure to keep the premiums paid shall make the loan payable immediately, the transaction is illegal, the insurance contract being a cover for usury. *Missouri Valley L. Ins. Co. v. Kittle*, 1 McCrary, 234, 2 Fed. 113.

And *National L. Ins. Co. v. Harvey*, 2 McCrary, 576, 7 Fed. 805, following the preceding case, holds that where the maximum rate of interest is charged and taken and the payment of the insurance premium is required in advance, and the taking out of the policy is made a condition precedent to, and a further consideration for, the loan, the transaction is usurious, although the premiums charged are not unreasonable.

And *Clague v. Their Creditors*, 2 La. 114, 20 Am. Dec. 300, holds that an exchange of notes bearing 6 per cent interest only is usurious, where one party, as a condition of making the exchange, requires the other to insure certain lives with the former, although at the usual rate of premiums charged, and send their crops to it for sale, under the New York statute, which the court states was intended to prevent the taking of more than legal interest by any device which the wit of man might invent.

It would seem that the Louisiana court in the preceding case was mistaken as to what the courts of New York would hold in such a case, from the decision in *John Hancock Mut. L. Ins. Co. v. Nichols*, 55 How. Pr. 393, *supra*, and also from the decisions in *New York F. Ins. Co. v. Donaldson*, 8 Edw. Ch. 199, and *Utica Ins. Co. v. Cadwell*, 3 Wend. 296, which hold that a loan from a fire insurance company is not usurious because the borrower is required, as a condition of obtaining the loan, to keep the mortgaged premises insured with the lender at the usual rate of premium.

Where an insurance company requires the borrower to pay interest at the highest legal rate, and at the same time take out and assign to the company an endowment policy, the monthly payments on which during the endowment period more than equal the amount of the loan, the transaction is usurious under Va. Code, §§ 2817, 2818, making all contracts and

1133; *Washington L. Ins. Co. v. Paterson Silk Mfg. Co.* 25 N. J. Eq. 160; *Grosvenor v. Flax & Hemp Mfg. Co.* 2 N. J. Eq. 453; *Griffin v. New Jersey Oil Co.* 11 N. J. Eq. 50; *Utica Ins. Co. v. Caducell*, 3 Wend. 295; *New York F. Ins. Co. v. Donaldson*, 3 Edw. Ch. 199.

In all these cases, where there is no statute to the contrary, the general rule of courts of equity, that he who seeks equity must do equity, applies.

Tyler, Usury, 439.

Yet the plaintiff makes no tender back of the policy, and no attempt to have it canceled by decree.

Nonpayment of the premium notes did not forfeit the policy. They gave the insurer the option of declaring a forfeiture. This requires an overt act, brought home to the insured.

*Mutual L. Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443.

*Messrs. J. V. Hilliard, John M.*

assurances for the loan or forbearance of money or other thing at more than 6 per cent interest illegal. *Brower v. Life Ins. Co.* 86 Fed. 748. The court in this case held that by the transaction the borrower was simply given an easy and convenient way of depositing with the lender his instalments for the payment of his debt, and that he had no contingent interest, even if he should die before the debt matured.

And where the borrower is required, as a condition of obtaining a loan on which the highest legal rate of interest is charged, to take out with, and assign to, the lender an endowment policy on which the latter has the chance of making \$300 if the borrower lives through the endowment period, the transaction is usurious under the rule making any contract usurious if there is an intent to get more than the lawful rate of interest. *Miller v. Life Ins. Co.* 118 N. C. 612, 24 S. E. 484. In this case the court makes the statement that in its investigation of the question it has found no case or other authority that does not sustain the principle that a usurious transaction is one in which it is intentionally provided that a party may take more than the lawful rate of interest for the loan of money, but that cases have been found which differ as to the application of such principle; and that while a few cases, including *Washington L. Ins. Co. v. Paterson Silk Mfg. Co.* 25 N. J. Eq. 160, *supra*, and *Homeopathic Mut. L. Ins. Co. v. Crane*, 25 N. J. Eq. 418, *supra*, hold that it is not usurious *per se* for a life insurance company to require a would-be borrower to take out a policy of insurance as a condition precedent to the loan, none of them decide that the transaction would not be usurious if so intended, and that the great weight of authorities is to the effect that it is usurious *per se*.

And *Carter v. Life Ins. Co.* 122 N. C. 388, 30 S. E. 341, holds a similar transaction to be usurious, approving the preceding case of *Miller v. Life Ins. Co.* 118 N. C. 612, 24 S. E. 484, without further discussion of the matter.

And in *Moon v. Union Mut. L. Ins. Co.* as explained in a letter by complainant's solicitor in 3 Cent. L. J. 345, a borrower of \$20,000 was required to take out insurance for \$76,000 on the lives of himself and two brothers, \$1,451, being deducted from the loan as premiums, \$1,440 as interest in advance, \$500 for services rendered in the case and \$600 as commissions to the company's agent, the highest legal rate of interest being charged. The court, *Dillon*, United 53 L. R. A.

*Swartz, and Kibler & Kibler*, for defendant in error:

The case at bar is to be distinguished from a case in which an insured insures his own life for the benefit of another, because the law is that any person may insure his own life for the benefit of another.

*Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *American Life & Health Ins. Co. v. Robertshaw*, 26 Pa. 189; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Etna L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Tucker v. Mutual Ben. L. Co.* 50 Hun, 50, 4 N. Y. Supp. 505; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380.

And even a stranger.

*Johnson v. Van Epps*, 110 Ill. 551; *Hearing's Succession*, 26 La. Ann. 326; *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. 272; *Valton v. National Fund L. Assur. Co.* 20 N. Y. 32.

The fact that John Strawn agreed to pay

States Circuit Judge, held that the transaction was illegal mainly because the borrower was required to take out such a large insurance, and also because of the commissions paid to the insurance agent. Only an interlocutory decree had been rendered when the letter was written, and the case does not seem to have ever been officially reported.

And where the lender reinsures the life of the borrower for less than it charges for guaranteeing to cancel the debt in case of his death, the transaction is usurious.

Thus, in *Missouri, K. & T. Trust Co. v. Krumseig*, 23 C. C. A. 1, 40 U. S. App. 620, 77 Fed. 32, affirming 71 Fed. 350, a borrower of \$2,000 was required to pay \$3,600 in monthly instalments of \$30 each during a period of ten years, the contract stating that such amount was intended to cover the principal sum loaned, interest and cost of guaranty to cancel debt in case of death. It was agreed that the debt should be canceled on the death of the borrower at any time before the maturity of the debt if all instalments had been paid. The lender had an agreement with an insurance company by which the lives of its debtors were insured therein, and after deducting the premiums required to keep such insurance in force the lender would, under the contract, receive back nearly \$500 in excess of the highest legal rate of interest. The court held that the transaction was a mere cover for usury, and on appeal to the Supreme Court the judgment was affirmed in 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179.

In *Missouri, K. & T. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N. W. 560, the court held that a similar transaction was a cover for usury, saying: "We had supposed that in the course of our professional and judicial experience we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws, or the usury laws, or both, of this state."

And in *Mathews v. Missouri, K. & T. Trust Co.* 69 Minn. 318, 72 N. W. 121, the transaction was held to be identical with that in the preceding case, and governed by it.

J. H. H.

the premiums does not add anything to the validity of the transaction.

*Etna L. Ins. Co. v. France*, 94 U. S. 561, 24 L. ed. 287; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529.

The insured must have an interest in the subject-matter of the insurance. A policy of insurance obtained upon a subject in which the insured has no interest is void, whether or not it is so stipulated therein. The notes given for the premiums upon such insurance are void for want of consideration.

*Bersch v. Sinnissippi Ins. Co.* 28 Ind. 64; *Fowler v. New York Indemnity Ins. Co.* 26 N. Y. 422; *Peabody v. Washington County Mut. Ins. Co.* 20 Barb. 339; *Freeman v. Fulton F. Ins. Co.* 38 Barb. 247; *Tallman v. Atlantic Fire & Marine Ins. Co.* 29 How. Pr. 71; *Saucyer v. Mayhew*, 51 Me. 398; *Sweeney v. Franklin F. Ins. Co.* 20 Pa. 337; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Mowry v. Home L. Ins. Co.* 9 R. I. 346.

In life insurance, as in other kind of insurance, the assured must have an interest in the life insured; and where insurance is effected by one person on the life of another the assured must show himself to have possessed an interest in the life of that other at the time the insurance was effected.

*Bevin v. Connecticut Mut. L. Ins. Co.* 23 Conn. 244; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 36, 22 Am. Rep. 180; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576.

And substantial pecuniary interest is sufficient.

*Hoyt v. New York L. Ins. Co.* 3 Bosw. 440. The insurable interest of a father in the life of his child is sustained only on the ground that the father is entitled to the services of the child.

*Mitchell v. Union L. Ins. Co.* 45 Me. 104, 71 Am. Dec. 529.

The relation of nephew and uncle does not constitute an insurable interest to enable either to insure the life of the other.

*Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321.

The insurable interest in the life of another arises from the relations of the party taking the insurance to the insured, so that from the relations thus established there may be some expectancy of advantage or benefit from the continuance of the insured's life.

*Keystone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 8 Atl. 638; *Price v. Supreme Lodge K. of H.* 68 Tex. 361, 4 S. W. 633; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518; *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. Rep. 949; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213.

Where a third party without any insurable interest in the life of another procures a policy of insurance on the life of such person, either by having a policy issued directly to himself, or by having the person whose life is insured take out a policy to himself 53 L. R. A.

and then assign it, the transaction is a mere speculation on the life of another, and, as such, contrary to public policy and void.

*Lamont v. Grand Lodge I. L. of H.* 31 Fed. 180; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Seigrist v. Schmoltz*, 113 Pa. 326, 6 Atl. 47; *Downey v. Hoffer*, 16 W. N. C. 185.

A policy of insurance on the life of another, taken by one who has insurable interest in it, for the purpose of assigning it to a third person who has no such insurable interest in it, is void as a wagering policy in the hands of the assignee.

*Keystone Mut. Ben. Asso. v. Morris*, 115 Pa. 446, 8 Atl. 638.

The law forbids, from considerations of public policy, any person to insure the life of another unless he has some interest in the life of such person.

1 Bacon, Ben. Soc. § 248; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Loomis v. Eagle Life & Health Ins. Co.* 6 Gray, 398; *Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 927; *Tate v. Commercial Bldg. Asso.* 97 Va. 74, 45 L. R. A. 243, 33 S. E. 382.

The notes of John Strawn are void for the want of any consideration, and because of the want of authority in the company under the statutes of Ohio to make this contract.

Where, as a condition of making a loan, the borrower is required to take policies of life insurance from the lender, and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, it is generally held that the profit thus derived by the lender is equivalent to additional interest, and therefore usurious.

*Missouri Valley L. Ins. Co. v. Kittle*, 1 McCrary, 234, 2 Fed. 113; *National L. Ins. Co. v. Harvey*, 2 McCrary, 576, 7 Fed. 805; *Clague v. Their Creditors*, 2 La. 114, 20 Am. Dec. 300.

Where a transaction, whatever its form, is in fact a usurious lending of money, the transaction is a usurious one, and will be dealt with as such by the court.

*Smith v. Cross*, 90 N. Y. 549.

On the question of usury it is the intention of the parties which determines the nature of the transaction.

*Tyson v. Rickard*, 3 Harr. & J. 109, 5 Am. Dec. 424; *Sylvester v. Swan*, 5 Allen, 134, 81 Am. Dec. 734; *Maine Bank v. Butts*, 9 Mass. 49; *Kilgore v. Dempsey*, 25 Ohio St. 413, 18 Am. Rep. 306; *Earnest v. Hoskins*, 100 Pa. 551; *Austin v. Walker*, 45 Iowa, 527.

An agreement to take an insurance policy and pay the premiums thereon, and, in addition, to pay the highest legal rate of interest on the money lent on such policy, is usurious.

*Missouri Valley L. Ins. Co. v. Kittle*, 1 McCrary, 234, 2 Fed. 113; *National L. Ins. Co. v. Harvey*, 2 McCrary, 576, 7 Fed. 805.

**Spear, J.**, delivered the opinion of the court:

The contention here relates wholly to the legal effect of the transaction involving the giving of the notes last referred to in the



foregoing statement. The first claim of the company was upon notes and mortgage given for a loan of money to John Strawn, and the other upon notes and mortgage given to secure a sum advanced by the company to enable the deceased to pay premiums upon a policy of life insurance issued by the company on the life of one Edward L. Roberts, and by him assigned to the company as collateral security for the loan made to Strawn. It was claimed by the administrator and heirs, and found by the common pleas and circuit courts, that the loan of money and the issuing of the policy were parts of one and the same transaction, and were a mere device on the part of the company for securing upon the loan a larger rate of interest than the legal rate; that the transaction was usurious, and that the company was entitled only to the face of the loan, with interest at 6 per cent, less certain payments which they claimed had been made. Pertinent facts necessary to an understanding of the questions presented follow.

April 30, 1889, John Strawn applied to the Union Central Life Insurance Company for a loan of \$12,500 for five years, with interest at 7 per cent, payable annually, tendering as security a mortgage upon 244 acres of land, being part of the land involved in this suit. The company declined to loan the amount on the security alone of the land, but would do so if added thereto there were given the additional security of a life insurance policy. Thereupon, May 30, 1889, Strawn executed and delivered to the company five principal notes for the loan; one for \$10,500, due in five years, and four for \$500 each, due in one, two, three, and four years, with interest coupons attached to each for annual interest, and a mortgage to secure the same on the land referred to. Also another mortgage on the same land to secure the payment of four premium notes of \$532 each, due in one, two, three, and four years, and to bear interest at 8 per cent after maturity; the notes being executed by Edward L. Roberts and John Strawn, and given for the payment of annual premiums on the policy of insurance issued by the company on the life of Roberts. The policy was a ten-year annual life rate endowment policy, which required all payments to be paid up in ten years. In order to give the policy value as collateral, the premium for five years was paid in advance; that is, five annual premiums at the regular rate were properly discounted, and thus paid at the inception of the policy. This payment was made by the advance of the amount by the company and evidenced by the notes of the insured (Roberts) and John Strawn, secured by mortgage by Strawn, as stated above, the notes being treated by the company, as between it and the insured, as cash. The policy was then assigned by Roberts to the company as collateral to the mortgage given to secure the larger loan. Roberts was a minor, eighteen years of age, a grandson of Strawn; and the trial court found Strawn had an insurable interest in the life of Roberts solely from the fact that

Roberts was his grandson, no other relation existing between them giving such interest. It further found that the policy is not a wagering policy, and for that reason not illegal, void, or without consideration. Strawn himself was not an insurable subject on account of his advanced age, and hence the requirement that the policy be upon the life of another, and that Strawn should secure the payment of the premiums. The grandson was without means, and unable to pay them. The policy was made payable to the insured, if living at maturity, and in case of death prior to maturity to his executors, administrators, or assigns. It acknowledged receipt of \$532, the first premium, and the four notes of like amount, payable in one, two, three, and four years, secured by mortgage, and containing a provision that failure to pay any one of the notes at maturity would give the company the right, at its election, to avoid the policy; but it does not appear that the company had exercised that right. It was the habit of the company to require the assignment as collateral security of policies in the manner above mentioned, although there was no written rule to that effect. The court found that the mortgage was ample security at the time the loan was taken, independent of the assignment of the policy. Many facts are found by the trial court, but the foregoing statement is believed to embrace all that are necessary to an understanding of the points decided.

No substantial claim of fraud, or deceit, or circumvention practised by either party, is made; nor is it seriously claimed that the transaction was misunderstood by the parties, either as to its terms or legal effect. The issues are issues of cold law. Three grounds are stated and argued by counsel for defendants in error as supporting the conclusion of the courts below that the transaction is void, and not enforceable against the administrator of John Strawn, viz.: (1) Because of the minority of Edward L. Roberts, and his inability to make a valid contract for insurance, or to assign the same; (2) that the insurance was void because John Strawn had no insurable interest in the life of Edward L. Roberts, and the same was therefore a wagering policy; (3) because the whole transaction connecting the life insurance feature with the loan was a mere shift and device to compass usury, and was therefore illegal.

As to the first proposition it is sufficient to say that a contract by a minor is voidable only, and that at his election. The other contracting party cannot avail himself of the lack of power on the part of the minor to conclusively bind himself as a reason for refusing performance on his part. Hence the contract cannot be said to be absolutely void. In the present case the record does not show that the insured has elected to avoid the contract, although it does show that he has long since reached his majority. Nor is he a party in the case, and his rights in the matter, whatever they may be, cannot be adjudicated here.

Respecting the second proposition, it is apparent that the question of insurable interest on the part of John Strawn in the life of Roberts is not involved in the inquiry. It is true that the grandfather procured the making of the contract of insurance, but the policy was made payable to the grandson (the insured), and, in case of his decease before maturity, to his executors, administrators, or assigns. So that, in legal intentment, it was a contract wholly between the company and the insured. The courts below held that the contract was not a wagering contract, and in this we agree with them.

The third proposition is of more gravity. It raises the question whether an insurance company, in the making of a loan of its surplus funds, can lawfully require of the borrower that a life policy be taken from that company, and assigned to it as collateral security for the proposed loan. It would seem that the matter of the amount of the security otherwise tendered cannot have weight, for the parties are at full liberty to agree upon the amount of security to be taken, as they are to make any other contract not inhibited by law; and a contract otherwise legal is not to be invalidated because a court may be of opinion that more security has been exacted than was necessary. Had the policy been taken out in some other company, and assigned as collateral, no one would have thought of interposing the claim of usury. The objection must rest, if well founded, upon some fact other than the quantum of security. Put in other words, the question is: May a loaner of money at the time of agreeing upon the loan also agree with the borrower for the execution between them of another contract, by which a part of the money loaned is to be paid to the lender as consideration for the lender's promise to pay a larger sum on a future contingency (a contract fair in itself and lawful), without tainting the loan transaction with usury? Authorities which seem to hold the negative of this proposition are adduced, and, regarded in the light of principle, the writer might have difficulty in reaching a satisfactory conclusion. But the question seems not to be an open one in this court. In the case of the same plaintiff in error against *Morrow*, reported in 16 Ohio C. C. 351, it is held by the circuit court that, "where a life insurance company requires of an applicant for a loan at the same time to take out an insurance policy on his life on the usual terms and conditions, such insurance and the premiums paid thereon will not be considered as compensation in addition to legal interest for the loan, and usurious;" and a recovery was had. On error by *Morrow* to this court the judgment was affirmed. 61 Ohio St. 661, 57 N. E. 1133. It is suggested that in that case usury was not distinctly pleaded. Whether so or not, the facts were pleaded, and the record sufficiently disclosed facts warranting a holding against the company had the court been of opinion that an insurance contract of the character indicated could not be made by the

parties without tainting the loan with usury. But it is insisted that the *Morrow Case* is not authority in this case because the insurance contract was different in that in the *Morrow Case* the insurance was effected on the life of the borrower himself, while here it was issued upon the life of another in whose life the borrower had no insurable interest. Assuming, without holding, that the borrower was without insurable interest in the life of the insured, does it follow that the contract of Strawn with respect to the payment of the premium notes was invalid? We confess our inability to see that it does. If the policy had been made payable to Strawn, the point would be well taken; but, being payable to the insured, and not to Strawn, the rule as to insurable interest is not pertinent. If, then, the insurance contract and Strawn's notes for premiums are not invalid on that score, and if, as we have found, the requiring of a life policy by the company is not to be regarded as compensation in addition to legal interest for the loan, and so usurious, what is left here but an inquiry as to consideration? Applying the familiar rule that one may lawfully contract with another for the benefit of a third, it would hardly be doubted that the grandfather might pay premiums on a life policy for the grandson, and present him with the policy. Why not? If the purchase were a horse, or a farm, would anyone doubt the legality of it? And if he might buy outright and pay, why might he not buy on credit? Could he, in a suit by the vendor of a horse so purchased, or of a farm, be heard to say that he had no interest in the beneficiary, and hence his obligation had no validity? The consideration moving from the company was its agreement to pay the policy at maturity, or at death if sooner; and the payment of the first five premiums by the grandfather for the benefit of the grandson constituted a sufficient consideration to support his pledge of the policy for the benefit of the grandfather, at least to the extent of premiums paid, and entirely good until he should elect to avoid the transaction. Decisions are not lacking, and many are cited, to the effect that, where the borrower is induced to make with the lender some unusual and unfair additional contract,—as to buy a piece of land from the lender at an exorbitant price, or give a note to secure a loan of gold at a higher rate than the market value in addition to legal interest,—the contract will be held usurious. But it does not appear that the insurance contract in this case was unusual, or that the rate charged or the terms imposed were other than those which were customary.

It is further urged that the whole contract is unconscionable, and its execution would result in great hardship. The former claim, we suppose, must stand on the question whether or not it is illegal. As to the latter claim, it does appear to work a hardship as it has turned out. But, had the young man died soon after the issuing of the policy, or during the time for which the premiums had been paid, the apparent hardship

would have been on the other party. It was held by a fast bargain, and would have been compelled to pay, for no court would have listened to a defense by the company, had such been interposed, based on the ground here urged by defendants in error, *viz.*, the inability of the minor to make a binding contract. In case of default by Strawn in the payment of his loan the company would have been required to first exhaust the mortgage security, and, only in the event that that proved insufficient, could it have resorted to the proceeds of the policy. The balance would have belonged to the insured's legal representatives, subject, possibly, to advances on account of premiums. In this view the question of insurable interest on

the part of the grandfather becomes immaterial, and the complaint of wagering contract untenable.

Viewing the case as presenting a legal claim on the part of the company, and following the former decision with respect to the main point of contention, we are led to the conclusion that the judgments below should be reversed, and the cause remanded to the court of common pleas, with direction to enter judgment upon its previous finding of facts and in conformity with this opinion.

*Reversed.*

**Minshall, J., dissents.**

### PENNSYLVANIA SUPREME COURT.

Thomas DUTTON and Wife

*v.*

Borough of LANSDOWNE, Impleaded, etc.,  
*Appt.*

(198 Pa. 563.)

**The municipality and the abutting property owner cannot be sued jointly to recover damages for injuries caused by a defective sidewalk.**

(March 18, 1901.)

**A** PPEAL by the defendant borough from a judgment of the Superior Court affirming a judgment of the Court of Common Pleas for Delaware County in favor of plaintiffs in an action brought to recover damages for personal injuries caused by a fall on a sidewalk which was alleged to have been negligently permitted to be out of repair.  
*Reversed.*

The facts are stated in the opinion.

**Mr. Lewis Lawrence Smith**, for appellant:

The plaintiffs joined, in one action, both the borough and the property owner, who was liable over to the borough under the general law.

*Mintzer v. Greenough*, 192 Pa. 137, 43 Atl. 465.

This was a misjoinder.

*Brookville v. Arthurs*, 130 Pa. 515, 18 Atl. 1076; *Lohr v. Philippsburg*, 156 Pa. 246, 27 Atl. 133, 165 Pa. 109, 30 Atl. 822; *Duncan v. Philadelphia*, 173 Pa. 550, 34 Atl. 235; *Pittsburg use of Flanagan v. Fay*, 8 Pa. Super. Ct. 275; *Pittsburg use of Flanagan v. Daly*, 5 Pa. Super. Ct. 532.

In view of the difference between the liability of the borough and the property owner, no joint judgment could be sustained against both. Where there are several trespasses, or a single trespass, in which the de-

fendants have not joined, concerted, or concurred, there can be no joint recovery.

*Bard v. Yohn*, 26 Pa. 482; *Klauder v. McGrath*, 35 Pa. 128, 78 Am. Dec. 329; *Leidig v. Bucher*, 74 Pa. 65; *Collins v. Cronin*, 117 Pa. 35, 11 Atl. 869; *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970.

The liability of the city depends on a state of facts not affecting its codefendants, and the converse.

*Trotbridge v. Forepaugh*, 14 Minn. 133, Gil. 100.

In *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209, and *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970, cases involving the liability of several mine owners for a common injury resulting from several trespasses due to a negligent disposal of the washings from their several mines, the law is said to be that, "without concert of action, no joint suit could be brought against the owners of all the collieries."

**Mr. V. Gilpin Robinson**, for appellees:

Where a property owner after notice, actual or constructive, and a borough after notice, either actual or constructive, permit a highway to be in a defective condition, there is such concert of action as, under the authorities, renders them liable in a joint action.

*Peoria v. Simpson*, 110 Ill. 300, 51 Am. Rep. 683; *Weakly v. Royer*, 3 Watts, 460; *Leidig v. Bucher*, 74 Pa. 65; *Chambers v. Lapsley*, 7 Pa. 24; *Klauder v. McGrath*, 35 Pa. 129, 78 Am. Dec. 329; *Laverty v. Vandersdale*, 65 Pa. 507; *Collins v. Cronin*, 117 Pa. 35, 11 Atl. 869; *Boyd v. Insurance Patrol*, 113 Pa. 269, 6 Atl. 536.

The question of misjoinder does not properly enter into this case. The borough had actual notice of the defective condition of the board walk, and undertook to repair it. Its failure to do this thoroughly resulted in the injury to the plaintiff which is the basis of the action. It was therefore proper to hold the borough alone responsible.

In an action for tort, where more than one are joined, failure to prove that all are guilty

**NOTE.**—For a case in this series as to the right to join lotowner and city in action to recover assessment paid by mistake, see *Langevin v. St. Paul* (Minn.) 15 L. R. A. 766.  
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ty does not defeat the action; a verdict may be taken against one of the defendants.

*Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 147, 98 Am. Dec. 209; *Leidig v. Bucher*, 74 Pa. 65; *Laverty v. Vanarsdale*, 65 Pa. 507; *Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200; *Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L. R. A. 554, 24 Atl. 638; *Carlisle v. Brisbane*, 113 Pa. 544, 57 Am. Rep. 483, 6 Atl. 372; *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759, 25 Atl. 522; *Chambers v. Lapsley*, 7 Pa. 24; *Collins v. Cronin*, 117 Pa. 35, 11 Atl. 869; *Boyd v. Insurance Patrol*, 113 Pa. 269, 6 Atl. 536; *Weakly v. Royer*, 3 Watts, 460; *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L. R. A. 808, 33 Atl. 237. See also *Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142; *McLaughlin v. Philadelphia Traction Co.* 175 Pa. 565, 34 Atl. 863.

The practice of suing the property owner and the municipality has been followed and approved.

*Boyle v. Hazleton*, 171 Pa. 167, 33 Atl. 142; *McLaughlin v. Philadelphia Traction Co.* 175 Pa. 565, 34 Atl. 863.

Potter, J., delivered the opinion of the court:

The theory upon which the municipality and the property owner were sued jointly in this case is radically wrong. As a result, the judgment must be reversed for the reason that the action was brought in a form which cannot be sustained. The distinction between the duty of the municipality and the property owner is clearly stated in *Brookville v. Arthurs*, 130 Pa. 501, 18 Atl. 1076, by Justice Sterrett, in which he says: "The borough and Mr. Arthurs were in no sense of the term joint wrongdoers. They did not co-operate in the same wrongful act in such way as to make them joint wrongdoers. While it is true that the borough could not deny its liability for neglect of its general duty to see that the streets and sidewalks thereof are kept in reasonably good and safe condition, it cannot be pretended that the corporation in any way co-operated with the defendant in his neglect to perform the duty which, as between it and himself, he assumed to discharge. As shown by the evidence, the true relation of the defendant to the borough was that of a resident property owner bound by the ordinance, and still further by his express promise, to keep the sidewalk in question in good repair. The claim is not for contribution, but to recover from the defendant the amount which the plaintiff was compelled to pay in consequence of his neglect to do what he should have done, and expressly promised to do." The authorities all seem to agree that the plaintiff has the right, in cases of this character, to sue either the municipality or the owner, but it does not follow that both can be sued jointly; the measure of responsibility being very different. In *Lohr v. Philipsburg*, 156 Pa. 246, 27 Atl. 133, which was a sidewalk case, the lower court held the borough to the same measure of liability as an employer. But this court, speaking by our 53 L. R. A.

Brother Mitchell, in reversing, said: "There is a clear distinction to be taken between the duties in the two cases. That of the master is primary and absolute, to know and to do, while that of the borough, or of any municipality, as to sidewalks, is secondary and supplemental, to see that the property owner makes and maintains a safe pavement; and its breach of duty is not in failing to do the work, but in failing to compel the owner to do it." And again, in *Duncan v. Philadelphia*, 173 Pa. 550, 34 Atl. 235, this court said: "It is the duty of a municipality to exercise a reasonable supervision over its sidewalks; but as the first duty in relation to them rests upon the property owner, and that of the city is secondary only, it is not liable for defects without notice, actual or implied, of their existence." And again, in *Mintzer v. Greenough*, 192 Pa. 137, 43 Atl. 465, the court says: "It is the primary duty of property owners along a street to keep in proper repair the sidewalk in front of their respective properties. . . . Hence it is that, owing to this primary liability, many cases exist in this state in which, after recovery from the municipality, the latter has successfully recovered over from the property owner on account of his breach of his primary duty to keep the sidewalk in a safe condition." We repeat, therefore, that it does not follow that because both the property owner and the borough may be liable, each for the neglect of a particular duty, they may be joined in an action of tort. The breach of duty here is not like that of maintaining a party wall, which is equally incumbent upon both parties. The case of *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L. R. A. 808, 33 Atl. 237, has been cited as analogous to the view taken by the trial court. But that case did not turn upon the precise point being considered here, and the court did not pass upon any difficulty growing out of the pleadings. It is difficult to see where any authority for sustaining the judgment in this case can be found in *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 143, 98 Am. Dec. 209, or in *Leidig v. Bucher*, 74 Pa. 65, as they are authority for the doctrine that defendants who have not joined in committing a wrong should not be joined in the same action. Neither does *Laverty v. Vanarsdale*, 65 Pa. 507, and other similar cases cited, touch the point here. If two defendants be sued jointly for a tort, and the evidence is not sufficient to hold one, there may be a discontinuance as to that one, and the trial may proceed as to the other. In such case the joint action does not fail because the tort is not joint, if committed, but for the reason that the evidence fails to show any concert of action. But where the declaration is for a joint tort, and the case goes to the jury as against both defendants, if, under such circumstances, the evidence fails to show that the defendants were joint tortfeasors, it is error to permit a recovery against one or both. Such a case would show, not a mere misjoinder of parties, but a misjoinder of causes of action. In any

view of the question, the relation between the municipality and the owner presents separate and distinct causes of action, and they cannot be sued jointly.

*The judgment is therefore reversed.*

T. Brent SWEARINGEN, Assignee of Fleming Brothers, *et al.*,

v.

SEWICKLEY DAIRY COMPANY

and

A. M. BYERS *et al.*, Appts.

(198 Pa. 68.)

**The statute of limitations begins to run against the liability of a stockholder to creditors of the corporation on his unpaid stock subscription at the time the corporation becomes insolvent as shown by an assignment for benefit of creditors.**

(January 7, 1901.)

**A**PPREAL by defendants Byers and others from a decree of the Court of Common Pleas, No. 1, for Allegheny County in favor of plaintiff in an action brought to enforce appellants' liability upon stock subscriptions to the defendant corporation. *Reversed.*

The facts are stated in the opinion.

**Messrs. Watson & McCleave**, for appellant Byers:

The right of action to recover the alleged balance of unpaid stock subscription upon the stock held by A. M. Byers is barred by laches.

No action or proceeding was instituted for more than eight years after the Sewickley Dairy Company became insolvent and made a general assignment for the benefit of creditors, and for about ten years after the alleged balance of stock subscription was assessed by the board of directors, and declared to be payable.

*Pittsburgh & O. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770; *McCully v. Pittsburgh & C. R. Co.* 32 Pa. 25; *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. 77; *Pittsburgh & C. R. Co. v. Plummer*, 37 Pa. 413; *Franklin Sav. Bank v. Bridges*, 20 W. N. C. 43; *Modern L. Ins. & Improv. Trust Co. v. Keller*, 3 Pa. Co. Ct. 118; *Amer v. Armstrong*, 6 Pa. Co. Ct. 392; *Shackamaxon Bank v. Dougherty*, 20 W. N. C. 297.

The assignees of this corporation might have sued the stockholders for unpaid subscriptions to capital stock.

*Yeager v. Beranton Trust Co. & Sav. Bank use of Linen*, 14 W. N. C. 296; *West Chester & P. R. Co. v. Thomas*, 2 Phila. 344; *Citiens & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73.

A claim payable on demand (and here the unpaid subscriptions were assessed by the corporation and ordered to be called: hence

they were payable on demand, but were never called or demanded) is due as soon as demandable, and not from the time of demand; and the statute of limitations begins to run from that date.

*Milne's Appeal*, 99 Pa. 483; *Taylor v. Witman*, 3 Grant. Cas. 138.

The fact that the assignment of the corporation created a trust fund for the payment of creditors did not prevent the running of the statute of limitations against debts due to the corporation.

*York's Appeal*, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65; *Light's Estate*, 136 Pa. 211, 20 Atl. 536; *Milne's Appeal*, 99 Pa. 483; *Reed v. Marshall*, 90 Pa. 345; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417.

The fact that this suit is brought by creditors standing upon the rights of the assignee in equity does not prevent the running of the statute.

*Todd's Appeal*, 24 Pa. 431; *Buehler v. Bufington*, 43 Pa. 278; *Jones v. Turberville*, 2 Ves. Jr. 11; *York's Appeal*, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65.

The assignment for the benefit of creditors did not toll the statute of limitations as to the claim of creditors against the assignor, whether or not it did toll the statute as to claims against the fund assigned to and coming to the possession of the assignee.

*Penn Bank's Estate*, 152 Pa. 65, 25 Atl. 310; *Kaufman's Estate*, 22 Pa. Co. Ct. 385.

The statute of limitations begins to run in favor of stockholders against the creditors' debt at the same time it commences to run in favor of the company, even though the company is sued before the statute is a bar as to it.

*Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; 1 Dan. Ch. Pr. 6th ed. p. 643; *Cressey v. Meyer*, 138 U. S. 525, 34 L. ed. 1018, 11 Sup. Ct. Rep. 387.

**Messrs. J. A. Langfitt and L. M. Plumer** for appellants John I. Shaw and others.

**Messrs. W. K. Jennings and T. M. Henry**, for appellee:

Before there is any obligation upon the stockholder to pay without an assessment and call by the company there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the statute of limitations does not begin to run in his favor until such order or demand.

*Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166; *Re Glen Iron Works*, 13 W. N. C. 387.

The corporation became insolvent within three years after subscriptions to the capital stock were made, and made a voluntary assignment on January 5, 1891. It cannot be claimed, therefore, that the statute of limitations had run during the solvency of the company.

When insolvency occurred the rights of

NOTE.—As to when statute of limitations begins to run against liability of stockholder, see earlier cases in this series as follows: *Powell v. Oregonian R. Co.* (C. C. D. Or.) 3 L. R. A. 201; *Hospes v. Northwestern Mfg. & Car Co.* 53 L. R. A.

(Minn.) 15 L. R. A. 470; *Wells v. Black* (Cal.) 37 L. R. A. 619; and *Brunswick Terminal Co. v. National Bank* (C. C. App. 4th C.) 48 L. R. A. 625.

creditors intervened, and the amount of the par value of the stock remaining unpaid thereupon immediately became a trust fund for the benefit of the creditors of the corporation.

Statutes of limitation do not run against trust funds.

**Mitchell, J.**, delivered the opinion of the court:

The dairy company, on June 11, 1889, authorized a call for 25 per cent of the subscription to stock, payable on July 1, in order to pay for a right of way contracted to be purchased from one Fleming, as specified in the resolution. Under arrangement with Fleming, the company, instead of collecting the 25 per cent and paying it to Fleming, issued the stock itself directly to him, credited with a payment of 25 per cent. The contract was not carried out, however, and the right of way was never conveyed by Fleming to the company. Between June 11 and July 1, the appellant bought from Fleming, paid in 75 per cent in cash, and received the stock as full paid. On January 5, 1891, the company, having become insolvent, made an assignment for the benefit of creditors, and on June 30, 1899, the present bill was filed as a creditors' bill to collect the 25 per cent unpaid subscription. The first question that arises is whether the bill is barred as too late, under the analogy of the statute of limitations.

The general rules are, first, that, on an obligation for the payment of money on demand, the statute begins to run at once. Suit is a sufficient demand, and must be brought within six years. *Andress's Appeal*, 99 Pa. 421; *Milne's Appeal*, 99 Pa. 483; *Boustead v. Cuyler*, 116 Pa. 551, 8 Atl. 848. Secondly, where the contract is to pay on the future performance of a condition or happening of an event, or at a certain time after demand, there a demand is necessary to a right of action, and the statute does not begin to run until demand is made. *Smith v. Bell*, 107 Pa. 352; *Eichman v. Hersker*, 170 Pa. 402, 33 Atl. 229; *Taylor v. Witman*, 3 Grant Cas. 138. Whether there is a third rule that, if demand is necessary, it must be made within six years from the contract, has been both affirmed and denied in our cases, which are much at variance on the question. It was asserted in *Laforge v. Jayne*, 9 Pa. 410; and expressly held in *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770; *McCully v. Pittsburgh & C. R. Co.* 32 Pa. 25; *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. 77; and *Franklin Sav. Bank v. Bridges*, 20 W. N. C. 43. On the other hand, it was denied generally in *Taylor v. Witman*, 3 Grant Cas. 138; and expressly rejected in *Girard Bank v. Bank of Penn. Twp.* 39 Pa. 92, 80 Am. Dec. 507; *Smith v. Bell*, 107 Pa. 352, and other cases, on the distinction, however, between obligations for the simple payment of money and deposits or bailments,—a distinction now well established. It was on this distinction that the case of *Laforge v. Jayne*, 9 Pa. 410, was said to be overruled in *Finkbone's Appeal*, 86 Pa. 368. 53 L. R. A.

Probably all the cases may be reconciled by a careful regard to this distinction, but it is not necessary in this case to pursue the subject further. It was expressly held in *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 22, 72 Am. Dec. 770, and the kindred cases already cited, that where no call is made upon subscriptions to corporate stock for six years the liability of the subscriber is barred by the statute of limitations, thus placing such subscriptions under the first rule as above expressed. These decisions, however, have not commanded uniform assent, and it must be confessed that they are not easy to reconcile with the cases that hold that a call or assessment by the corporation is a necessary foundation for a right of action against the stockholder. But *Pittsburgh & C. R. Co. v. Byers* and its kindred cases have never been overruled, and in *Franklin Sav. Bank v. Bridges*, 20 W. N. C. 43, they were followed, and the principle enforced, in an action by the assignee for the benefit of creditors of an insolvent bank upon an assessment made more than six years previously, though in the meantime, but also more than six years prior to the suit, the bank had become insolvent and made an assignment for creditors. The learned court below were of opinion that *Franklin Sav. Bank v. Bridges* was overruled by *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166. In this we cannot concur. The questions raised in *Lane's Appeal* related solely to the remedy, and the opinion is devoted to the consideration of the defenses set up—First, that the creditors generally had a complete and adequate remedy prescribed by the act under which the corporation was chartered; and, secondly, that the principal creditor filing the bill had a remedy by attachment execution on his judgment. In an elaborate opinion by the late Justice Green the whole subject was reviewed, and in some quotations and observations upon them the statute of limitations was referred to, but it was always *arguendo* and by way of illustration. No question, under the statute, arose in the case or was passed upon by the court.

We have in the present case three dates from which it is claimed by appellant that the statute began to run, and all of which were more than six years before the filing of the bill. First, the assessment and call for the 25 per cent. If this had been a clear unconditional call, the right of action would have been immediate and complete, and the statute would have commenced to run. But, as already stated, the call was complicated by the transactions with Fleming. How the company came to turn over the certificates to him without getting the right of way of which they were to be the price, or why suit was not brought for a conveyance of the way, or a rescission of the contract so far as within his control, does not appear, and is probably best accounted for by his position in the company. Secondly, if the date of purchase by the appellant be taken as the inception of his liability, and the principle of *Pittsburgh & C. R. Co. v. Byers* be applied, the bill was too late. But, thirdly, without going fur-

ther into this subject, and leaving the cases on the necessity of demand within six years open for consideration when the question necessarily arises, we have for the third date the insolvency of the company as shown by its assignment for the benefit of creditors.

When does the right of action by the creditors for unpaid subscriptions accrue? Such subscriptions are a fund in the hands of the stockholders charged with a trust for the payment of the corporate debts. This trust does not depend on any statute, but is deduced on general principles of equity from the premise that the capital is publicly pledged to those who deal with the corporation for their security. *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166. So long as the corporation is solvent, the whole subscription is due in accordance with its terms, and is payable when and as called for by the corporation. But, when the corporation becomes insolvent, the contract between it and the subscriber is terminated, and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt, not to it in its own right, but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscriptions become part of the assets for payment of the creditors. It is true they are special, or, as they may be called, reserved, assets, not to be put in distribution until the insufficiency of the other assets is shown; but this is no reason why the creditors may not proceed at once to show that fact. In *Franklin Sav. Bank v. Bridges*, 20 W. N. C. 43, already cited, it was said by Albright, J., in entering a nonsuit which was sustained by this court: "Conceding that the unpaid subscription, when realized, would be a fund to be held for the benefit of the depositors and other creditors of the corporation, it is apparent that as soon as the assignment was made the depositors and creditors were entitled, through the assignee, to demand that the unpaid subscriptions should be paid. . . . The creditors were at that time in the position of one to whom an obligation is due on demand, or who can make demand upon the doing of an act himself." In *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, the charter of a bank provided that the stockholders should be individually liable for the bills or notes issued by the bank. The main question was on the constitutionality of the statute of limitations reducing the time for bringing suit, but it was also held that not only this liability, but the equitable liability, for unpaid subscriptions to stock, arose when the bank stopped payment, and the statute began to run from that time, though it antedated by nearly a year and a half the assignment by the bank for the benefit of its creditors.

No other case has been cited, nor has my 53 L. R. A.

own examination found any other, in which it has been directly decided that on the insolvency of the corporation the creditor's right of action for unpaid subscriptions is complete, and hence that the statute of limitations begins to run, but the general trend of judicial expression is in that direction. Thus, in *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178, Fed. Cas. No. 17,636, Cadwalader, J., says: "Upon the insolvency of the corporation, the obligations of the stockholders thus at once become assets for the payment of its debts to such extent as other assets are deficient." And in *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411, Fed. Cas. No. 9,994, Treat, J., says: "If a company is insolvent, the original mode of making calls upon the stock is not to be pursued in the enforcement of such a decree; for the debt is then due on the stock without demand." Both these cases are cited in *Lane's Appeal*. In *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731, the stockholder was a creditor of the corporation, and sought to set off his claim against his unpaid subscription, but the Supreme Court held this could not be done, Miller, J., saying: "As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." And in *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220, it is said: "The assignee might have filed a bill in equity against all the delinquent shareholders jointly. . . . But, if the company is utterly insolvent, in any event a separate action at law in each case is much to be preferred. . . . If the contingency should occur that the assets realized exceed the liabilities to be met, the . . . courts will see that no wrong is done to those adversely concerned."

All of the cases say that on a creditors' bill an account must be taken of the debts, assets, and unpaid subscriptions in order to determine how much of the latter should be called. This clearly implies that the creditors need not wait until full administration has exhausted the other assets, but may proceed at once to ascertain and liquidate the stockholders' liability, even though payment may not be enforced until actual necessity has been shown. And the decisions in analogous cases are in harmony with this view. Thus, in *Cornell's Appeal*, 114 Pa. 153, 6 Atl. 258, a bill by judgment creditors of a corporation against certain stockholders on their unpaid subscriptions was sustained on the averments of insolvency of the corporation and the exhaustion of plaintiff's remedies at law, though no account had been taken of the other liabilities of the corporation, and other stockholders were not made parties, Trunkey, J., saying: "The right of the claimant to immediate and entire relief is not to be delayed by any questions of expediency or of the ultimate rights of the defendants to contribution." A similar bill was sustained in *Bell's Appeal*, 115 Pa. 88,

8 Atl. 177. In *Citizens & M.-Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73, it was held that, while ordinarily an account and assessment are necessary to fix the amount of the stockholders' liability on his unpaid subscription, yet "the necessity for this does not exist where the whole amount is required to pay the debts. . . . The assignee may sue at once, for all is required." And in *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885, a creditors' bill against a single stockholder was sustained, although no call had been made by the corporation, no account taken of the corporation's other indebtedness, and the other stockholders were not made parties. In all of these cases the fact of insolvency was held sufficient to support an action, and, of course, as soon as the right of action accrued the statute of limitations began to run.

No sufficient reason is perceived why these principles should not apply to cases like that at bar, at least to the extent of ascertaining and liquidating the liability of the stockholders promptly, and while evidence on disputed facts is presumably obtainable. The very numerous questions of contested liability, particularly in the Federal courts under the bankruptcy acts, show that this is a matter of practical concern. And the interests of creditors, not less than the rights of the stockholders, are served by this view. If there is no right of action for unpaid subscriptions until full administration of all the other assets, then this case is

an illustration of the delay and difficulties imposed on the creditors. Eight years and a half elapsed from the assignment till the filing of this bill, and in the meantime the creditors were exposed, not only to the delay, but also to the chances of failure of assets by the death and distribution of the estates of some of the stockholders, and the insolvency or financial inability of others, besides all the vexatious questions of colorable or bona fide transfers of the stock. If a bill had been filed in 1891, averring insolvency and entire insufficiency of other assets, it is clear that it would not have been demurrable, and the final determination of how much of the unpaid subscriptions should be assessed and collected might well have been intrusted to a court quite competent to settle it with equity to all parties. We are of opinion, therefore, that not only is the case of *Franklin Sav. Bank v. Bridges* an express authority, but also that it is supported by correct reasoning from admitted principles. The right of action of the plaintiff, whatever it was, accrued upon the fact of insolvency of the dairy company shown by the assignment for the benefit of creditors, and the statute of limitations began to run from that date. The bill, therefore, was too late.

*The decree is reversed*, and the bill directed to be dismissed, with costs.

Rehearing denied.

#### TENNESSEE SUPREME COURT.

H. B. BAKER, *Appt.*,  
v.

LOUISVILLE & NASHVILLE TERMINAL  
COMPANY *et al.*

(106 Tenn. 490.)

1. A railroad company is not liable to an employee of an ice company with which it had contracted for a supply of ice for its refrigerator cars, who was injured by falling from the top of a car which he was storing with ice, either because the car was left on a curve which caused it to incline sideways unduly, or because the roof was slippery with ice, since these were not defects in the premises, the duty to remedy which the railroad company owed to persons impliedly invited to its premises.
2. Allegations in a declaration cannot be considered as part of an amended declaration subsequently filed, which is complete in itself and does not refer to or adopt the former as a part of it.
3. An allegation that it was the duty of a railroad company to place a car at a derrick to be loaded by employees of an ice company with which it had contracted

NOTE.—As to right of servant to recover damages from persons other than his master for injuries received in the performance of his duties, see *Cleveland, C. C. & St. L. R. Co. v. Berry* (Ind.) 46 L. R. A. 33, and *note*.

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for a supply of ice, without stating how such duty arose, is a mere conclusion of law, and is immaterial.

(January 19, 1901.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Davidson County in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed*.

The facts are stated in the opinion.

*Messrs. Washington, Allen, & Rains* for appellant.

*Messrs. Smith & Maddin*, for appellee Louisville & Nashville Terminal Co.:

The railroad company had no contract with the plaintiff. The plaintiff, knowing that the cars were not at the derrick, voluntarily undertook to ice the car where it stood. Seeing the ice and snow, and proceeding to the work, and getting on top of the car, he took the risk of the method of doing the work at that place.

In all such cases it must appear: (1) That there was some defect in the premises or in the appliances, which it was the defendants' duty to remedy or repair; (2) that this defect was known to defendants, or should, by reasonable care, have been



known to them; (3) that it was not known to plaintiff, and that he could not by reasonable care have known it.

*Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Loosee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387.

And having voluntarily undertaken to ice the car by getting on it when the top was covered with snow and ice, he took the risk of slipping, and is not entitled to recover.

*Samuelson v. Cleveland Iron Min. Co.* 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499.

The fact that the car was not placed at the derrick will not render defendant companies liable.

*King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Larock v. Ogdensburg & L. C. R. Co.* 26 Hun, 382.

The rule of *respondeat superior* applies only to cases where the relation of servant and master exists, and does not apply as between an employer and the servant of an independent contractor or person.

*Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163; *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572; *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 376; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 13 S. W. 691; *Cunningham v. International R. Co.* 51 Tex. 503, 32 Am. Rep. 632; *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618; *Negus v. Becker*, 143 N. Y. 303, 25 L. R. A. 667, 38 N. E. 290.

*Messrs. Claude Waller, East & Fogg, and J. D. De Bow* for North Carolina & St. Louis R. Co.

**McAlister, J.**, delivered the opinion of the court:

Plaintiff brought this suit to recover damages for personal injuries. Demurrers were filed by each of the defendants, and were sustained by the court, and leave granted to amend declaration. A voluntary nonsuit was taken as to Louisville & Nashville Railroad Company. Two amended counts were then filed. Demurrers to these amended counts were also sustained, and plaintiff's suit was dismissed. Plaintiff appealed, and assigns as error the action of the court on the demurrers.

The last amended declaration embraces all the features contained in the original and first amended declarations, with additional allegations. It is therefore only necessary to consider that count, and the demurrers interposed thereto, to reach the real merits of the controversy and a correct judgment thereon. The amended declaration was, *viz.*: "Defendants were common carriers, and shipped large amounts of fresh meats, requiring ice in their cars, which was placed therein by opening the top of the cars and letting down blocks of about 100 pounds. The defendants had a contract with the ice company to do the work, and plain-

tiff had for a long time been employed by the ice company, and did this work for it, in the yards of the railroad company. That in doing the work it was necessary for plaintiff to go on defendants' premises, and upon their tracks and cars, and it had been his custom to go on their premises and ice the cars at a derrick provided for that purpose, and with the derrick the work could be done in safety. At the time of the injuries defendants expressly invited plaintiff on their premises to ice a car on the 25th February, 1900, and defendants negligently failed and refused to place the car which they had invited plaintiff to ice at the derrick, but placed it on a curved track on an incline, which caused the car to careen. It was night, and the car had just gotten into the yards from the north. Plaintiff asked the defendants to place the car at the derrick, but defendants refused, and invited plaintiff to ice it at said remote point, saying it should be iced there, and nowhere else. In icing it away from the derrick, the ice had to be drawn up by hand, by rope and hooks, and plaintiff had to go on top of the car, and the work was accompanied by dangers which the use of the derrick would have obviated. It was accompanied by hidden dangers, which were known to defendants and not known by plaintiff. By reason of the darkness, plaintiff did not know the car was on a curve or incline, and did not know, or have any means of knowing, that the car brought with it upon the roof from distant points ice and snow, which made it extra-hazardous to ice it by hand. The invitation of defendants to ice this car away from the derrick led the plaintiff to believe, and he did believe, the work could be done with safety, and that the place was safe; the defendants and their servants knowing that by reason of the darkness plaintiff could not but by the exercise of ordinary care, observe the dangers of the situation, and the dangers of icing said car by hand at that time and place. That on said date and place the defendants negligently failed to warn him of the fact that the car was on an incline, and was covered with ice and snow, and, these facts not being open to observation, and while plaintiff was upon the car, and in the exercise of ordinary care, and by reason of the ice and snow on top of the car, and by reason of the car being careened on the curve, he slipped, and fell upon and from the roof of the car to the ground," etc. This declaration does not set out any duty or contract on the part of defendants to put the car to be iced at any particular place or at any derrick.

The demurrer of both defendants in substance is as follows: (1) The declaration shows that plaintiff was in the employ of the ice company, and was undertaking to fill a car with ice by virtue of his contract of employment with the ice company, when he was injured. The declaration fails to show that defendants or their officers or agents had any authority to direct plaintiff to go into any dangerous position; or

that the plaintiff was under any contract of employment with defendants by which there was any duty imposed on him to obey such orders, if any had been given him by it or its agents. The declaration simply alleges that this defendant requested plaintiff to ice a certain car when it arrived in Nashville, and when it arrived plaintiff requested defendant's servants to place the car at a derrick, which defendant refused to do, but placed it at a less convenient point; and that while he was undertaking to fill the cars with ice at the inconvenient place he was injured. The declaration fails to show the violation of any legal duty which defendants owed plaintiff, and a violation of which caused the injury to him. (2) The declaration shows that plaintiff was not an employee of these defendants, but was an employee of the ice company, and that in attempting to fill a certain car with ice he was acting as an employee of that company. The only allegation of negligence is that the defendants failed to put the cars at a convenient place for icing them. There was no duty imposed upon these defendants by the common or statutory law to place the cars at any particular place. Any duty which was imposed upon them in this respect arose out of their legal contract with the ice company; and such duty, if it existed, was for the benefit of that company, for a breach of which that company would have had its action for damages for breach of contract. (3) The declaration shows that plaintiff voluntarily undertook to ice the car in the position in which it had been placed without any orders from the defendant or its agents or officers having control or authority over him, and it therefore seems that in undertaking to do this work he assumed all the risks and dangers incident to its performance. (4) The declaration shows that the only danger incident to the performance of this work was that the snow and ice were upon the car, which was careened and steeper upon one side than upon the other, on account of which the plaintiff slipped and fell. The declaration fails to show that there were any hidden or unseen dangers, or what they were, if any, or that they caused or contributed to the injury; and does show that the dangers were as obvious to the plaintiff as to any one else, and that it required no expert knowledge to detect them. The plaintiff, in law, assumed all of the risks obvious to him when he undertook to put ice in this car while it was covered with snow and sleet, and careened so as to make one side of the roof higher than the other.

A condensed statement of the case made in the declaration is that the Nashville Ice Company was under a contract with the defendants to ice their refrigerator cars. The plaintiff, Baker, who sustained the injuries, was an employee of the ice company, and not of the defendants. It had been customary to ice the cars at a derrick by means of which the ice could be elevated to the top of the car, and deposited therein. The

car in question was not placed at the derrick, but was left on an inclined and curved track. The company's servants declined to station the car at the derrick. The plaintiff undertook to ice the car by stationing himself on top of the car and pulling the ice up by hand with the aid of ropes and hooks. It appears that the roof of the car was covered with ice and snow, and, as the plaintiff attempted to pull the ice up, he slipped and fell from the car, sustaining very serious personal injuries. The theory of plaintiff's counsel is that plaintiff was upon the defendants' premises for the purpose of transacting business upon an implied invitation, and that the injury was occasioned by reason of defects on defendants' premises. The rule invoked by counsel is thus stated by Mr. Wood in his work on Master and Servant (§ 337), viz.: "Although a contractee is not, in general, liable to the employees of the contractor for injuries resulting to them while engaged in his work under the control of such contractors, yet, if the work is done on his premises, he is bound by the same legal obligation that exists as between him and his immediate servants to keep them in a suitable and safe condition, and is liable to any of the servants of such contractors for injuries resulting to them from defects therein not under a contract obligation, but arising from the duty he owes to each of the employees arising out of his obligation to provide such appliances, and this duty extends to keeping the premises upon which the servants of the contractor are at work in a reasonably safe condition whether the contract provides therefor or not." Mechem, Agency, § 186; Id. p. 492, note. Counsel for plaintiff especially rely upon the case of *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387. In that case it appeared that plaintiff's intestate was in the employ of some carpenters who contracted with defendants to put a cornice on their mill, and the defendants were to provide all scaffolds required for the purpose. The deceased, while engaged in the work, was killed by the fall of a scaffold built by the defendants for the use of the workmen. In an action to recover damages the plaintiff was nonsuited in the lower court upon the ground that the defendants owed no duty to the deceased, but this was reversed by the court of appeals upon the ground that, the scaffold being erected by the defendants upon their own premises for the express purpose of accommodating the workmen, a duty was thereby imposed upon the defendants to use proper diligence in constructing and maintaining the structure, and that this duty existed independently of the contract; and this is the rule applicable to every person who can be said to have come upon the master's premises by his invitation, and not in the character of a mere licensee, whether or not such person be a stranger to the owner. Mr. Wood, in commenting on this case, says that the rule must be understood as applying only in cases

where the contractee owes a duty to the contractor's servants, and is limited to cases of defects in his premises. Applying the rule thus laid down to the facts of this case, it must be conceded that the plaintiff was upon the defendants' premises by an implied invitation, and not in the character of a mere licensee. But there was no breach of any duty which defendants owed the plaintiff as the servant of the ice company, an independent contractor. The company had not agreed to furnish any particular appliances or machinery for the accommodation of the workmen of the contractor in hoisting the ice into the top of the car, nor was the injury caused by any neglect in constructing and maintaining the appliances, like the insufficient scaffolding in *Coughtry v. Globe Woolen Co.* If, for instance, it had appeared in this case that defendants had agreed to furnish a derrick for the use of the contractor's servants in loading the ice into the car, and the injury to plaintiff had been caused by the falling of the derrick, owing to its insufficient construction, plaintiff's right of action would be sustained by the case cited of *Coughtry v. Globe Woolen Co.* But it does not appear from the face of the declaration that defendants had agreed to do anything for the benefit of the contractor's servants. Hence the sole inquiry is whether the premises of defendants, where the plaintiff was impliedly invited to work, were in a reasonably safe condition. In order to warrant a recovery under this rule, it must be alleged that the injury was caused by defects in the premises, and the facts constituting the particular defect complained of must be set out. It is alleged that the refrigerator car required to be iced in this case was stopped on a curved or inclined track, but it is not alleged that this track was out of repair, or improperly constructed, or otherwise defective, except that it was curved and inclined. The angle of inclination is not even stated so that the court can see that the track was dangerous. Plaintiff could not be heard to complain of the original construction of the track, since the company would have the right to build it in a manner best suited to its business. The other allegation is that plaintiff did not know of the snow and ice being on said car, which defendants had negligently allowed to be there, and failed to warn plaintiff against the danger. This was a danger that was open and obvious to plaintiff the moment he climbed upon the car, and, having assumed the risk of icing the car under such conditions, he cannot be heard now to complain. In addition to this, we are of opinion that snow and ice on the roof of a car is not such a defect in the premises as the law contemplates in fixing the rule of liability to one there by implied invitation.

Another ground of recovery alleged is that it was the duty of defendants to have all cars needing ice placed at the derrick to be iced, and that defendants were guilty

of a breach of this duty. This allegation is made in the first amended declaration filed. The last amended declaration does not contain this allegation. In *State v. Lea*, 1 Coldw. 178, the rule was stated to be that, unless the second or other count expressly refers to the first, no defect therein will be aided by the preceding count, for, though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former. 1 Chitty, Pl. p. 356; 6 Bacon, Abr. 188. In *Louisville & N. R. Co. v. House*, 104 Tenn. 110, 56 S. W. 836, it was said: "The rule is the original complaint [or declaration] is superseded, and its effect as a pleading destroyed, by filing an amended complaint complete in itself, and which does not refer to or adopt the original as a part of it." The last amended declaration was complete in itself, and makes no reference to the allegation in the first amended declaration that it was the duty of the defendants to place the car at the derrick to be iced. But, independently of this, the allegation was insufficient, for the reason that it merely stated a conclusion of law. It did not allege how it became the duty of defendants to place the cars at the derrick. No such contract with plaintiff is alleged, nor is it stated that such a contract was made with the ice company, by whom plaintiff was employed. At most, it simply appears that it had been customary to place the cars at the derrick, but no duty or obligation, contractual or otherwise, is shown; so that this allegation is not material. Moreover, it is not shown that the failure of defendants to place the car at the derrick was the proximate cause of the accident.

*Affirmed.*

William Perry RIDLEY *et al.*

*v.*

William P. HALLIDAY, Jr., *et al.*, *Plffs. in Err.*

(106 Tenn. 607.)

1. **Failure to make objection by some preliminary pleading** to the jurisdiction of a court of chancery over a suit to convert realty into personalty is a waiver of objection that the court is without jurisdiction to act in the cause, since it has unquestionable power to make such conversions.
2. **Nonexistence of remaindermen of the first class** under a will leaving property in trust to one for life, with remainder to his children, with remainders over, will not prevent the sale of realty so as to bind such remaindermen should they come into be-

NOTE.—As to power to cut off contingent interest of unborn children by sale of property, see other authorities in this series as follows: *Kent v. Church of St. Michael* (N. Y.) 18 L. R. A. 331; *Hale v. Hale* (Ill.) 20 L. R. A. 247; *Loring v. Hildreth* (Mass.) 40 L. R. A. 127; and *Gavin v. Curtin* (Ill.) 40 L. R. A. 776.

ing, if the life tenant and the living remaindermen of the other classes are before the court.

3. A bill to sell realty held in trust for a life tenant, with remainder to his children and other remainders over, may be filed by the life tenant as well as against him.

(March 22, 1901.)

**E**RROR to the Court of Chancery Appeals to review a judgment affirming a judgment of the Chancery Court for Maury County decreeing the sale for reinvestment of certain real estate conveyed by J. W. S. Ridley, deceased, to Webb Ridley in trust for certain persons, some of whom were yet unborn. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Figuers & Padgett, E. H. Hatcher, and James C. Bradford*, for plaintiffs in error:

Whatever power the chancery court had to decree the sale of lands at the time of the adoption of the Code remained unimpaired, and is now possessed by it.

A court of chancery had general jurisdiction over the estates, as well as the persons, of infants, and could, under appropriate circumstances and for proper purposes, direct the sale of their property.

*Thompson v. Mebane*, 4 Heisk. 370; *Porter v. Porter*, 1 Baxt. 299; *Gray v. Barnard*, 1 Tenn. Ch. 208.

Estates tail are now deemed to be fee-simple estates, without restrictions or limitations.

Shannon's Code, § 3673.

The rule in *Shelley's Case*, 1 Coke, 88, which was an outgrowth of the statute *de donis*, survived its repeal.

*Polk v. Paris*, 9 Yerg. 209, 30 Am. Dec. 400.

This celebrated rule shared the fate of the statute *de donis*, and was abolished by an act passed in 1851-52.

Shannon's Code, § 3674; *Williams v. Williams*, 10 Heisk. 568.

Courts of equity have inherent power over land, to change it, either by sale or partition; and, generally, all persons in being having, or who might have, reversionary or remainder interests, are necessary parties; but where the remainder is to a person or persons not *in esse* it is necessary, in order to bind them, that the owner of the first estate of inheritance should be before the court as a party, and if there be no person in being in whom the first estate of inheritance is vested, then it is sufficient to bring before the court the life tenant, or such persons as are in being.

When the courts of equity, in the exercise of their inherent jurisdiction over the property of infants and other persons under disability, began to partition and sell lands subject to limitations in remainder, they required, in analogy to the practice of the common-law courts in cases of common recovery, that the first tenant of the estate of inheritance should be a party.

*Reynoldson v. Perkins* (1769) 2 Amb. 564.

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Afterwards, in consequence of the inability to sell or partition lands where there was no tenant of the first estate of inheritance, the rule was broadened so that the life tenant alone was deemed to be sufficient.

*Giffard v. Hort*, 1 Sch. & Lef. 408; *Dayrell v. Champness*, 1 Eq. Cas. Abr. 400; *Leonard v. Sussex*, 2 Vern. 527; *Finch v. Finch*, 2 Ves. Sr. 492; *Lloyd v. Johns*, 9 Ves. Jr. 37; *Gaskell v. Gaskell*, 6 Sim. 643; *Fordyce v. Bridges*, 10 Beav. 90; *Mitford, Eq. Pl. & Pr.* 24, 25; *Calvert, Parties in Eq.* 49-53; *Tyler, Parties in Eq.* 24; *Van Fleet, Former Adjudication*, § 491; 1 *Story, Eq. Jur.* § 656a; 2 *Minor, Inst. ed.* 1892, 238; *Agar v. Fairfax*, 2 White & T. Lead. Cas. in Eq. \*469; *Hoffman, Ch. Pr.* 161; *Barbour, Ch. Pr.* 287; *Spence, Eq. Jur.* 707; *Cheesman v. Thorne*, 1 Edw. Ch. 629; *Mead v. Mitchell*, 17 N. Y. 212, 72 Am. Dec. 455; *Baylor v. DeJarnette*, 13 Gratt. 152; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698; *Sweet v. Parker*, 22 N. J. Eq. 454; *Knotts v. Stearns*, 91 U. S. 638, 23 L. ed. 252; *Brevoort v. Brevoort*, 70 N. Y. 139; *Monarque v. Monarque*, 80 N. Y. 320; *McArthur v. Scott*, 113 U. S. 391, 28 L. ed. 1031, 5 Sup. Ct. Rep. 652; *Kent v. Church of St. Michael*, 136 N. Y. 10, 18 L. R. A. 334, 32 N. E. 704; *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, 33 N. E. 858; *Gavin v. Curtin*, 171 Ill. 640, 40 L. R. A. 776, 49 N. E. 523; *Ruggles v. Tyson*, 104 Wis. 500, 48 L. R. A. 809, 79 N. W. 766, 81 N. W. 367.

The legal title was vested in the trustee, Webb Ridley. Webb Ridley in his capacity as trustee held the legal title for the benefit and behoof of every person, born and unborn, who had or might have interest, present, future, or contingent, in the property. He stands in this record as the representative of both the parties in being, including the widow, and those unborn.

At common law, if the particular estate supporting the remainder determined or was destroyed before the contingency happened, the remainder was annihilated.

4 Kent, Com. 253.

To preserve contingent remainders from forfeiture and destruction, recourse was had to the creation of trustees to preserve the contingent remainder during the life of the tenant for life, notwithstanding any determination of the particular estate permanently, by forfeiture or otherwise.

4 Kent, Com. 245; *Fearne, Contingent Remainders*, 325.

In Tennessee it has been held that if the particular estate which supports a contingent remainder is destroyed before the remainder vests, the remainder is defeated.

*Peck v. Carmichael*, 9 Yerg. 324.

Trusts of this nature, and all other trusts, were always under the cognizance, direction, and control of courts of equity. They could direct the trustees, change the property, and sell and invest the proceeds whenever, in their judgment, it became necessary to do so.

*Platt v. Sprigg*, 2 Vern. 303; *Frewin v. Charlton*, 1 Eq. Cas. Abr. 386; *Basset v. Clapham*, 1 P. Wms. 358; *Winnington v.*

*Foley*, 1 P. Wms. 536; *Symance v. Tattam*, 1 Atk. 614; *Curtiss v. Brown*, 29 Ill. 201; *Voris v. Sloan*, 68 Ill. 588; *Allen v. Graves*, 3 Bush. 491; *Meddis v. Bull*, 13 Ky. L. Rep. 767, 18 S. W. 6; *Baldrige v. Coffey*, 184 Ill. 73, 56 N. E. 411.

*Mr. W. C. Salmon* for defendants in error.

**Beard, J.**, delivered the opinion of the court:

In 1895 J. W. S. Ridley by deed of gift conveyed to his son Webb Ridley a valuable farm of 580 acres of land in the county of Maury, upon the following trusts: That the said Webb Ridley, trustee, should permit and suffer his son William Ridley, for and during his natural life, to have and receive the rents, income, and profits of said lands, and to exercise such control over the use, occupation, renting, and cultivation thereof as he, the said William, might deem proper, but in such way, nevertheless, that such lands, and the rents, incomes, and profits thereof, should not in any way be liable for the debts or contracts of the said William; that upon his, the said William's, death, said lands should go to his children and to the living issue of any deceased child the issue taking the parent's share; that, in case William left a widow surviving, she should have the right to occupy the land during her widowhood, sharing equally with the children, or their issue, the rents, incomes, and profits derived therefrom; that should said William at death leave a widow, but no children, or issue of children, the trustee should suffer and permit her to receive and enjoy the income of the lands during her life or widowhood, but so that they should not be liable for her debts or contracts, and that at the death or marriage of the widow the lands should go to the grantor's other children, and to the issue of such of them as might be dead; that, should William die leaving no widow or children, or issue of deceased child or children, the said lands should go to the grantor's other living children, or the issue of such of them as might be dead. In 1898 the defendants, the two Strudwicks and one Carpenter, made a written proposition to the trustee and the life tenant in which they agreed to purchase this property at the price of \$75 an acre, upon the condition that the latter parties would institute proper proceedings in the chancery court of Maury county and procure an acceptance of the same. Upon receiving the proposition the trustee, Webb, and the life tenant, William P. Ridley, at once filed a bill in that court, to which all persons in interest, *in esse*, were made parties defendant, as follows: Annie Halliday and W. P. Halliday, her husband, and their minor child, W. P. Halliday, Mary P. Ridley, and the infant children of Webb Ridley. Of these defendants, Annie R. Halliday and Mary P. Ridley were the children of the donor, J. W. S. Ridley, and the sisters of the trustee, Webb, and the life tenant, W. P. Ridley. In this bill, after setting out the deed of gift, the inter-

ests created by it, both vested and contingent, and the proposition for its purchase already set out, many reasons were then averred why it was greatly to the interest of all concerned that the same should be accepted. The prayer was that the matter might be referred to the clerk and master to take proof whether such sale would be advantageous, and, in the event he should report it was, then that it be made. It was also averred that William P. Ridley, the life tenant, was unmarried, and that he had never had children born to him. Answers were filed by the adult defendants and by guardians *ad litem* duly appointed for the minors. The answer of the adults conceded that it would be wise to accept the proposition of purchase, while those of the guardians *ad litem* simply craved the protection of the court for the interest of the minors. The cause then proceeded to a reference to the clerk and master, who, after taking much proof, reported that the offer of purchase from the Strudwicks and Carpenter was a very advantageous one, and recommended its acceptance by the court. This report was unexcepted to, and the chancellor entered a decree of confirmation, and at the same time made provision for the investment of the money received for the purchase of the property so that the interests of all parties, born and unborn, might be preserved in the fund as they existed under the deed in the land itself. From this decree a writ of error has been duly prosecuted.

No question was made in the court below, by demurrer or otherwise, as to the jurisdiction of the chancery court to grant the relief sought by the bill. While, if that court had been absolutely lacking in jurisdiction of the subject-matter of the cause, then jurisdiction would not have been conferred by this failure to make an objection by pleading at the proper time (*Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 516, 16 N. E. 909), yet, as a chancery court has unquestionably the power, in a proper case, where it has the proper parties before it, to convert realty into personalty (*Ruggles v. Tyson*, 104 Wis. 500, 48 L. R. A. 809, 79 N. W. 766, 81 N. W. 367; *Gavin v. Curtin*, 171 Ill. 641, 40 L. R. A. 776, 49 N. E. 523), a failure to make objection by some preliminary pleading was a waiver of objection that the court was without jurisdiction to act in the cause. But not only no jurisdictional objection was taken in the court below; none is made here. To the contrary, the power of the court to decree the conversion of the realty into money, under the conditions averred in the bill and established by the evidence, was conceded there, and is equally conceded in this court. The only question made upon this appeal and by assignment of error is that as the record shows that the life tenant, William P. Ridley, was unmarried and without children, the decrees pronounced would not bind such children should they hereafter be born to him upon his possible future marriage; the contention of the appellants being that they are without virtual representation in the case. This

insistence rests in part upon § 5086 of Shannon's Code, and in part upon the rule of jurisprudence so generally recognized,—that no one is bound by a judgment or decree save parties to the record, regularly served, and their privies. What may be the proper construction of this Code section we think it unnecessary to determine in this cause. It is one of the sections of chapter 3 of title 2 of part 3 of the Code. This chapter is entitled, "Of the Sale of Property of Persons under Disability," and the body of the chapter is in keeping with the title. Section 5072 (this being the first section of the chapter) provides that "the court of chancery may, for and on behalf of persons laboring under the disability of coverture and infancy, consent to and decree a sale of the property . . . of such persons under the provisions of this chapter," while § 5073 provides that this "application may be made by bill or petition filed by the husband or regular guardian, to which the person under disability is a defendant to be represented by next friend or guardian *ad litem*," etc. The present bill is not filed within these statutory provisions. It is not filed either by a husband of a married woman, asking a sale of her property, or by a guardian of minors, seeking the same relief as to theirs. It is that of a trustee and life tenant, who, bringing all the contingent remaindermen *in esse* into court, and averring the necessity of such relief, ask that real estate in which these parties have a contingent interest be sold by order of court, and that its proceeds be held subject to the trusts imposed upon the realty. The bill, being outside these provisions, must rest upon the inherent power of a chancery court to grant such relief, and by its decree for conversion bind parties who may hereafter come into existence. There is no doubt that if there had been in being, and made a party by proper process to this cause, one of the first class of contingent remaindermen provided for in the trust deed, the decree would have bound all other members of the class who subsequently came into being. That result follows from the doctrine of representation; it being assumed that the living representative would look after the interests of the entire class, by bringing to the attention of the court the merits of the controversy so far as they affected the class. But, in the absence of a member of such class, can the decree herein pronounced carry the whole title to the purchasers? This was the purpose in filing the bill, and if it fails in this respect the failure is absolute. It has been held by a large majority of the courts, both English and American, that in certain cases the life tenant will represent contingent remaindermen, where no one of the latter is *in esse* at the time the court is called upon to intervene with regard to the estate in controversy. In *Finch v. Finch*, 2 Ves. Sr. 492, in passing upon the rule of virtual representation as annulled to the sale of lands limited in remainder, under a bill to execute trusts, Lord Hardwicke said: "It is admitted to be necessary to bring the 53 L. R. A.

first person entitled to the remainder and inheritance of the estate, if such is in being. It is true, if there is none such in whom the remainder of the inheritance is vested in being, . . . then it is impossible to say the creditors are to remain unpaid, and the trust not to be executed, until a son is born. If there is no first son in being, the court must take the facts as they stand. It would be a very good decree, and no son born afterwards could dispute it unless he could show fraud, collusion, or misbehavior in the performance of these trusts." In *Leonard v. Susser*, 2 Vern. 527, there was a tenant for life, with remainder to his sons. The tenant for life, before he had a son born, brought a bill against the trustees in whom the title was vested for an account, which was decreed, and it was held that the account should stand and be binding upon the sons. In *Gaskell v. Gaskell*, 6 Sim. 643, there was a tenant for life, with remainder to his first and other sons in tail of an undivided moiety of certain estates. The tenant for life, before a son was born to him, filed his bill against his cotenants for partition. Objection was made that the complainant then had no issue in being. But the vice chancellor (Shadwell), in overruling this objection, said the court had frequently decreed partition under such circumstances, and that a decree for partition in that case would be binding upon the tenant in tail when he came into being. In *Giffard v. Hort*, 1 Sch. & L. 408, Lord Redesdale announced the rule thus: "Courts of equity have determined, on grounds of high expediency, that it is sufficient to bring before the court the first tenant in tail in being, and, if there be no tenant in tail in being, the first person entitled to the inheritance, and, if no such person, then the tenant for life. . . . Where all the parties are brought before the court, . . . and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred. This is now considered the settled rule of courts of equity, and of necessity." Perhaps no one in the history of equity jurisprudence can more properly be said to be a master of the rules and practice of the English chancery courts. Before his elevation, as John Mitford he had published a work on Equity Pleading and Practice, which is regarded as a valuable text-book by the profession to this day. In that work he embodied the rule of virtual representation which he subsequently announced in the case last cited.

Turning to the cases determined by American courts, with the exception of the supreme court of North Carolina, we find them holding the same rule. In *Oakesman v. Thorne*, 1 Edw. Ch. 629, the vice chancellor held that the partition proceedings in that case would bind after-born remaindermen,

under the authority of *Wills v. Slade*, 6 Ves. Jr. 498, even without the aid of statute. In *Kent v. Church of St. Michael*, 138 N. Y. 10, 18 L. R. A. 331, 32 N. E. 704, in the course of its opinion the court said: "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost necessity. The rights of persons unborn are sufficiently cared for, if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place, and are secured in some way for such persons." The case of *Gavin v. Curtin*, 171 Ill. 640, 40 L. R. A. 776, 49 N. E. 523, is directly in point. The complainant in that case under the will of her father was tenant for life, with remainder in fee to her children, or to the issue of any of these children dying during the existence of the life estate; and in the event of her death without children, or the issue of such, then remainder over to the testator's sons. Before the birth of any child the life tenant filed a bill for the conversion of this real estate, stating strong equitable grounds therefor, and made as the only defendants thereto her brothers, who were contingent remaindermen of the second class. It was held that the bill was maintainable, and that the decree for sale, of necessity, would bind her after-born children. In addition we refer to *Ruggles v. Tyson*, 104 Wis. 500, 48 L. R. A. 809, 79 N. W. 766, 81 N. W. 367; *Sweet v. Parker*, 22 N. J. Eq. 454; *Baylor v. Dejarrotte*, 13 Gratt. 152; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698; *McArthur v. Scott*, 113 U. S. 391, 28 L. ed. 1031, 5 Sup. Ct. Rep. 652.

The authors of works on equity pleading and practice, so far as we have examined, with singular unanimity adopt the same view. Reference is here made to Mitford Eq. Pl. & Pr. *supra*; Calvert, Parties in Eq. 49-53; Tyler, Parties in Eq. 24; Story, Eq. Pl. § 145. In the section referred to, Judge Story says: "Doubts were formerly entertained whether in suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. That doubt, however, is now removed, and the decree is held binding upon them, upon the ground of a virtual representation of them by the tenant for life in such cases." It is true that this statement of the rule by the author is by its terms limited to cases in partition, but, as we have already seen, it was applied in *Leonard v. Sussex*, 2 Vern. 527, in the matter of an account, and to the enforcement of a trust in favor of creditors by a decree for the sale of lands in *Finch v. Finch*, 2 Ves. Sr. 492. No sound reason has been, or, so 53 L. R. A.

far as we can discover, can be, suggested why it should not apply in any other proceeding where a court of equity is exercising its jurisdictional power in disposing of real estate, the title to which is embarrassed by contingent remainders awaiting unborn remaindermen. If in the one class of cases necessity requires an application of the doctrine of virtual representation, why should it not be as operative in the latter? We have held that, without the aid of the statute already referred to, a court of equity, in proper cases, has the inherent power to convert, for the benefit of minors, realty into personalty. *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968; *Thompson v. Mebane*, 4 Heisk. 370. In such a case could there be found any solid ground for distinguishing it, so far as this matter of representation is concerned, from a case of mere partition? We think not. If in the case of partition and of the conversion of the property of infants, falling within the inherent jurisdiction of courts of equity, then why not in every case where the nature of the trusts and the situation of the property make it eminently judicious, if not absolutely essential, in the interest of all persons *in esse*, as well as *in posse*, that a conversion should take place? In each case it is essential that the interest of the contingent remaindermen in the proceeds of the converted property be preserved by the decree directing the conversion. *Monarque v. Monarque*, 80 N. Y. 320. This being done, we see no good reason why the rule of virtual representation should not apply. Even if the limitation or qualification suggested in Calvert, Parties in Eq. p. 52 (that is "that, except under very particular circumstances, no tenant for life would be considered capable of maintaining the suit, unless he were one to whose issue there was a remainder in tail"), is to prevail the present case would fall within its spirit; for here the contingent remaindermen whom the tenant for life represents are not remaindermen in tail, yet they are children who may be born to him, and the children of such as may die during his life.

We have examined the cases from North Carolina referred to in the able and exhaustive brief of the counsel for appellants, and, while they are entitled to great consideration, we think they are overborne by the weight of authority. There is nothing in our own cases to exclude us from the rule we have already indicated, and we think that its adoption is consistent with sound policy, and, when applied under proper restrictions, will work to the advantage of all interests involved.

Before concluding, it is proper to say that, upon the authorities, it is immaterial whether in such a case the bill is brought by or against the tenant for life. *Gaskell v. Gaskell*, 6 Sim. 643; *Hale v. Hale*, 146 Ill. 257, 20 L. R. A. 247, 33 N. E. 858; *Leonard v. Sussex*, 2 Vern. 527; *Story*, Eq. Pl. § 145.

The decree of the court of Chancery Appeals is affirmed.

LIVERMORE FOUNDRY & MACHINE  
COMPANY, *Plff. in Err.*,

v.

UNION COMPRESS & STORAGE COM-  
PANY, for use of W. S. Campbell, *et al.*

(105 Tenn. 187.)

1. The appellate court will not interfere with the jury's adoption, as a basis for their verdict, of one of several theories as to the cause of an accident, where it is reasonably deducible from the evidence.
2. Photographs of wrecked machinery, taken immediately after an accident, are admissible as evidence, with an explanation of them by the witness who took them, in order to show the condition of the wreck.
3. On cross-examination of one of the parties for whose use a suit is brought, he cannot be asked what he paid a woman for her interest in the suit, in order to affect the credit of her husband as a witness in the case, where there is no issue to which the inquiry is pertinent.
4. The measure of damages for furnishing an imperfect and unskillfully made cylinder for a cotton compress, on account of the defects of which an accident occurred which caused the loss of the use of the compress for the entire season, may include its rental value, that is, the value of its use, during that season, where the cylinder was furnished under a contract to have the compress ready for use at a certain date, which the contractor understood was necessary in order to have it ready for compressing that season's crop of cotton.

(June 26, 1900.)

**E**RROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for breach of a contract to repair the machinery in a cotton compress. *Affirmed.*

The facts are stated in the opinion.

*Messrs. McFarland & Neblett*, for plaintiff in error:

The court erred in permitting the use of a photograph of the compress, building, and machinery, and its appearance after the accident, over the objections of defendant.

*Bruce v. Beall*, 99 Tenn. 309, 41 S. W. 445.

The court erred in allowing evidence as to rental value of the compress for the season of 1897-98, and in its charge to the jury as to allowance of rental value of the compress, and its refusal to charge as to rental value as asked by the defendant, because the declaration of the plaintiffs contained no such count or sufficient specific claim for rents as would permit recovery for such special damages.

**NOTE.**—On the question as to loss of profits of sale or purchase as damages, see *note* to *Guetzkow Bros. Co. v. A. H. Andrews & Co.* (Wis.) 52 L. R. A. 209, in which the present case is referred to.

For use of photographs as evidence, see *Dederichs v. Salt Lake City R. Co.* (Utah) 35 L. R. A. 802, and *note*; *Selleck v. Janesville* (Wis.) 47 L. R. A. 691; and *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 49 L. R. A. 77, 53 L. R. A.

*Hadley v. Baxendale*, 9 Exch. 341, is the leading case on this subject.

The text writers seem generally to have adopted the rule laid down in this case as perhaps the best yet presented, but all admit that it is not applicable to all cases.

The rule is not capable of meeting all cases, and when the matter comes to be further considered it will probably turn out that there is no such thing as a rule as to the legal measure of damages applicable in all cases.

*Gee v. Lancashire & Y. R. Co.* 6 Hurlst. & N. 211; 1 Sedgw. Damages, p. 218, note a.

The liability for a breach of contract is less extensive than that for a tort, involving only such consequences as were within the contemplation of the parties at the time of the formation of the contract.

5 Am. & Eng. Enc. Law, p. 13.

Whatever foresight of the probable consequences the defaulting party may have at the time of the breach, he is not generally held, for that reason, to any greater responsibility; he is liable only for the direct consequences of the breach of such a contract, and such as were within the contemplation of the parties when the contract was entered into, as likely to result from a breach.

1 Sutherland, Damages, 74.

In matter of contract, the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance.

*Wood's Mayne*, Damages, § 12, p. 14; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828; *Hendrick v. Stewart*, 1 Overt. 476; *Pettee v. Tennessee Mfg. Co.* 1 Sneed, 381; *McWhirter v. Douglas*, 1 Coldw. 591; *State v. Ward*, 9 Heisk. 132.

The onus of making a contract ought to lie on the party who seeks to extend the liability of another, rather than upon him who merely seeks to restrain his own within its original limits.

*Wood's Mayne*, Damages, § 36, pp. 41, 42.

The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition.

*British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 509; *Horne v. Midland R. Co.* L. R. 8 C. P. 131, 42 L. J. C. P. N. S. 59; *Elbinger Aktien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; 1 Sedgw. Damages, p. 223; *Horne v. Midland R. Co.* L. R. 7 C. P. 583; 2 Benjamin, Sales, pp. 893, 894; *McWhirter v. Douglas*, 1 Coldw. 602.

Such notice as the facts establish in this case is insufficient to charge defendant with such special and extraordinary damages as the rent of a cotton compress for a whole season.

*On petition for rehearing.*

The measure of liability was dependent upon a factor not within the knowledge of the contractor,—the rent of such a compress. The same cylinder would be fur-



nished at the same price to another compress whose rental was only \$1,000 or to another whose rental was \$10,000. The manufacturer, having no knowledge whatever of the year's or season's rental, would not be responsible to one for \$1,000 and to the other for \$10,000.

Wood's Mayne, Damages, § 12.

Accidental or consequential damages are not recoverable on breach of contract.

*Hendrick v. Stewart*, 1 Overt. 476; *Pettee v. Tennessee Mfg. Co.* 1 Sneed, 387.

The rental value of this compress was based entirely upon the profits to have been derived from running it for the season.

Profits are too contingent and speculative to be allowed as damages for breach of contract.

*Hendrick v. Stewart*, 1 Overt. 476; *Pettee v. Tennessee Mfg. Co.* 1 Sneed, 381; *McWhirter v. Douglas*, 1 Coldw. 591; *Hurley v. Buchi*, 10 Lea, 349.

**Mr. W. A. Percy**, for defendants in error:

By reason of the failure to furnish the machinery contracted for at the time when it was contracted to be delivered, a loss of the use of the compress for a considerable period ensued; and that such would be the case was in the contemplation of the parties when the contract was made, and the particular time of delivery was specified in order to avoid such loss.

In England the loss of the use of property occasioned by delay in delivering necessary machinery, when notice of the use to which the machinery is to be put is inferable from the contract or circumstances surrounding it, has been uniformly allowed.

*Hadley v. Baxendale*, 9 Exch. 341; *Cory v. Thames Ironworks & Shipbuilding Co. L. R.* 3 Q. B. 185; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 475; *Grebert-Bornis v. Nugent*, L. R. 15 Q. B. Div. 85; *Wilson v. Newport Dock Co. L. R.* 1 Exch. 184; *Simpson v. London & N. W. R. Co. L. R.* 1 Q. B. Div. 275; *Agius v. Great Western Colliery Co.* [1899] 1 Q. B. 419.

Profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

*Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Hunt v. Oregon P. R. Co.* 1 L. R. A. 842, 36 Fed. 482.

Loss of rents were held recoverable in—*Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Graves v. Kansas City, P. & G. R. Co.* 69 Mo. App. 574; *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644; *Graves v. Glass*, 86 Iowa, 261, 53 N. W. 231; *Good-* 53 L. R. A.

*Loe v. Rogers*, 9 La. Ann. 273, 61 Am. Dec. 205.

Plaintiff recovers the rental value of a building from the time it should have been completed.

*Heater v. Know*, 63 N. Y. 561.

There is nothing in the term "profits" itself which precludes their being given in evidence and used as the measure of damages, and when excluded it is because they are unnatural or remote, and there are no criteria by which to estimate them with that certainty which the law requires. Indeed, in many cases profits are the only certain or reliable measure of damages. But, as a general rule, the expected or anticipated profits of a business enterprise cannot be proved with any degree of certainty, and therefore cannot be recovered.

*Williams v. Island City Milling Co.* 25 Or. 573, 37 Pac. 49; *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. 25; *John Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N. W. 930; *Covode v. Principaal*, 110 Mich. 672, 68 N. W. 987.

A critical examination of the Tennessee authorities will not show that the court is out of line with the universal trend of decisions in other states.

*Hendrick v. Stewart*, 1 Overt. 476; *Pettee v. Tennessee Mfg. Co.* 1 Sneed, 381; *Porter v. Woods*, 3 Humph. 62, 39 Am. Dec. 153; *McWhirter v. Douglas*, 1 Coldw. 593, 9 Heisk. 69; *State v. Ward*, 9 Heisk. 100; *Fort v. Orndoff*, 7 Heisk. 168; *Walker v. Ellis*, 1 Sneed, 515; *Spears v. Armstrong* (Tenn. Ch. App.) 42 S. W. 37.

This contract was performable in Mississippi, where the machinery was to be erected and delivered; and the rights of the parties are regulated by the laws of that state.

It has been the well-settled law in Mississippi since the case of *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 482, that loss of rents or profits may be recovered when they may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into.

A wider range of damages is admissible where wrongs are committed than in cases of simple breach of contract.

*Schile v. Brokhahus*, 80 N. Y. 614; *White v. Moseley*, 8 Pick. 356; *Erie City Iron Works v. Barber*, 106 Pa. 133, 51 Am. Rep. 508; *Page v. Ford*, 12 Ind. 46.

Where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby; and upon this question evidence of profits which he was actually making is admissible.

*Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114; *Lambert v. Haskell*, 80 Cal. 619, 22 Pac. 327; *Conlon v. McGraw*, 66 Mich. 194, 33 N. W. 388; *Sedgw. Damages*, § 189; *Crawford v. Parsons*, 63 N. H. 438; *Ludlow v. Yonkers*, 43 Barb. 493; *Willis v. Branch*, 94 N. C. 142; *Evens v. Cincinnati*, 2 Handy (Ohio) 236; *Nims v. Troy*, 59 N. Y. 500; *Korf v. Lull*, 70 Ill. 420; *Rogers v. Bemis*, 69 Pa. 432; *Novelty Iron Works v. Capital*

*City Oatmeal Co.* 88 Iowa, 524, 55 N. W. 518; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Scribner v. Jacobs*, 31 N. Y. S. R. 794, 9 N. Y. Supp. 856; *Reich v. Colwell Lead Co.* 50 N. Y. S. R. 298, 21 N. Y. Supp. 495; *Somerby v. Tappan*, Wright (Ohio) 229; *Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co.* 79 Md. 103, 29 Atl. 69, 77 Md. 202, 26 Atl. 493.

Loss of profits during delay is recoverable.

*Wade v. Haycock*, 25 Pa. 382; *Diwon-Woods Co. v. Phillips Glass Co.* 169 Pa. 167, 32 Atl. 432; *Allison v. Davidson* (Tenn. Ch. App.) 39 S. W. 905.

**Beard, J.**, delivered the opinion of the court:

The plaintiff in error in the year 1897 was engaged in the iron-foundry business in Memphis, Tennessee; and the Union Compress & Storage Company owned at that time a plant, erected at Clarksdale, Mississippi, for compressing cotton in bales for shipment to market. The power used by the latter company in doing this work was furnished by two sets of cylinders, in part steam and in part hydraulic, one of which was high and the other low pressure. In the winter of 1896-97 the low-pressure hydraulic cylinder and some of the pipes communicating between it and the compress proper were permanently injured. This disabled the entire plant, and made it necessary for the compress company to have, not only a new cylinder and new pipes, but also other parts of its machinery repaired, in order to put the compress in working condition for the season of 1897-98, which began at that point about the 1st of October. To this end this company entered into a written contract with the Livermore Foundry & Machine Company, which is in the words following, to wit:

August 17th, 1897.

This contract between the Livermore Foundry and Machine Co., of Memphis, Tennessee, and the Union Compress and Storage Co. of Clarksdale, Miss., witnesseth, that the said Livermore Foundry and Machine Co., for and in consideration of a sum of money, amount herein mentioned, agree to furnish the necessary labor and material for the repairs on the compress machinery, to wit: To furnish one new cylinder head, drilled and fitted per old one. To furnish one new piston head, fitted with packing rings and springs, with additional metal added. To furnish one new low-pressure hydraulic cylinder. New special bolts for steam-cylinder head, and rear end of both hydraulic cylinders. To repair cracked steam cylinder in best possible manner, and make tight. To reline high-pressure cylinder with seamless drawn tube, so as to be true and smooth. To furnish and set in place one piece of 4-inch extra-heavy hydraulic pipe, 10 feet 9 inches long, and to bend same so as to conform to shape of old one. It is further agreed that the Livermore Foundry and Machine Co. shall take

down and dismantle all above-mentioned parts of machinery, and ship same to Memphis, without expense to the Union Compress and Storage Co., and upon completion of repairs at Memphis to return same to Clarksdale, Miss., and erect same in place, without expense to the said Union Compress Company. The Livermore Foundry and Machine Co. agrees to complete the above-mentioned repairs and press ready for service within the period of fifty-five days from the date of the contract. For the faithful execution of this contract, the Union Compress and Storage Co. agrees to pay the Livermore Foundry and Machine Co. the sum of two thousand and thirty-four dollars on the following terms: One thousand dollars to be paid when repairs are delivered aboard cars at Clarksdale, Miss., and the balance, 1,034.00, to be paid within thirty days after the completion and satisfactory test of the work. It is further agreed that in the event, during the progress of the work or testing of the press, other work, repairs, or changes, not enumerated in this contract, are made, same shall be paid for by the Union Compress and Storage Company at such rates and prices as may be agreed upon. The Livermore Foundry and Machine Company agrees to allow the Union Compress and Storage Company the sum of six dollars per ton f. o. b. Memphis for scrap iron, and copper at eight cents per pound.

Although by this contract the work was to be finished and the various mechanical appliances were to be put in place, ready for the operation of the compress, within fifty-five days from its date, a much longer period elapsed before this was done. In the early part of November, however, they were adjusted in part, at least, and subjected to a test which was unsatisfactory to Mr. Leach, who was on the ground as a skilled employee, representing the plaintiff in error in placing the new machinery, and in the experiment made. Finally, after material changes had been made under his direction, he notified the officers of the compress company that he would be ready to make another test on the 11th of November, and asked that he be supplied by the company with a sufficient working crew for this purpose, which was done. In making this test it was discovered that the defect or defects in the head of the hydraulic cylinder constructed by plaintiff in error, which were discovered at the first experiment, still existed, and that some additional work was required to correct them. This was done, and on the 12th of November a working crew was again furnished to Leach, and the machinery of the plant was put in operation in the morning, and, with stoppages for short intervals, to make some immaterial changes, was continued in operation until about 4 o'clock in the afternoon, up to which time about 400 bales of cotton had been compressed. About that hour an explosion took place, inflicting serious damage on the plant itself, and killing one of the employees of the compress company instantly, and fatally

wounding two others. Upon examination it was disclosed that the head of the low-pressure steam cylinder, as well as that of the low-pressure hydraulic cylinder, had blown out, and other parts of the machinery had been seriously injured. Before the accident the compress company had paid \$1,000 on the contract, but this payment was made with the express understanding that the compress company waived no right against the foundry company by reason of any breach of its contract. This action was brought to recover this sum, together with damages sustained by the company for the injury sustained by the plant from this explosion, and for rental value of the compress during its period of enforced idleness following the accident, upon the theory that the imperfect and unworkmanlike cylinder furnished by the plaintiff in error was the occasion of the accident and loss. The trial of the case resulted in a verdict which is in these words:

We, the jury, find for the plaintiffs, and assess their damage for injury and cost of repairing machinery and premises, and replacing same, caused by breach of contract and cylinder explosion, \$3,500; for money paid on contract, \$1,000.00, with interest; for loss of rental value of compress, caused by breach of contract and cylinder explosion, \$3,000.00; total, \$7,500.

W. H. Montgomery, Foreman.

The first error assigned is that there is no material evidence to support the verdict of the jury. In considering this assignment, the well-settled rule is as announced in *Citizens' Rapid-Transit Co. v. Seigrist*, 96 Tenn. 120, 33 S. W. 920, that, in order to impeach in this court a verdict approved by the trial judge, the complaining party must take as true the strongest legitimate view of the testimony against him, and be prepared to show that it affords no support to the verdict. So that if the testimony in a given case, viewed from different points of observation, should suggest two theories, both of which may be naturally deduced from it, one of which, if adopted by the jury, makes reasonable their verdict, and the other would leave it without material support, this court will assume that the one which sustains the verdict was the one adopted by the triors of fact, and maintain their finding. Bearing in mind this rule and its corollary, we will now examine briefly the facts as disclosed in the case. But before doing so it is proper to give some idea of the location and operation of these cylinders and their connections. They were placed in a horizontal position. The low-pressure steam cylinder was in the rear, and the hydraulic cylinder manufactured by the plaintiff in error was immediately in front; the two being joined firmly together by bolts. Inside these cylinders was a piston common to both. By the use of a lever connected with proper valves in these cylinders, this piston was moved back and forth. Steam was let in behind the piston,

which as it expanded pressed it forward, and as this movement progressed its plunger came in contact with a volume of water contained in the hydraulic cylinder, and this was moved up towards its head, being pressed against it with a force equal to from 350 to 400 tons, as might be required, which, through pipes communicating with the compress, began the work of compressing a bale of cotton, which was completed by a still more powerful force furnished by the high-pressure steam and hydraulic cylinders. As has already been said, the heads of these two low-pressure cylinders, as the result of the explosion, were blown off, and the theory of the plaintiff below was that this resulted from the fact that the defendant had unskillfully cast the cylinder; that its head was of inferior material, and so imperfectly and unskillfully done that it would not stand the strain put upon it in the careful operation of the machinery; and that, much before it had received the full force of the strain it should have borne if properly constructed, the head blew off, and thus relieved from resistance, and under the influence of the propelling steam in its rear, the piston moved forward with such energy as to break off the head of the steam cylinder. The record shows that, after the casting was done, Garside, who was the manager of the Livermore Foundry & Machine Company, found on examination what he supposed shallow sand holes in the head of the cylinder, which he says did not weaken it, but did give it rather an ugly and unfinished appearance, so he had placed over this head a solid brass plate, covering its entire surface, at an expense to his employer of \$150. To fix this cap or plate over this head, some 45 holes were bored into the upper rim of the cylinder, and the cap was fitted on with bolts carried into these holes. Mr. Garside says: "When the job was done, it looked like a good piece of work, and it was shipped down there." And again he says: "I did not think that the drilling there would weaken it to any extent that would be dangerous,—that would be anywise dangerous." As has been stated, after the cylinder was placed, and the other machinery was adjusted to it, Leach, who was sent to Clarksdale, as the representative of plaintiff in error, to do this work, subjected it to a number of tests. When the first of these was made, and pressure was put on this cylinder, according to the testimony of a number of witnesses jets of water burst out all around the head, where it is claimed the imperfections were. This experiment was altogether unsatisfactory to Leach, so, after expending several days of labor in undertaking to remedy the defects, he informed the officers of the defendant in error that he was ready for another test. When, during this test, pressure was once more applied, it was found that water still ran in jets from holes around or in this head. While thus operating the machinery in compressing cotton with a crew of the compress company, furnished to him for the purpose, and working under his direction, according to

Cutrer, a witness, "he would stop every little while and do a little work." After the first test he had said to Campbell that he would make an effort, by the use of countersunk bolts, to stop the leaks, and if this failed his company would have to make a new casting; and during the progress of this second test he said to Cutrer that he was afraid he might not be able to remedy it, and the Livermore Company would have to cast a new cylinder, but he would continue his work upon it, to see if he could fix it. The head of the hydraulic cylinder was examined by a number of persons, witnesses in the case. Shipway, superintendent of the cotton compresses for many years in Memphis, was one of these persons, and he testified that it was "honeycombed and defective;" that the effect of attaching the brass cap with bolts carried into the holes bored in it was to weaken it still more; that this cap could serve no useful purpose, but must have been put on to cover up blow holes, or to prevent them from showing or leaking water. Morrison examined this head, and found it made of porous, slaggy metal, and very imperfectly constructed, and Walsh, a practical machinist, and engineer of many years' experience, who also examined the head, pronounced it "not a workmanlike piece of work at all," and that the drilling of the holes for the cap diminished the resisting force of the metal; and Martin, a witness for defendant below, on cross-examination admitted that, if it leaked as described by other witnesses, he would not regard it as a sound piece of work. All these parties agree that never before had they known a brass cap on a cylinder head. It is evident, without further detail, that there was material testimony which, the jury accepting, warranted them in believing that this hydraulic cylinder, at that place where it was to receive the greatest pressure, was of inferior material, poorly cast, and afterwards diminished in strength by the effort to cover its defects. But were they authorized to infer that this defective heading was the cause of the explosion? That the initial explosion was not in the steam cylinder, we think the jury were authorized to conclude. The steam cylinder had worked for years satisfactorily, and up to the moment of the accident gave no evidence of weakness. The explosion, so far as the record shows, did not dislodge it from its place, though its head was blown out, while this head, together with the hydraulic cylinder, was driven forward a distance of several feet. Upon examination by the expert witnesses, the metal in the former was pronounced perfect, while that in the latter was found to be imperfect by the witnesses named. In addition, we think the testimony in the case warrants the contention of the plaintiff below that, if the initial break had been in the steam cylinder, its necessary effect would have been to release the piston from the pressure upon it from behind, and thus have at once relieved the head of the hydraulic cylinder from the strain upon it, and, whatever other damage

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might have been done to the latter, this would not have blown off. On the other hand, we can well see that the jury might naturally have inferred that the break first occurred in the head of the hydraulic cylinder, which, unable, by reason of inferior metal used, and imperfect construction, to longer resist the strain put upon it, gave way suddenly; and the piston, thus relieved, under the impulse of a steam pressure of from 350 to 400 tons, sprang forward with tremendous violence, dragging after it the head of the steam cylinder, and at the same time carrying with it the hydraulic cylinder. It is true, there was a suggestion by the defendant below, based upon the testimony of Leach, that the accident was the result of carelessness on the part of the engineer in operating this machinery, resulting in the head of the piston being driven against the head of the hydraulic cylinder, thus weakening it until disintegration of the metal took place, followed by this explosion; but it is evident that this theory, as was the other, as to the initial point of explosion, propounded by the defendant below, was discarded by the jury, and they accepted, rather, that of the plaintiff. It was for that tribunal to pass upon these respective theories, and, finding that the one adopted by the jury was reasonably deducible from the evidence, we cannot interfere with the verdict.

2. It is assigned for error that the trial judge improperly admitted photographs of the compress and the wrecked machinery, taken after the accident. These photographs were taken by the witness immediately after the accident, and served to give the jury, with the explanation of them by the witness, a more correct idea of the condition of the wreck than they would obtain from mere description without their aid. Even if proper objection had been made, which we do not find in this record, yet it could not avail, as we hold they were competent to go to the jury. *Bruce v. Beall*, 99 Tenn. 309, 41 S. W. 445; *Missouri, K. & T. R. Co. v. Magee* (Tex. Civ. App.) 49 S. W. 929.

3. It was not error on the part of the trial judge in declining to permit defendant below to ask Campbell (one of the parties for whose use the suit is brought), on cross-examination, what he paid Mrs. Cutrer for her interest in this suit. There was no issue in the case which made this inquiry pertinent. When the husband of Mrs. Cutrer was on the stand, within the freedom of cross-examination he might have asked as to this matter; but, being a collateral matter, his answer would have concluded the investigation.

4. The trial judge, in his charge, said to the jury that, if they found that the loss of the use of the compress was due to the breach of contract of the defendant to furnish the machinery according to the contract, yet such loss could not be considered or allowed by them, unless they also found that the defendant, at the time the contract was made, had notice, either from

it or otherwise, that such loss of use would ensue from nonperformance by it of its contract. He then adds: "But if you find that it was in the contemplation of the parties to the contract, by the terms of the agreement or by direct notice, that, in the event of default by the defendant to furnish suitable and proper machinery, the loss of the use of the compress would necessarily ensue; and if you find, as a necessary result of the explosion (if you find the explosion due to the negligence of the defendant in furnishing a defective cylinder), that the plaintiff was deprived of the use of the compress,—plaintiff would be entitled to recover the rental value of the compress, as shown by the evidence, during the period in which it was so deprived of its use." It is insisted that there is error in this last paragraph. Before considering this assignment, it is proper to say, in reply to another objection of plaintiff in error, that the declaration averred a loss of rental use or value of the compress for the season of 1897-98, resulting from the breach of contract on the part of the foundry company; and evidence was adduced tending to show that after the accident it was impracticable to supply the compress with machinery in place of that destroyed, so as to enable it to do any work during that season, and also what the compress could have done with good machinery, and its rental value. In the instruction just quoted the trial judge was applying, in brief terms, the rule laid down by Alderson, B., in the new celebrated case of *Hadley v. Baxendale*, 9 Exch. 341, which is in these words: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, (i. e., according to the usual course of things), from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as to the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract, under these special circumstances, as known and communicated." Perhaps no rule of practice has provoked more attention from courts and text writers, or been more uniformly adopted, than this. It has been with singular unanimity recognized as resting on the sound principle that a party suffering from a breach of contract on the part of another is entitled to recover full compensation for the loss sustained thereby. It is true, he can recover only these damages resulting fairly and naturally from the breach, but such as may be supposed to have been within the contemplation of the parties as the probable result of the 53 L. R. A.

breach are certainly of that character. Mr. Sutherland, in his work on damages (vol. 1, p. 79); says: "There is no relaxation of the rule confining the recovery to damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed, some strictness exists to confine the recovery to the immediate consequences. The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract would derive from its performance is the measure of his damages if it be broken. It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to both parties. If it appear by these surrounding circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or to avoid an anticipated loss, the liability of the other for a violation of the contract will be determined, and the amount of damages fixed, with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at a contract, . . . silent as to such circumstances, . . . such damages . . . sometimes appear to arise very remotely and collaterally to the undertaking violated. But, when the contract is considered in connection with the extrinsic facts, there is established a natural and proximate relation of cause and effect between the breach of the contract and the injury to be compensated." Mr. Sedgwick, in his work on Damages (vol. 1, § 149), after an examination of the cases in which *Hadley v. Baxendale*, has been reviewed and applied, in summing up the general result, says: "On the whole, it will be found that the general tendency of judicial opinion in the United States, as well as in England, is that no new rule of damages has been introduced; that the plaintiff recover such damages as are proximate and natural; and that, in ascertaining what are natural consequences, we must take into the account all the circumstances of the case, including all facts bearing on the question which were in the knowledge of both parties, even though these be such as would not necessarily, without such knowledge, enter into it." It would be a waste of labor and space to review the cases in which this rule has been applied,—in some with a liberality which we might not feel called upon to sanction, and in others with more narrowness of construction, but in all approved. Among the English cases are *Cory v. Thames Iron Works & Ship Building Co.* L. R. 3 Q. B. 185; *Elhinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 475; *Grébert-Borgnis v. Nugent*, L. R. 15 Q. B. Div. 85; and *Agius v. Great Western Colliery Co.* [1899] 1 Q. B. 419; and by the American courts is

*Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58; *Graves v. Kansas City, P. & G. R. Co.* 69 Mo. App. 574; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. 644; *Williams v. Island City Milling Co.* 25 Or. 573, 37 Pac. 49; *Vioksburg & M. R. Co. v. Ragsdale*, 46 Miss. 482. The rule was referred to with approval by this court in *McDonald v. Unaka Timber Co.* 88 Tenn. 38, 12 S. W. 420, and was directly applied at the present term in the case of *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* (opinion by Justice Caldwell) 104 Tenn. 568, 50 L. R. A. 729, 58 S. W. 303.

But it is argued that, granting the authority of this rule, yet the present case was not a proper one for its application; that the information given plaintiff in error was not sufficient to put it on notice of the extraordinary damages it might incur from a breach of its contract. No case holds, in order to put this rule in operation, that the party invoking it must have said to the other party, at the moment of making the contract, that he would claim these damages for a breach, but it may be conceded that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." (*British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499); or, as is said by Mr. Sedgwick, "notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a nature that the contract was to some extent based upon the special circumstances." [§ 159.] Yet, thus interpreting the rule, we think the testimony warranted the trial judge in giving it in charge to the jury. On this point it was as follows: "Mr. Cutrer, president of the company, said: 'Mr. Leach thoroughly understood that was the purpose in view,—to fit the compress, and have it ready in time to take up the cotton as it came in. Mr. Leach thoroughly understood, and we discussed together, the necessity for having this work done in time to press cotton for the season of 1897, and that, if his company took the contract, they were to take it and complete the work in time for the crop of 1897.' Mr. W. S. Campbell was asked:

Q. What information, if any, did you impart to the Livermore Foundry & Machine Company of the necessity of having the work contracted for completed in time, and as to the uses to which the press, when repaired, was to be put?

A. Well, I, of course, impressed the fact upon him that we wanted it completed in time to press cotton that would begin to come in to us; and, in fact, they fully understood the nature of the contract, and the necessity for having it in shape by the time the season was open for compressing.

But it is also said the trial judge was in 53 L. R. A.

error in saying to the jury, upon the case which this testimony tended to prove, that for its period of enforced idleness plaintiff below could recover the rental value of the premises. There was no error in this. *Schile v. Brokhahus*, 80 N. Y. 614; *White v. Moseley*, 8 Pick. 356; *Keller v. Stevens*, 66 Md. 132, 6 Atl. 533; *Chicago City R. Co. v. Howison*, 86 Ill. 218; *Dixon-Woods Co. v. Phillips Glass Co.* 169 Pa. 167, 32 Atl. 432.

But it is said that the trial judge, in the clause of his charge set out above, erroneously left it to the jury to construe the written contract between these parties. An examination of the whole clause, we think, shows this criticism to be highly technical. There was no ambiguity in the written contract, or controversy as to its execution or provisions. The issue to which the attention of the jury was then being called was, assuming that the foundry was responsible for the explosion and the enforced idleness of the compress, whether at the time of the making of the contract both parties had in view a prompt execution of the contract, in order to have the compress in order for the opening of the cotton season, and the loss which would ensue from a failure in promptness in that regard. The written contract did not embody these matters. They were to be ascertained from extrinsic evidence, and might rest in an agreement oral in character, or might depend entirely upon a notice from the compress company to the foundry, necessarily inferable from the circumstances known to both parties. It was to this feature of the case, and not to the written contract, the circuit judge was addressing himself.

Other errors are assigned, but, as they are unimportant, they are disposed of orally.

All are overruled, and the judgment is affirmed.

A petition for rehearing having been filed the following response was handed down thereto:

We have been earnestly asked to reconsider this case, upon the suggestion that we have carried the doctrine of *Hadley v. Baxendale* further than is warranted by principle or authority, and in so doing have countenanced an application of it which will prove of grave import to manufacturers in this state. Before examining this point, it is well to repeat that the case at bar is one where a manufacturer agreed with a compress company to construct and put in proper place a hydraulic cylinder within a fixed period, with full knowledge that it was an essential part of the compress machinery, and that the time for its completion and erection was named with regard to the beginning of a limited season, during which the compress could alone be made profitable, yet who delayed delivery much longer than the time agreed upon, and then furnished one which exploded under proper tests, inflicting such injury to the plant as to put it in a condition of enforced idleness for the entire season. In such a case the question

is, What is the owner of the compress entitled to recover against the delinquent manufacturer? That he should recover something is evident. He is without blame, while the party with whom he has contracted, in violation of a legal duty to supply a cylinder of good material and workmanship (*Overton v. Phelan*, 2 Head, 445), is at fault. Under these conditions, it will be conceded, the general rule is that the loss must fall on that one whose wrong has brought it about, and the party injured shall recover damages commensurate with the loss sustained. In the case at bar the compress was erected by its owner for compressing cotton for shipment to market. It was valueless for any other purpose, and was only valuable for this for a period running from about the 1st of October to the 1st of June of current years. Lying idle during that time, its profit or rent-earning capacity to its owners was destroyed. The record showing that it was disabled from work during this period through the fault of the plaintiff in error, what damages are the owners entitled to recover? In cases like the present it is certainly true that the weight of authority is that for his indemnity the party disappointed of prompt delivery may recover of the delinquent manufacturer the rental value of his property between the dates when the article contracted for should have been delivered and the date of its actual delivery. This much we understand to be conceded in the petition for rehearing, but the insistence is that the principle authorizing a recovery in such a case should not be applied where the enforced idleness is the result of an unexpected accident, from latent defects in the work supplied by the manufacturer, and covers a period of time so indefinite as a "season's business." It is said by counsel for petitioner that, in the case first put, the time of default is certain, and, as the manufacturer can calculate with a degree of certainty what the claim against him will be in case of default, it may very well be said that, in the want of prompt delivery, he contemplated as the natural result of his failure a loss to the owner of the rental value of his property during the period such failure continues, and his liability for such loss, as the natural result of his breach. But it is insisted that it is otherwise where a stoppage is put to machinery during a season's business by such an unexpected and unusual occurrence as the explosion of a mechanical contrivance furnished by him. In either case, however, there is a breach of his contract. In one he is bound to deliver on time, and fails to do so for several days or weeks. In the other he undertakes to manufacture and put in place within a given period a piece of mechanism of sound material and good workmanship, that will stand the strain necessarily imposed upon it, and instead supplies one constructed of such improper substance, and in a manner pronounced by experts to be so unworkmanlike, as that it explodes, and makes a useless wreck of the plant for a whole season. If liable in the one case,

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upon what substantial ground can liability be averted in the other? In neither case is he liable for a loss of profits; for fluctuation in business, changes in the price of labor, and unforeseen accidents to machinery make this, as a measure of damages, too uncertain. It is otherwise, however, as to the loss by the owner of the use of his property during the period of inactivity. The value of this use is the rental value of the property, and this is as well ascertainable for six months as for six weeks,—for a season as for a fractional part of a season. We can see no reason for discriminating between the two cases. For the shorter period he is held responsible because the loss was necessarily, under the facts of the case, within the contemplation of the parties, as the natural and proximate result of his act. So for the longer period he is equally liable on the same ground. It is true that in a claim for unliquidated damages the application of this rule, or in fact of any rule, may not always do exact justice to both parties. All the courts can do is to approach this result as near as possible. In all such cases the rule of right is that the party who has suffered is entitled to be placed as near as possible in the same plight he would have been if the contract had been performed by the other party; this, however, to be accomplished within legal limitations.

In the case of *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635, the court held that the measure of damages for failure to erect a mill at the time stipulated in the contract is its fair rental value during the time the owner is thus kept from its use. In discussing the rule the court made the following observation: "The inquiry here is, What standard of value for the loss of time shall we apply? We cannot adopt any estimate of profits that Abbott might have realized from working the mill, because these were merely speculative, depending on the quantity of flour it might grind, the fluctuation of the market as to prices of flour and grain, and the remote contingencies of his being able to procure wheat, labor, and fuel, as well as the continuance of the mill in running order, free from accidents and loss of time from other causes. . . . Considering the uncertainty attending the milling business, and the difficulty of defining a safe guide for juries, we are of opinion that a fair rent is the most reasonable standard of the defendant's loss by reason of the plaintiff's failure to complete the mill. This we take to be consistent with well-established principles. . . ." This rule is also applied in a finely-reasoned opinion delivered by Selden, J., for the court, in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, where, after examining and distinguishing the cases, it was held that speculative profits as a basis for recovery would not be considered, but the measure of damages in a failure to furnish an engine by a stipulated time is the value of the use during the period of delay. In *Olifford v. Richardson*, 18 Vt. 620, the defendant put

machinery into the plaintiff's mill in an unskillful manner, whereby he lost the use of his mill for a long space of time, and was put to great expense in repairing the machinery. It was held that both the loss of the use of the mill and the expense of repairs were to be compensated for in damages. In this case, though, the court seemed to allow, as competent, evidence of what the mill could have earned. On this last point we are not to be understood as approving its holding; otherwise, it is authority for the general proposition that the mill or compress owner is entitled to be placed, as far as a money recovery can, in the same condition as he would have been if the other party had not breached his contract. *Goodloe v. Rogers*, 9 La. Ann. 273, 61 Am. Dec. 205, is another authority to the same point. It is true, this was a case arising under the Civil Code of Louisiana, which in many essential features differs from the common law. But in this regard that Code adopts the rule for the measure of damages in cases like the present almost in the words of *Hadley v. Baxendale*. After providing that any "person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill," it then provides that "when the object of the contract is anything but the payment of money," and the party committing the breach is not guilty of fraud or bad faith, "he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract." Under a contract to build and put in operation a sugar mill and steam engine on the defendant's place the court found the plaintiffs were guilty of negligence in the execution of their contract by making a right-hand instead of a left-hand engine; that the castings had defects which caused their breakage when the mill was put in operation; and that they were guilty of a want of skill in the erection of the sugar mill, resulting in serious loss to the defendant. The court sums up by saying: "Under the law and the evidence, we consider the defendant entitled to recover damages for his loss of crop, and extra wages paid in consequence of the delay for alterations and repairs in putting the sugar mill and steam engine in operation; 53 L. R. A.

said delay being caused by plaintiffs' fault, and their failure to execute their contract." As a matter of course, the condition precedent to such a recovery is that the manufacturer had notice at the time he made the contract of the purpose his machine was to serve, and of the circumstances requiring a prompt execution of his contract. When these conditions do exist, then the losses which result from his default are within the contemplation of the parties, and cannot be called accidental, but are incidental to, and flow naturally from, the breach. This rule of law, together with its application to this case, being established, the only question open is, Is there any material evidence to show the rental value of this compress for the season? We do find such evidence, which, even if so slight as is insisted, warranted the inference of value drawn by the jury.

It is also urged that we were in error in our ruling on the action of the trial judge in declining to let the witness Campbell state what he paid Mrs. Cutrer for her interest in the present suit. Mr. Cutrer was an important witness for the plaintiff below. It is said that the purpose of the defendant below in undertaking to elicit information from Campbell as to this transfer from Cutrer and his wife in the subject of the litigation was to affect Cutrer's credit as a witness with the jury. We repeat, as to this, that when Cutrer was cross-examined he might have been asked as to this transfer; but, whatever his answer, it would have concluded the inquiry, because made with regard to a matter collateral to the issue. If, however, independent of the fact of transfer, Cutrer had, under the pressure of cross-examination, denied that he had a strong bias for the plaintiff in the suit,—according, at any rate, to some authority (1 Wharton, Ev. § 561),—he might then have been contradicted by evidence of his own statements to the contrary, or other implicatory acts. But we find no warrant for the course adopted in this case, and still think the action of the trial judge in this regard correct. After a careful reconsideration of all the assignments of error, we are unable to discover any reason for a change in the conclusion originally announced by us, and the petition for rehearing is therefore dismissed.



## MONTANA SUPREME COURT.

PARROT SILVER &amp; COPPER COMPANY,

Resp't.,

v.

A. P. HEINZE et al., Appts.

(.....Mont.....)

1. The granting of a preliminary injunction in an action to enjoin the abstraction of ore in alleged violation of plaintiff's mining claim is so largely a matter of discretion that it will be sustained upon appeal, where there has been a reasonable showing made in support of the application in the court below.
2. Where the apex of a vein leaves a mining claim by crossing the side lines, so that the supposed side lines are in fact end ones, the right to follow the dip is limited by a vertical plane passing downward through the side line, maintaining its direction as marked; and there is no right to follow the dip into territory which might properly have been reached had the side lines as marked proved in fact to be such.
3. In case the apex of a vein entering across the end line of a mining claim passes out across the side line the right to follow the dip of the vein is limited by a vertical plane passing downward through the point where it leaves the side line, parallel with the end line of the claim.
4. A mining claim need not contain

the apex of a claim to be valid, but in case claims located along the apex fail to keep it within their end lines so that the vertical planes drawn to limit the right of owners of adjoining claims to follow the dip of the vein, under U. S. Rev. Stat. § 2322, make a right angle, a valid claim may be located on such dip within the lines of such angle, where it has passed beyond the lines of the former locations.

(March 12, 1901)

**A** PPEAL by defendants from an order of the District Court for Silverbow County enjoining defendants from removing certain ore from within the limits of complainant's mining claim. *Affirmed.*

The facts are stated in the opinion.

*Messrs. McHatton & Cotter and J. M. Denny*, for appellants:

The plaintiff in ejectment must establish the title he alleges, or he will fail in the action.

*Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635; *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208; *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708; *Cooper v. Miller*, 113 Cal. 238, 45 Pac. 325; *Herbert v. King*, 1 Mont. 475; 10 Am. & Eng. Enc. Law, 2d ed. p. 481, and cases in note 2.

NOTE.—The right to follow a vein or lode on its dip beyond the surface lines of the location:—

- I. In general.
- II. Parallelism of lines.
- III. When the apex crosses both side lines.
- IV. When the apex crosses an end line and a side line.
- V. When the apex enters across a side line and departs across the same side line.
- VI. Identity of the vein or lode.
- VII. Conflict and priority of rights.
- VIII. Uniting interests; laying lines of junior, upon senior, location.
- IX. The right as affected by contract.
- X. Degree of dip.
- XI. Right as to veins other than discovery vein.
- XII. Title to ore bodies that apex beyond claim, when adverse party cannot follow dip.
- XIII. Miscellaneous.

## I. In general.

The act of 1866, while it expressly gave to a lode mining claimant the right to follow the lode or vein, located by him, on its dip (*Wolfey v. Lebanon Min. Co.* 4 Colo. 112), did not expressly define the extent of that right; but the courts have, in effect, done so. Thus, the opinion of Judge Field in *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548, when construed in the light of the decision, seems to establish that the locator of a claim under the act of 1866 cannot pursue the vein, either along its apex or dip, beyond the end lines of his claim drawn down vertically. In this connection, Judge Field says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain 53 L. R. A.

number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location."

The right to follow a vein on its dip is limited by the end lines of the mining claim in case of a patent under the act of 1866, as well as in case of a location under the act of 1872. *Walrath v. Champion Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909, affirming 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978, which affirmed 63 Fed. 552.

The act of May 10, 1872, expressly fixes the limits of such right with respect to locations governed by it. It provides (U. S. Rev. Stat. § 2322): "The locators of all mining locations heretofore made or which shall hereafter be made, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The courts that have construed and applied this section seem to be pretty well agreed that its general purpose is to secure to the locator the same length of vein on the dip as he has on the apex. Some of the courts, in applying the

Whether the defendants have title, or are mere trespassers, it is certain that they are in possession of the vein and ore body in question, and that is a sufficient defense against one who has no title at all, and never had any.

*Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601.

The plaintiff in this case cannot maintain its action in ejectment. It has shown that it is not entitled to the vein and ore body in question, and the injunction granted is erroneous.

*Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726; *Montana Co. v. Clark*, 42 Fed. 626; *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601; *Bullion Min. Co. v. Croesus Gold & Silver Min. Co.* 2 Nev. 168, 90 Am. Dec. 526.

Injunctions should not be lightly granted. Facts must be shown establishing an irreparable injury.

*McHenry v. Jewett*, 90 N. Y. 58; *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703.

An injunction will not be granted to a party unless he has a clear, reasonable, or equitable right which is being, or is about to be, disturbed.

*Mowday v. Moore*, 133 Pa. 598, 19 Atl.

provision to conditions that do not seem to have been contemplated by Congress when the section was enacted have sought to give effect to this general purpose at the cost of some straining or violation of its language. But the true principle by which courts must be governed in construing the section has now been settled and declared by the United States Supreme Court in *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, as follows: Whenever a party has acquired the title to ground within whose surface area is the apex of a vein, with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length ought to be awarded him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute.

The only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law requires that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines. *Ibid.*

The right to follow a vein upon its dip outside of the side lines of the location is based upon the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface, and that right is limited at each end by the end lines of the location crossing the lode or vein and extending perpendicularly downwards and indefinitely in their own direction. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25 L. ed. 253.

## II. Parallelism of lines.

There being no provision for end lines, in the act of 1866, there was, of course, no requirement that end lines should be parallel; and it is established beyond contradiction that parallelism of end lines is not required as to locations made under the act of 1866. *Eureka Consol.* 53 L. R. A.

626; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393, 18 Atl. 106; *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; *Lyon v. Woodman*, 2 Legal Gaz. 81, 7 Morrison, Min. Rep. 493.

A clear legal or equitable right free from reasonable doubt must be satisfactorily shown, to authorize a preliminary injunction.

*Hilliard, Inj.* § 16, p. 14; *North River S. B. Co. v. Livingston*, 3 Cow. 713; *Schilling v. Reagan*, 19 Mont. 508, 48 Pac. 1109.

The writ of injunction is not solely for the purpose of preserving property in *status quo*, and it will not be granted for that purpose only unless the party seeking it shows that, if it be not granted, real injury will probably ensue to his rights.

*Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 22 Mont. 159, 56 Pac. 120.

*Messrs. William Scallan, T. J. Walsh, and J. K. Macdonald*, for respondent:

The owner of a mining claim can maintain trespass or injunction with reference to a vein underneath his surface, the apex of which is in another claim, which claim, for some reason or other, has no extralateral rights.

The owner of the surface is presumed to

*Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548; *Consolidated Wyoming Gold Min. Co. v. Champlon Min. Co.* 63 Fed. 540; *Walrath v. Champlon Min. Co.* 63 Fed. 552; *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *Argonaut Min. Co. v. Kennedy Min. & Mill. Co.* 131 Cal. 15, 63 Pac. 148.

But the end lines of a lode mining claim, under the act of 1866, must be straight. *Walrath v. Champlon Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909, Affirming 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978, which affirmed 63 Fed. 552.

The act of 1872, however, expressly requires that the end lines shall be parallel. It is said in *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, that the object of that requirement is to give the claimant as much of the lode on its downward course as he has at the surface, but no more.

There is no requirement of the statute that the side lines shall be parallel, and the requirement that the end lines shall be parallel is for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

Under the act of 1866 parallelism in the end lines of a surface location was not required; but where a location has been made since the act of 1872 such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, Affirming 4 McCrary, 279, 14 Fed. 377. The exterior lines of the claim involved in this case, whose owner sought to follow the vein on its dip, formed a curved figure somewhat in the shape of a horse-shoe, and its end lines were not, and could not

own everything beneath the surface, and this presumption obtains until someone is able to show that there is a vein within the ground, the apex of which is within a claim belonging to him, so located that it has extralateral rights.

Congress having prescribed conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or be content with simply the mineral beneath his territory.

*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 66, 43 L. ed. 76, 18 Sup. Ct. Rep. 895; *Bell v. Skillicorn*, 6 N. M. 399, 28 Pac. 768; *Doe v. Waterloo Min. Co.* 54 Fed. 935; *Lindley, Mines*, § 866.

The conveyance from the government of the Adventure gave to the patentee thereof all the rights of a grantee at the common law, viz., all ores and minerals underlying the ground, reserving, however, to any locator or patentee of a mining claim so located as to have extralateral rights the right to enter thereon and extract the ore from a vein apexing in his ground and passing on its dip into the ground in question through the plane of the side line.

*Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726; *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep.

be made, parallel. The right to follow the vein on its dip was denied because of the non-parallelism of the end lines. It was said in this case that the end lines marked on the ground must control.

No right of following the dip beyond the side lines appertains to a claim, located under the act of 1872, in the form of an isosceles triangle, since in such a case the requirement of parallelism of end lines cannot be complied with. *Montana Co. v. Clark*, 42 Fed. 626.

Substantial parallelism of the end lines is sufficient. *Cheesman v. Shreeve*, 40 Fed. 787.

A substantial compliance with the requirement of parallelism of end lines is sufficient to entitle the locator to follow the vein on its dip when it was evidently intended to lay out the location in a rectangular figure. *Doe v. Sanger*, 83 Cal. 203, 23 Pac. 365. In this case the divergence from a parallel was about 250 feet, that is, the southern end of the western end line should have been about 250 feet farther east in order to have been exactly parallel with the eastern end line. The court held that the divergence was not such as to defeat the right to follow the dip. It further appeared in this case that within less than a year of the original location the western end line was rectified by means of an official survey so as to make it parallel with the east line, and the application for patent was made upon that official survey. The rectification, however, is treated as an additional reason why the locator's right to follow the dip should not be defeated, and not as an absolute necessity. The court does, however, say that it is, perhaps, the duty of the locator to make such change as is necessary to parallel his end lines within a reasonable time, if such change interferes with the substantial property rights of no other person.

In determining the parallelism of end lines as affecting the right to follow the vein on its dip, the fact that the claim is intercepted by another survey is to be disregarded. *Cheesman v. Shreeve*, 40 Fed. 787.

Where the strike of the vein passes perpendicularly through the end lines, the mere me-

601; *Doe v. Waterloo Min. Co.* 54 Fed. 938; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510.

There is no existing law by which title to a vein underlying a claim can be obtained independent of surface ground.

*Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 20 Mont. 336, 51 Pac. 159.

The patent of the owner of the mining claim gives him "title to the entire land, soil, mineral, and all."

*Forbes v. Gracey*, 94 U. S. 767, 24 L. ed. 314; *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887; *Doe v. Waterloo Min. Co.* 54 Fed. 935.

**Brantly, Ch. J.**, delivered the opinion of the court:

Action in the nature of ejectment to determine the title to certain openings and ore bodies beneath the surface of the Adventure mining claim, situate in Silverbow county. The plaintiff, upon filing the complaint, asked for an injunction *pendente lite* to restrain defendants from removing the ores in question. From an order grant-

anderings of the outcrop between the end lines (caused by the surface influences of slides and débris on the mountain side) should not absolutely control the question of parallelism, but the spirit and reason of the statute require that the settled and permanent course of the vein on its strike, as nature fixed it, should control; such sagging being restricted to slight variations from the general direction and trend of the strike. *Cheesman v. Hart*, 42 Fed. 98.

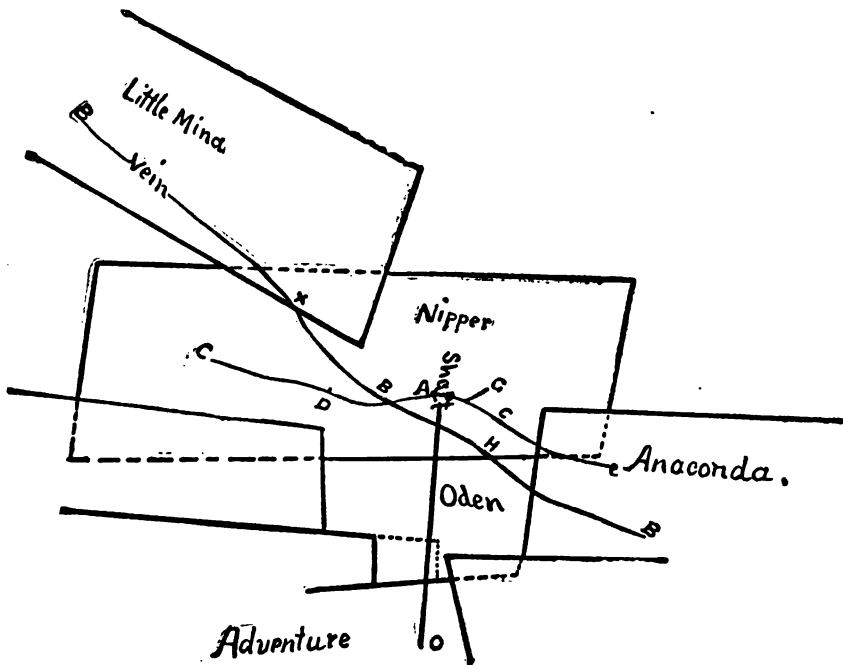
To entitle the owner of a claim patented upon an application made under the act of 1866 and made up by the consolidation of several locations, to follow the dip of his vein, he is not required to show the separate lines of any of the original locations within the surface boundaries of the patented claim; it is enough to show that a lode running in the direction of the length of his claim, and having its apex within the surface boundaries thereof, extends in its dip downwards into the ground of another claim, and that the ore in question is included between the parallel end-line planes of the patented claim. *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, affirming 73 Fed. 597; certiorari denied in 171 U. S. 687, 18 Sup. Ct. Rep. 940.

In *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 468, 54 Fed. 284, the circuit court of appeals held that the fact that an applicant for a patent to a mining claim suffered a judgment by default in an adverse suit which established title, in the owner of the adjoining location, to a triangular portion from a corner of the claim as originally described, thereby leaving the claim a pentagon, did not have the effect of depriving the applicant of the right to draw a new end line at such a point as to leave out the triangular portion and thereby preserve the parallelism of his end lines. This case was reversed on another point in 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733, but this point was in substance affirmed.

The right of an owner of a claim, the end lines of which as patented are parallel, to follow the vein on its dip beneath the side line, cannot be

ing the injunction the defendants have appealed. The principal question presented by the appeal can best be understood by reference to the subjoined diagram, which illustrates the contentions of the parties:

The plaintiff is the owner of the Adventure claim, with all the rights conferred by a patent thereto from the United States. The defendant F. Augustus Heinze is the owner of thirty-one undivided thirty-sixths



defeated by showing that as the claim was originally located the end lines diverged in the direction of the dip, it appearing that prior to the patent one of the end lines had been drawn in so as to make it parallel with the other, as the patent while unrevoked is conclusive with respect to that point. *Doe v. Waterloo Min. Co.* 54 Fed. 935.

Where the patent to a claim gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines of the same, whose apex is within the surface lines of the claim, and whose strike is cut by the end lines of the claim extended perpendicularly downward, the parallelism of the end lines cannot be collaterally attacked in a suit involving the right to follow the vein on its dip. *Waterloo Min. Co. v. Doe*, 27 C. C. A. 50, 48 U. S. App. 411, 82 Fed. 45.

While, as has been seen, the courts have declared in broad terms that parallelism of the end lines is essential to the existence of extralateral rights with respect to locations made under the act of 1872, the circuit court of appeals in *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, *supra*, intimated that if the end lines of such a location converged in the direction of the dip, that fact would not prevent the locator from following the vein on its dip between vertical planes drawn through them and extended in their own direction, since in that case the non-parallelism of the end lines would operate to confine the locator to a less length on the dip than on the apex. This was *obiter*, however, as the claim involved in that case was located under the act of 1866, which did not require parallelism of end lines. The 53 L. R. A.

effect, therefore, upon extralateral rights of the convergence of the end lines in the direction of the dip seems to be an open one, unless the broad statement that the end lines must be parallel may be deemed to have foreclosed it. It is apparent, of course, that, even if such convergence does not entirely defeat the locator's extralateral rights, it reduces them below what they would have been if the end lines had been parallel, and, so far as the equity of the matter is concerned, there is no reason why this reduced right should not be preserved to the locator.

While, as already shown, it is well settled that the end lines of locations made under the act of 1866 need not be parallel, it was the opinion of the court in *Argonaut Min. Co. v. Kennedy Min. & Mill. Co.* 131 Cal. 15, 63 Pac. 148, that the extralateral rights appertaining to a location under the act of 1866, the end lines of which as located diverged in the direction of the dip, were to be confined between vertical planes let fall at the ends of the location at right angles to the general course of the vein. This holding involved the denial, on one hand, of the contention of one of the parties that there were no extralateral rights because of the non-parallelism of the end lines, and, on the other hand, of the contention of the adverse party that the extralateral rights extended between vertical planes drawn through the diverging end lines. In support of the latter contention it was urged that if by any process of reasoning any limitation upon the extralateral right was originally imposed upon the locator's title by reason of the divergence of the end lines, such limitation was removed by the proviso of the act of 1872, which limits the extralateral rights

of the Nipper claim, also patented, lying to the north. When this controversy arose the defendant Arthur P. Heinze was in possession of the Nipper claim as lessee of the interest of F. Augustus Heinze, and was engaged in mining and extracting ore at the point O, beneath the surface and within the vertical planes passing downward through the boundaries of the Adventure claim. These operations were conducted through a "working winze" descending into the earth from the surface within the boundaries of the Nipper claim at A, and following the vein on its dip to the south at an angle of about 75 degrees through the intervening country to the point O, at a depth of 1,300 feet below the surface. The plaintiff admits that the ore bodies at this point have their apex in the Nipper claim, but contends that the evidence shows that this apex, instead of crossing the end lines of the Nipper claim, follows the course indicated by the line B, B, passing across the north side line of the Nipper in the Little Mina at X, towards the northwest, and through the south side line into the Oden claim at H, and thence across the east end line of the Oden into the Anaconda, towards the southeast. This being the condition of the vein, it is confidently asserted that the Nipper claim has no extralateral rights, and that, therefore, since none of the intervening claims have any part of the apex, so as to give them extralateral rights, the ore bodies in controversy belong to the plaintiff by virtue of what counsel assert are its common-law rights. Defendants on their part contend that the evidence shows that the

apex of the vein, as demonstrated by developments at and beneath the surface within the boundaries of the Nipper claim, follows the general direction of the side lines from near the west end line, through the point of discovery at D, and crosses the south side line into the Anaconda at a point near the southeast corner of the Nipper claim. The position of the vein under this contention is indicated by the letters C, C, C. There is some evidence to show that there is also a branch of this vein passing off in the direction indicated by the letter G.

There is a sharp conflict in the evidence introduced to support these adverse contentions as to the strike of the vein. The district court issued the injunction after a hearing. It is evident, from the situation as illustrated by the diagram, that that court found in favor of plaintiff's contention. Otherwise, its action cannot be justified upon any reasonable theory; for, if the theory of the defendants is correct, it is clear that, in following the vein on its dip, they are merely asserting their extralateral rights granted under their patent, though in doing so they pass entirely through the adjoining claims on the south and enter plaintiff's claim. Upon the evidence submitted the district court might have found in favor of defendants' contention. As it did not, however, and as there is substantial evidence tending directly to support plaintiff's contention, we do not feel justified in holding that the showing made by plaintiff was not reasonable, or that the court abused its discretion in finding as it did. The

by vertical planes drawn downward through the end lines. The court held, however, that this proviso was a limitation upon rights already given, and did not necessarily confer ownership to all within those lines, but merely forbade the locator from passing beyond them.

The court assumes to rest its decision upon the authority of *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548, *supra*, and quotes in this connection the language of that case to the effect that "lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course, at the ends of the claimant's line of location will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass." It is not entirely clear, however, from an examination of the *Eureka* case itself, that the court there intended to so limit the extralateral rights with respect to locations under that act which have located end lines. The language just quoted may, perhaps, have been used in the light of the statement in the opinion, quoted in division I., to the effect that end lines are not in terms named in the rules of the miners, but are necessarily implied, and is perhaps to be limited to locations which have no located end lines. It is further to be observed that the court, in announcing its decision in that case, said: "And inasmuch as the ground in dispute lies within planes drawn vertically downward through the end lines of the plaintiff's patented location, our conclusion is that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor." The end lines here spoken of, as is shown by the diagram used in the case, diverged

in the direction of the dip. It appears, however, from the diagram that the ground in question would have been included between planes drawn at right angles to the general course of the vein at the ends of the plaintiff's location, and it is apparent that the determination of the point decided in the *Argonaut* case was not necessary to a decision. The court may therefore have used broader language than it would have used if the particular point had been before it.

### III. When the apex crosses both side lines.

If a location be laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof for the purpose of defining the extralateral rights. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25 L. ed. 253.

The same view had been previously expressed in *McCormick v. Varnes*, 2 Utah, 355, which involved the same location.

The doctrine has been followed and applied to various conditions as to angles at which the lode crosses the side lines, and as to the comparative distances of the lode across and along the lode, by the following cases given in their chronological order: *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356; *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 294. (Reversed on another point in 157 U. S. 683, 30 L. ed. 859, 15 Sup. Ct. Rep. 733); *Watervale Min. Co. v. Leach* (Ariz.) 33 Pac. 418; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L.

rule heretofore applied by this court in this class of cases is that the granting of a preliminary injunction is so largely a matter of discretion that it will be sustained, upon appeal, where there has been a reasonable showing made in support of the application in the court below. *Anaconda Copper Min. Co. v. Butte & B. Min. Co.* 17 Mont. 519, 43 Pac. 924; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 20 Mont. 528, 52 Pac. 273; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 21 Mont. 539, 55 Pac. 112; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.* 22 Mont. 159, 56 Pac. 120. For present purposes, therefore, we shall assume the finding in favor of plaintiff as to the course of the vein through the Nipper claim to be correct, and proceed to determine the legal question presented upon this theory of the case.

ed. 419, 14 Sup. Ct. Rep. 510, Reversing 9 Mont. 548, 24 Pac. 200; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *New Dunderberg Min. Co. v. Old, 25 C. A. 116, 49 U. S. App. 201, 79 Fed. 598*; *Argonaut Consol. Min. & Mill. Co. v. Turner, 23 Colo. 400, 48 Pac. 685*; *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 109 Fed. 535; and the principal case.

The hardships which this doctrine works under certain conditions, and its view of the general purpose of the proviso limiting extralateral rights on the dip, led the Montana supreme court in *King v. Amy & S. Consol. Min. Co.* 9 Mont. 543, 24 Pac. 200, to limit it, so far as concerned the right to follow the vein on its dip, to cases where the vein on its apex struck across the location substantially at right angles with the located side lines, and in other cases to allow the locator to follow the dip up to a plane parallel to the located end line let fall at the point where the lode crossed the located side line. This attempted limitation was, however, repudiated by the United States Supreme Court when the case came before it, and the decision of the Montana supreme court was reversed. *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510. The latter court held in that case that when a vein crosses both side lines such side lines are to be treated as end lines for the purpose of determining the right of the locator to follow the vein on its dip. Justice Field said in this case: "The most that the court can do where the lines are drawn inaccurately and irregularly is to give the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law."

It will be observed that the language in which the doctrine is announced in the last case is broad enough to permit the locator to follow the vein on its dip beneath the line called the end line, between vertical planes through the lines called the side lines extended in their direction; but in the cases heretofore cited the doctrine was applied for the purpose of defeating the right to follow the dip beneath the line called the side line, and not for the purpose of

From this point of view it is apparent that the apex of the vein, in its course through the Nipper claim, crosses both side lines. The defendants, therefore, have no right to follow the vein on its dip in the direction of the Adventure claim. The supposed side lines of the Nipper claim are in fact end lines, and whatever rights its owners have to follow the vein in the direction of the Adventure are limited by a vertical plane passing downward through the south side line extended in its own direction towards the west. "It may be considered as absolutely and finally settled that, where a vein on its course crosses two opposite side lines, the vein cannot be followed, either on its dip or strike, beyond vertical planes drawn through the side-end lines, and that the angle at which it crosses these side lines makes no difference in the application of the principle." 2 Lindley, Mines, § 588.

enabling him to follow the dip beneath the line called the end line.

In *Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co.* 100 Fed. 910, however, it was expressly held that where the claim is located across, instead of lengthwise, of the vein, the owner may follow the vein on its dip beyond the line that was located as an end line, but which under the doctrine established by the cases has become a side line, and his extralateral rights are measured by vertical planes drawn through the lines originally located as side lines, but which have become end lines, extended in their own direction. In other words, the located side lines become end lines, not merely for the purpose of defeating the right to follow the vein on its dip, but also for the purpose of defining the limits of such right if the vein dips underneath the located end line.

#### IV. When the apex crosses an end line and a side line.

When the vein enters across an end line, and, after extending for nearly 100 feet within the side lines, changes its course and crosses one of the side lines, the locator may follow the claim on its dip outside the side line, his right being limited between a plane drawn through the end line crossed and a plane, parallel therewith, drawn at the point where the vein crosses the side line. *Tyler Min. Co. v. Sweeney, 4 C. C. A. 320, 7 U. S. App. 463, 54 Fed. 284.*

When a lode enters through one end line of a location, and, after running nearly parallel with the side line, crosses such side line before reaching the other end line, the extralateral rights are limited by a plane drawn through the end line crossed by the lode, and another plane parallel therewith drawn at the point where the lode crosses the side line. *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540.

The latter case was reversed on another point by the United States Supreme Court in *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733. The latter court, referring to the question, said: "There has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line."

The Montana supreme court, taking advantage of the freedom allowed by such statement, adopted in *Fitzgerald v. Clark*, 17 Mont. 100, 30 L. R. A. 803, 42 Pac. 278, the position taken by the circuit court in *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540, *supra*, although it regarded it as opposed to the

This is a concise statement of the present condition of the law upon this subject as declared by the Supreme Court of the United States in *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25 L. ed. 253, in *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, in *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356, in *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510, and in *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; and the question as to what are the extralateral rights of the owner of a claim in which the apex is situated as in the Nipper is not now open to further discussion. It is equally as well settled by the adjudicated cases that the extralateral rights of the owners of the Oden claim, lying to

the south between the Nipper and the Adventure, if they have any at all upon the vein in question, are limited towards the west by a vertical plane passing downward through the point H, and parallel with the east end line of that claim. The condition here presented was considered by this court in *Fitzgerald v. Olark*, 17 Mont. 100, 30 L. R. A. 803, 42 Pac. 273, and the conclusion there stated is that, where the apex of the vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line. This case was affirmed on appeal by the Supreme Court of the United States (171 U. S. 92, 43 L. ed. 87, 18 Sup. Ct. Rep. 941), upon the authority of *Del Monte Min. & Mill. Co. v. Last*

principles upon which the supreme court reversed *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510, *supra*, III. *Fitzgerald v. Clark* was affirmed by the United States Supreme Court in *Clark v. Fitzgerald*, 171 U. S. 92, 43 L. ed. 87, 18 Sup. Ct. Rep. 941, upon the authority of the opinion in *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, decided the same day.

In the latter case the decision was in form an affirmative answer to the following question certified by the circuit court of appeals: "If the apex of a vein crosses one end line and one side line of a lode mining claim as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?" The doctrine, therefore, seems to be announced in its broadest terms, and to be applicable whether the length of the apex within the surface lines of the location is small or great, though the fact in that respect, of course, determines the length the vein may be followed on its dip. The doctrine has been adopted and applied by the following cases in addition to those already mentioned: *Republican Min. Co. v. Tyler Min. Co.* 25 C. C. A. 178, 48 U. S. App. 213, 79 Fed. 733 (certiorari denied in 166 U. S. 720, 41 L. ed. 1187, 17 Sup. Ct. Rep. 998); *Tyler Min. Co. v. Last Chance Min. Co.* 71 Fed. 848.

**V. When the apex enters across a side line and departs across the same side line.**

In *Catron v. Old*, 23 Colo. 433, 48 Pac. 687, the Colorado supreme court, while not denying, under all circumstances, the right to follow on its dip a vein which enters a claim across a side line and departs across the same side line, held that in the case at bar no extralateral rights could be awarded, it appearing that the claim in question was in the form of an obtuse angle, and that the lode struck across the point of the angle and did not run parallel or nearly parallel with the side line crossed by it, at any point.

**VI. Identity of the vein or lode.**

A lode, ledge, or vein which may be followed on its dip outside the limits of the surface lines extended vertically must be the same vein or lode on the apex or outcrop of which the claim of the party has been located. *Iron Silver Min. Co. v. Cheesman*, 118 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481, affirming 2 McCrary, 191, 8 Fed. 297.

To establish the right to follow a vein on its

dip beyond the side lines, the locator must be able to show that the lode is continuous and in place throughout its whole course from its origin in his own ground to the place in which he claims it. *Leadville Min. Co. v. Fitzgerald*, 4 Morrison Min. Rep. 380, Fed. Cas. No. 8,158.

The mere fact that the line of contact between porphyry and lime extends from one claim into another does not show the existence of a lode which may be followed in the absence of mineral beyond a mere trace in the intervening space. *Stevens v. Gill*, 1 Morrison Min. Rep. 576, Fed. Cas. No. 13,398.

To justify the taking of ore under another's location by virtue of the right to follow a vein on its dip, the person claiming such right must show by a preponderance of the evidence that there outcrops within his claim a vein, lode, or ledge within the meaning of the law, descending upon its dip continuously, upon ore of appreciable value, to the ground in controversy. *Cheesman v. Shreeve*, 40 Fed. 787.

The right of an apex proprietor to pursue a vein passing beneath his side line is dependent upon whether or not, as a fact, the part or mineral body of vein matter which lies outside of the perpendicular of the side lines of his surface claim is so preserved in its identity with the lode inside that it is a part of the same vein the apex of which belongs to the surface owner. *Butte & B. Min. Co. v. Societe Anonyme*, 23 Mont. 177, 58 Pac. 111.

To make available the right to pursue a vein on its dip, the identity of the vein pursued must be proved; but a vein that is incessant or identical in its parts is not necessarily a vein which is continuous, in the sense that the continuity or union of its parts is absolute and uninterrupted. *Ibid.*

The identity of a vein is essential to the right to follow it on the dip, and it must be continuous, but its continuity may be interrupted even to a closure of the fissure, without destruction of the identity, provided the extent of the interruption or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact. *Ibid.*

To follow a vein or lode on its dip, it must be continuous only in the sense that it can be traced by the miner through the surrounding rocks; slight interruptions of the mineral-bearing rock are not alone sufficient to destroy the identity of a vein, nor would a short partial closure of the fissure have the effect to destroy the continuity of a vein, if, a little further on, it appears or recurs again with mineral-bearing rock. *Cheesman v. Shreeve*, 40 Fed. 787.

The term "vein or lode" within the mining acts of Congress is applicable to any zone or belt

*Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, decided on the same day. It thus appears that neither the owners of the Nipper nor of the Oden have, by virtue of their title to the portion of the apex within their respective boundaries, the right to follow the vein on its dip into the ground underlying the Adventure; in other words, these claims have no extralateral rights in the direction of the Adventure.

The question presented for determination upon this condition of affairs may therefore be stated thus: Assuming that the apex of the vein from which the appellants are extracting ore beneath the Adventure surface is in the Nipper ground, and that the vein in its strike crosses both of the side lines of the Nipper, so that the owners of the Nipper may not follow the vein on its

dip to the south, can the respondent, who owns the Adventure claim, successfully assert title to the ores in that part of the vein beneath its surface and within the planes of its exterior boundaries? The appellants insist that it cannot do so, because, not having the top or apex of the vein within the exterior boundaries of the Adventure claim, it has no title to the part of the vein lying under the surface, notwithstanding appellants have no title thereto. In other words, this part of the vein was not granted to the respondent by its patent, and therefore the appellants, though without title themselves, commit no wrong upon respondent in entering beneath the surface and taking away ores to which it has no title. This contention has no foundation either in law or reason. Under the common-law rule as adopted in this country, a grant of lands

of mineralised rock lying within boundaries clearly separating it from the neighboring rock. *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548; *Cheesman v. Shreeve*, 40 Fed. 787; *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. No. 13,413.

A continuous bed of mineralized rock lying within any well-defined boundaries on the earth's surface and under it would constitute a lode. *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. No. 13,413.

The existence of detached or small bodies of ore upon one line or upon or within a given stratum of rock, unless the remainder of the stratum contains the elements which constitute a vein, to wit, defined walls and crevice, continuous ore, and mineralization of appreciable value, throughout its extent, is not, within the statute, such a lode, ledge, or vein as entitles the owner thereof to follow the same beyond his side lines upon its dip. *Cheesman v. Shreeve*, 40 Fed. 787.

If the ore is found in general within boundaries of porphyry and lime, although some fragments of each may occur with it, the lode is well defined. If, however, the ore occurs in porphyry and lime, or in both or either, in such confused and irregular way as shows no line of demarcation for the ore body, the lode is not so defined as that it may be followed beyond the lines of the location. *Leadville Min. Co. v. Fitzgerald*, 4 Morrison Min. Rep. 380, Fed. Cas. No. 8,158.

If there is a continuous or unbroken sheet or body of ore extending from one claim into the other, there can be little doubt as to the boundaries; but if the mineral is not continuous, the matter of boundaries is important in ascertaining whether the lode extends from one claim to another. There may be such interruption of the course of an ore body as to lead to the inference that there can be no connection between the separate parts, although the contact may continue from one to the other; but if there is a body of ore within, and near to, the side line of the claim whose owner is seeking to follow his vein, and there are other bodies of ore in the ground in question, and there are well-defined boundaries to both and all, which are the same as to both and all, and such boundaries extend from one to the other, it ought to be found that they are parts of the same lode. *Ibid.*

If there is a general and pervading continuance of mineral matter within boundaries separating it from the neighboring rock, with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as it can be traced until it breaks off totally and is 53 L. R. A.

interrupted for a very large distance, there is a vein or lode which can be followed on the dip. *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. No. 13,413.

A vein is by no means always a straight line, or of uniform dip or thickness or richness of mineral matter throughout its course. The cleft or fissure in which a vein is found may be narrowed or widened in its course, and even closed for a few feet, and then found further on; and the mineral deposit may be diminished or totally suspended for a short distance, but if found again in the same course with the same mineral within that distance its identity may be presumed; but if the mineral disappears, or the fissure with its walls of the same rock disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of the claimant's survey is gone. *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 520, 20 L. ed. 712, 6 Sup. Ct. Rep. 481, Affirming 2 McCrary, 191, 8 Fed. 297.

In *Hyman v. Wheeler*, 29 Fed. 847, Hallett, D. J., gave the following instructions: A body of mineral, or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.

An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of § 2322, U. S. Rev. Stat. as any other form of deposit. *Ibid.*

A lode must have boundaries, but they need not necessarily be such as can be seen. There may be other means of determining their existence and continuance, as by assay and analysis. *Ibid.*

If the ore of the mountain on which a claim is located is distributed throughout the blue and brown limestones somewhat unequally, but nevertheless generally, and the occurrence of rich ore outside of the lines of the location is fortuitous and accidental, there is no lode in the sense of § 2322, U. S. Rev. Stat., and the ore in question cannot be reached by the locator under the provision of that section as to following the dip. *Ibid.*

To sum up briefly the matters before you, the body of ore exposed in the works of the mine is to be regarded as a lode, within the meaning of the law, unless the whole mass of limestone in which it is found has been mineralized in the same way as the body of ore, and to some extent, and this is a casual concentration of unusual richness. *Ibid.*

Strata lying along the plane of contact be-



without specific reservation conveys all rights above and beneath the surface,—*usque ad cælum et ad oroum*. It is not uncommon, however, for such conveyances to make reservations of rights both above and below the surface, and the fact that this is true in a particular case in no way affects the validity of the particular conveyance.

In what respect does a grant from the United States under the laws regulating the disposition of mineral lands differ from a common-law grant? To reach a solution of this question, regard must be had to the statute itself. Section 2322 of the Revised Statutes of the United States provides: "The locators of all mining locations heretofore made, or which shall hereafter be made, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their

locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the

tween blue and brown lime, if mineralized to the extent of showing value in silver, and distinguishable from other parts of the mountain by carrying ore and by association with the plane of contact, may constitute a lode extending as far as the strata lying on and near the contact may show ore in appreciable quantities. *Ibid.*

In *Doe v. Waterloo Min. Co.* 54 Fed. 935, the identity of the mineral zone within plaintiff's claim and called "south vein" as a part of the vein apexing within the defendant's claim and called "north vein" was denied, it appearing that there was a third zone of mineral matter called "middle vein," between the north and south veins, that each zone had distinct and well-defined boundaries, and that each had sufficient length, depth, and breadth to constitute a true and independent fissure vein, notwithstanding that throughout the liparite rock included between the foot wall of the north vein and the hanging wall of the south vein, there were innumerable cracks and seams, some of them running out from the respective veins, and some of them extending from one vein to the other, there being no such general breakage and crushing, or such general and irregular impregnation, or such irregular disposition of the ore bodies as was the case with the crushed and disintegrated limestone in the Eureka Case.

In *Waterloo Min. Co. v. Doe*, 27 C. C. A. 50, 48 U. S. App. 411, 82 Fed. 45, it was held, upon the facts, that the ore body beneath the plaintiff's location, which the defendant sought to reach by following his vein on its dip, was not a part of such vein, but was an independent vein. It appeared in this case that the defendant's claim was higher up on the mountain than the plaintiff's; that the ore body in dispute had a clearly defined foot wall and a clearly defined hanging wall, other than the hanging wall of the vein within the limits of the defendant's location; that the vein within those limits also had a clearly defined foot wall and hanging wall; and that the country rock, which was liparite, was softer between these two ore bodies than in other places, and there had occurred a greater kaolinization in its fissures than elsewhere. The assays made from the ground showed that, from the foot wall of the ore body in plaintiff's claim to the vein in the defendant's claim, the whole mass was impregnated with silver, and the material sampled south of such ore body did not show such condition. The court said with reference to this, however, that the material so sampled was the mud or brown tuffa, which was only a surface deposit resting upon the liparite.

In *Bunker Hill & S. Min. & Concentrating Co.* 53 L. R. A.

*v. Empire State-Idaho Min. & Developing Co.* 106 Fed. 471, the court said that, while there were no workings from the apex of the ledge of the plaintiff, who claimed the ore as belonging to a part of the dip of his vein, yet there was no doubt that the ore in question was a part of the dip of such vein between the vertical end-line planes of plaintiff's location.

#### VII. Conflict and priority of rights.

A patentee of a mining claim has no right, under § 2322, U. S. Rev. Stat., to follow the dip or vein of a lode apexing within his claim across the boundaries thereof into the agricultural lands of an adjoining proprietor who has the elder title. *Amador Medean Gold Min. Co. v. South Spring Hill Gold Min. Co.* 36 Fed. 668. (Reversed in 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921, for reasons not affecting the merits.)

The certificate of purchase of the agricultural land in this case was issued after the act of 1872.

The grant of a patent to the adjacent claim does not put an end to the right of a mere certificate holder to pursue the vein beyond his side lines into such adjacent claim. *Cheesman v. Hart*, 42 Fed. 98. The court said that it might present a different question, if, after the patentee sunk a shaft from the surface to the underlying vein, and took actual possession, a subsequent locator should undertake to oust the patentee.

The right under § 2322, U. S. Rev. Stat., to follow a vein on its dip beyond the side lines of the claim in which it apexes and beneath the surface lines of an adjacent claim is not affected by the fact that the latter claim is held under a senior patent. *Colorado Cent. Consol. Min. Co. v. Turck*, 2 C. C. A. 87, 4 U. S. App. 290, 50 Fed. 888; *Rehearing denied* in 4 C. C. A. 313, 12 U. S. App. 85, 54 Fed. 262; *Writ of Error dismissed*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

A similar decision was made by the circuit court of appeals in another case between the same parties involving the same property (17 C. C. A. 128, 36 U. S. App. 208, 70 Fed. 294). These decisions were upon the assumption that the senior claim, though its lines, extended downward, embraced a part of the dip of the vein apexing within the junior claim, was not originally located upon the dip of that vein.

A somewhat different question arises where the senior claim was located on the dip of the vein apexing within the junior claim. *Hallett, D. J.*, charged the jury in *Van Zandt v. Argentine Min. Co.* 2 McCrary, 159, 8 Fed. 725, that

surface of a claim owned or possessed by another." If this section stood alone, it would seem to restrict the rights of the locator to the use and enjoyment of the surface only for the purpose of following the vein upon its strike and dip under the prescribed limitations as to adjoining lands. Reading this in connection with the other provisions of the chapter, however, we find that it is "lands valuable for minerals" which are reserved from sale except as otherwise directed, it is "lands" in which the deposits are found which are open to occupation and purchase, it is "land claimed and located for valuable deposits" for which the patent may be obtained, and it is by virtue of the title secured to land that the purchaser obtains any right whatever with reference to mineral deposits therein. Upon a valid location of a definite portion of land

is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant. On the other hand, this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only do the rights conferred by the statute differ from those held under a common-law grant. "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to

a junior location along the apex of a vein cannot prevail against a senior location on the dip of the lode. The consideration of the question as to the correctness of this position would involve the general question as to the validity of locations on the dip, which does not come within the scope of this note. It may be said, however, that the decisions on that question throw considerable doubt upon the position here taken. When the controversy involved in this case reached the United States Supreme Court it was disposed of upon other grounds, as has already been shown (*Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356).

In *Walrath v. Champlon Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909, *infra*, the Providence location, which was made and patented before the act of 1872, was laid out in such shape that the northeasterly end line (the plane of which was held to fix the limit of the extralateral rights in that direction), when extended in its own direction, cut off a portion of the location in the form of a parallelogram, leaving it to the north of that line. This parallelogram embraced no part of the apex of the lode in question but did embrace a part of the dip. The lower courts did not discuss the question as to the ownership of that portion of the dip, but gave it to the Champlon Company by adjudging to it that portion of the vein on its dip that lay northeasterly of the end line continued in its own direction. The Supreme Court considered the question, and approved the decision of the lower court on this point. The vein in question was not the discovery vein, though the reasoning of the court would seem to apply equally to the discovery lode. The effect of this decision was to deny to the owner of the Providence claim ore bodies within the lines of such claim, although they belonged to a vein that apexed within the claim, not, however, in that particular part of it.

When the respective rights of locators on the same vein to follow the vein on its dip conflict, the priority of right is determined by priority of location, which must be determined by proof independent of the statute unless the patent itself fixes the date. *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284; *Reversed on another point in* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733.

Where a body of ore on the dip of a vein is between the extended parallel end-line planes of a junior location, and also between lines of a senior location on the same vein, which were located as side lines but which became end lines because the claim was located across, instead of along, the vein, the rights of the senior locator

prevail. *Tyler Min. Co. v. Last Chance Min. Co.* 71 Fed. 848; *Tyler Min. Co. v. Sweeney*, 24 C. C. A. 578, 48 U. S. App. 203, 79 Fed. 277.

Where the vein on which a location rests becomes divided, and the outcrop of one fork crosses into another location, that fork is lost to the former location, and the owner of the latter location may follow such fork on its dip into the former location. *Colorado Cent. Consol. Min. Co. v. Turck*, 2 C. C. A. 67, 4 U. S. App. 290, 50 Fed. 888; *Rehearing denied in* 4 C. C. A. 313, 12 U. S. App. 85, 54 Fed. 262; *Writ of Error dismissed in* 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

When the apex of a lode is so broad that for a distance at the point it crosses over a side line from one location into another it is partly within each location, the vein must be considered as apexing upon the senior location until it passes wholly beyond its side line; and the extralateral rights are to be fixed on that basis. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 44 C. C. A. 120, 104 Fed. 664.

When claims parallel to each other are located along the course of a lode or ledge, and each has within its surface a part of the width of the apex, the senior location takes the whole width, and the junior location has no right to follow the vein on its dip. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 106 Fed. 471.

The respective rights of the owners of veins which unite on their dip are determined by the provision of § 2336, U. S. Rev. Stat., that where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection. *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436.

That provision was applied in the case of *Little Josephine Min. Co. v. Fullerton*, 7 C. C. A. 340, 19 U. S. App. 190, 58 Fed. 521. In that case the plaintiff owned two mining claims, the veins of which united below the surface, and at a greater depth united in a vein of defendant's claim, which was north of the plaintiff's claim, at a point between the vertical plane of the defendant's claim and the northernmost of the plaintiff's claims. The northernmost of the plaintiff's claims was located before either of the other claims, and the case in effect holds that under § 2336, U. S. Rev. Stat., the plaintiff was entitled to all the mineral in the united vein below the point of union with the defendant's vein, irrespective of the question of priority of location as between the middle vein and the defendant's vein.

Where two veins apexing in different claims unite in their dip within the surface lines, extended down vertically, of a third claim, the

the incidents of ownership and possession at common law." *Doe v. Waterloo Min. Co.* 54 Fed. 935; *Leadville Min. Co. v. Fitzgerald*, 4 Morrison Min. Rep. 385, Fed. Cas. No. 8,158.

The passage quoted from the opinion of Judge Ross in *Doe v. Waterloo Min. Co.* 54 Fed. 935, is directly in accord with the view expressed by the supreme court of Dakota in *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887, as well as with the result of *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510. In the latter case the defendant was the owner of the Amy claim. The plaintiff and the defendant were tenants in common in the Nonconsolidated claim, having a common boundary with the Amy on the north. The apex of the vein in the Amy crossed both side lines and passed into the Nonconsoli-

dated across the common boundary. The defendant had taken a large amount of ore from within that portion of the Nonconsolidated east of a plane passing downward through a line parallel with the end lines of the Amy at the point where the vein passed into the Nonconsolidated. This court (9 Mont. 543, 24 Pac. 200) held that this ore belonged to the defendant by virtue of its right to follow the vein on its dip toward the north. Upon appeal the Supreme Court of the United States reversed the judgment of this court, holding that the side lines of the Amy were its end lines, that the extralateral rights of the defendant towards the north were limited by the vertical plane of the north side line, and that the plaintiff, in addition to a decree of partition demanded as the principal relief, was entitled to an accounting for the ores in

owner of the latter claim cannot contest the right of the owner of one of such claims to follow the vein on its dip, upon the ground that the other claim was the senior. *Roxanna Gold Min. & Tunneling Co. v. Cone*, 100 Fed. 168.

See also note to *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* (Colo.) 50 L. R. A. 209.

#### VIII. Uniting interests; laying lines of junior, upon senior, location.

Defendants cannot, after the commencement of an action of ejectment, unite several of their claims, each having a portion of the outcrop, for the purpose of asserting the right to follow a vein on its dip, when such right does not exist within the claims considered separately; but where the defendants prior to the alleged trespass had treated their claims as an entirety, and prosecuted work on them as a system of the development of the whole, the several claims may be regarded as one for the purposes of the case. *Cheesman v. Shreeve*, 40 Fed. 787.

It is immaterial, so far as affects the right of defendant to follow a vein on its dip beyond the side lines of his claim, that one end of the claim as originally located has been adjudged by the court to belong to a contesting claimant, if it appears that prior to the alleged trespass such contestant quitclaimed his interest to the defendant, and the latter has since held and claimed the same as one entire claim. *Ibid.*

The lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for, or securing to, such junior location underground or extralateral rights not in conflict with any rights of the senior location. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

So, also, the circuit court of appeals holds in *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 109 Fed. 538, that a junior locator has the right to so lay the lines of his claim in the absence of any objection on the part of the owner of the senior location.

It does not appear in either of these cases that the senior location had been patented before the junior location was made. The Secretary of the Interior, however, in *Hildee Gold Min. Co.* 80 L. Dec. 420, holds that the lines of a lode mining claim may be laid within, upon, or across the surface of patented lode mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing ex-

tralateral underground rights upon all such veins, where the lines are established openly and peaceably.

*Beatty, D. J., in Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 106 Fed. 471, was inclined to doubt, as an original proposition, the right of a junior locator to place any of his stakes or lines upon another claim, especially where the latter claim has been patented, but admitted that such right was established by the authorities.

The right of the junior locator to lay his lines on a prior location which has already been patented was also questioned in *State ex rel. Anaconda Copper Min. Co. v. Second Judicial Dist. Ct. (Mont.)* 65 Pac. 1020. The point, however, was not decided, as the real question in the case was as to the extent of the rights of the junior locator, conceding that he might lay his lines on the senior location. The opinion in this case points out that the reasoning in *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, *supra*, applies rather to unpatented, than to patented, locations.

*Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 109 Fed. 538, *supra*, holds that the issuance of a patent to the junior location covering a part of the senior location defeats the rights of the senior locator with respect to the overlap, in the absence of any contest of the application, and confers upon the junior locator both the surface and extralateral rights appertaining to such overlap. In this case the plaintiff's location overlapped on two of the defendant's locations. The plaintiff's location was subsequent to one of the defendant's locations and prior to the other. The effect of the holding last referred to was to give to defendant, by virtue of its last location, dip rights which would otherwise have belonged to the plaintiff.

The court in *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, did not undertake to decide as to the full extent of the rights on the dip which the junior locator would acquire in the case of overlapping claims, and intimated that, perhaps, his right to follow the dip would be limited by a plane, parallel with the end lines, let fall from the point where the apex entered the overlap, notwithstanding that there might be a portion of the dip between that plane and the plane of the end line laid within the lines of the senior location, that did not belong to the senior location; in other words, that the junior locator's right on the dip would be limited to the length of vein within the surface

controversy. By reference to the diagram in the opinion in 9 Mont. 569, 24 Pac. 201, it will be seen that the apex of the part of the vein to which the ore in controversy belonged was not in the Nonconsolidated, but in the Amy, claim; and upon no other theory can the judgment of the Supreme Court of the United States be justified than that the owners of the Nonconsolidated were entitled to the ore by virtue of their common-law right under their patent. The same may be said of the result of the judgment in *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 190, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, where similar conditions existed as to the apex of the ore in controversy.

of the territory patented to him (i. e., territory not within the senior location).

The circuit court in *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 108 Fed. 189, took the position that in determining the extralateral rights of the junior locator, in case of a conflict, the principle that a locator can have no greater length along the course of the ledge beneath the surface than he has along the apex is controlling. In that case the Stemwinder, which was the junior location, was in the form of a parallelogram. The end lines of the Emma, the senior location, converged in the direction of the dip, and the Emma was so located that it included all that part of the apex of the vein within the lines of the Stemwinder, that lay to the north of the Emma's south end line. The Stemwinder's apex rights therefore terminated at the point where the Emma's south end line crossed its surface. There was, however, a triangular portion of the Stemwinder that lay north of, and entirely outside of, the Emma. This triangular portion, however, contained no part of the apex. Under the influence of the principle referred to, the circuit court held that the extralateral rights of the Stemwinder were limited on the north by the plane of the south end line of the Emma extended in its own direction until it met the plane of the Stemwinder's south end line extended in its own direction. As already stated, the end lines of the Emma converged in the direction of the dip, and therefore its extralateral rights were limited to a triangular section of ground the base of which was the Emma's side line and the apex of which was the point where the end lines, extended, met. There was therefore left to the north of the plane of the Emma's south line, and between the end line planes of the Stemwinder, a portion of the dip of the vein that did not belong to the Emma. The effect of the decision of the circuit court was to deny the right of the Stemwinder to this portion of the dip, notwithstanding that it fell between the end-line planes of that location and could not be claimed by the Emma.

When the case reached the court of appeals, however, that court held (109 Fed. 538) that, but for the fact, already alluded to, that the Stemwinder had lost part of its dip right by the subsequent location of another claim in conflict with it, that dip right would have embraced all between the planes of the Stemwinder's end lines, excepting only so much thereof as belonged to the Emma.

State *ex rel. Anaconda Copper Min. Co. v. Second Judicial Dist. Ct. (Mont.)* 65 Pac. 1020, involved the question of the title to the ore bodies within the angle between the west end line of the St. Lawrence and the east end line of the Anaconda. These two end lines diverged 53 L. R. A.

Under the provisions of the statute, as they have been construed by these and the other cases heretofore cited, it is only the locator, or his successor, or a patentee, who has any right to follow a vein into the boundaries of an adjoining owner; and the latter, holding under a location or patent, is *prima facie* entitled to everything beneath his surface. He may assert this *prima facie* title to prevent intrusion by anyone who cannot show that he comes with the right acquired by a compliance with the provisions of the statute. This conclusion is also in accord with the spirit of all the statutes regulating the disposition of the public lands, which make it manifest that it is the policy of the government to grant every

from each other in the direction of the dip of vein south, and left a strip of ground, widening toward the south, which could not be reached by following the dip from either of these locations. The point of this angle was within the lines of a junior location, the Copper Trust, on the same vein, and the planes of the end lines of that location, extended southerly indefinitely, would embrace the entire strip. This strip, however, was also covered by senior locations made on other veins, and therefore the Copper Trust could not claim title to that portion of the surface of the strip that fell within its lines. The only part of the Copper Trust that did not conflict with a senior location was so situated that there was no continuous connection between the ore therein and the ore in the space in question, without passing through a portion of the dip that, concededly, belonged to senior locations. This fact seems to distinguish the case from *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 109 Fed. 538, where no such situation existed. It was held, and apparently conceded, that, in view of the situation, the Copper Trust could not claim title to the ore in the space in question by virtue of its right to follow the vein from that part of its surface not in conflict with any of the senior locations. The court also held that the Copper Trust could not establish its title to the ore in question upon the ground that it did not belong to the owners of any of the senior locations with which the Copper Trust was in conflict and was therefore appropriated by the Copper Trust. One of the grounds of this decision, which is discussed in XII. *infra*, is that, *prima facie*, the title to the ore bodies was in the senior locations to the south, notwithstanding that they had none of the apex of the vein to which the ore bodies appertained. But the court also took the position, apparently as an independent ground for its decision, that a junior locator cannot, by laying his lines upon or across a senior location, acquire any underground rights beneath the surface of the senior location.

#### IX. The right as affected by contract.

Where, in pursuance of a decree for specific performance of a contract, made for the purpose of compromising a dispute between the owners of adjacent claims, one of them conveys a 30-foot strip by metes and bounds along his end line, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein," etc., the conveyance does not defeat the grantor's right to follow the vein on its dip underneath the strip so described. *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 42 C. C. A. 415, 102 Fed. 430.

right therein, except where express reservation is made. Appellants cite and rely upon *Montana Co. v. Clark*, 42 Fed. 626, and *Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726, as conclusive of their contention. It is true that in *Montana Co. v. Clark*, Judge Knowles reached a conclusion directly contrary to that here stated; but that case is contrary to all the authorities so far as we are advised, and does not meet with our approval. The case of *Driscoll v. Dunwoody* is not pertinent, as it does not deal with any phase of the question involved in the case at bar.

The hearing in the court below was upon oral evidence and affidavits. Objection was

made by appellants to the introduction of two of the affidavits offered by plaintiff, on the ground that they were immaterial and incompetent. The objection was overruled. Appellants allege error. We have examined the affidavits in question, and conclude that the court committed no prejudicial error in admitting and considering them. One of them was immaterial; but it is apparent that, if it had been excluded, the result would not have been different.

*The order of the district court is affirmed.*

**Pigott and Milburn, JJ., concur.**

In *Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co.* 89 Fed. 529, it was held that where a portion of a mining claim is sold the rights, *inter se*, of the owners of the respective portions to follow the dip are to be determined by reference to the division line as described in the conveyance, although it is not parallel with the end lines.

In *Rutte & B. Min. Co. v. Société Anonyme des Mines*, 23 Mont. 177, 58 Pac. 111, the question is as to whether, when a claim is divided, the rights of the owners of the respective portions to follow the dip are to be determined by reference to the dividing line which they actually make, or by reference to a line drawn parallel with the end lines at the point where the vein crosses the dividing line, was mooted but not decided. The court said, however, that it would save some confusion if the rule were adopted that the end line of a claim should determine the limits on the dip of the vein taken at any point along the vein, so that a purchaser of a portion of a claim would acquire so much of a vein on its dip as he has at the surface, the limits on the dip to be fixed by the course of the true end lines of the claim from which the portion was conveyed.

When the parties to adjoining claims on the same location agree upon a dividing line upon the surface at a given point or for a given distance, that line must be extended along the dip of the vein or lode so far as that goes. *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548, Affirmed in 103 U. S. 839, 26 L. ed. 557.

#### X. Degree of dip.

That the inclination of a vein in its departure from the vertical course is more than 45 degrees does not deprive it of the character of a vein which departs from the perpendicular within the provision of § 2322, U. S. Rev. Stat., with respect to the right to follow a vein in its downward course though it departs from the side lines. *Stevens v. Williams*, 1 McCrary, 480, Fed. Cas. No. 13,414.

The contention was that when the inclination was more than 45 degrees from the vertical course the departure was not from the perpendicular but from a horizontal plane, and therefore it was not within the terms of the act. The court, however, held that the distinction was a mere verbal one. *Ibid.*

If a vein descends from the plane of the horizon, though at a very slight angle, it is to be regarded as departing from the perpendicular within the meaning of § 2322, U. S. Rev. Stat., and it may be followed on the dip. *Leadville Min. Co. v. Filtzgerald*, 4 Morrison Min. Rep. 380, Fed. Cas. No. 8,158.

#### XI. Right as to veins other than discovery vein.

The end lines of the original vein or lode on 53 L. R. A.

which a claim is located are to be treated as the end lines of all other veins found within the surface boundary, for the purposes of determining the limits of the right to follow such veins on their dip, irrespective of whether they actually cross those end lines or not. *Walrath v. Champion Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909, Affirming 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978, which modified and affirmed 63 Fed. 552. This case concerns the limits of the right to follow, on its dip, a vein or lode which apexed within the lines of the Providence mine location, patented prior to the act of 1872, but which was not the original lode on which that claim was located. The two lodes did not cross the same line in passing out of the location, but respectively crossed lines which joined each other at an obtuse angle. When the case was before the circuit court (63 Fed. 552), that court took substantially the view subsequently adopted by the Supreme Court, but held that the extralateral rights should be bounded by a vertical plane drawn through the line actually crossed by the lode in question, up to the point where that line joined the line crossed by the discovery lode (which was held to be the true end line of the location), and from that point, by a vertical plane drawn through the latter line extended in its own direction. When the case reached the circuit court of appeals, the decree of the circuit court was modified by eliminating the former plane as a boundary and making the boundary a vertical plane drawn through the true end line extended in its own direction; and the decree, as so modified, was affirmed by the Supreme Court. It appears, from the reports of the case both in the circuit court of appeals and in the Supreme Court, that the Champion Mining Company, which was the appellee in the former court and the defendant in error in the latter court, contended that extralateral rights should be bounded by a vertical plane, parallel with the true end line crossed by the discovery lode, let fall at the point where the other lode passed out of the claim. The adoption of such plane as a boundary would have confined the extralateral rights within narrower limits than were fixed by the courts. Their decisions seem to involve a repudiation of the boundary so contended for; but as the Champion Company was apparently satisfied with the decisions, it may be that the courts did not give the contention the consideration it would otherwise have received. There appears to be some reason to recommend the theory of this contention. It would seem that the adoption of the plane fixed by the courts as a boundary might result in giving the locator a greater length of vein on its dip than he has on the apex. Indeed that seems to have been the result in the case under discussion. Again, it is difficult to understand exactly how the rule adopted could be applied

in case the location were in the form of a parallellogram and the apex of the lode in question passed out of a side line and continued indefinitely on its strike between end-line planes.

It is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become end lines for all veins found within the surface boundaries. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 44 C. C. A. 120, 104 Fed. 664.

*Cosmopolitan Min. Co. v. Foote*, 101 Fed. 518, applies the rule that the extralateral rights with respect to all veins within the surface lines of a claim are to be determined with reference to the end lines of the discovery lode, to a case where the claim was located across instead of along the discovery lode, in consequence of which the located side lines became end lines and *vice versa*. The court held that there were no extralateral rights appertaining to a lode that ran transversely to the discovery lode, and which dipped underneath one of the located side lines.

**XII. Title to ore bodies that apex beyond claim, when adverse party cannot follow dip.**

There seems to be no question under the authorities that, *prima facie*, the owner of a lode mining claim owns all the mineral within his surface lines extended downward, vertically. The only question is as to the extent of this *prima facie* case, and as to when it is overcome. The principal case evidently takes the view that this *prima facie* case survives proof of the fact that the ore body in question belongs to a vein apexing without those lines, unless the adverse party also establishes his title to it by virtue of his right to follow his vein on its dip. On the other hand, the cases that are opposed to the principal case on the point in question seem to take the view that the *prima facie* case rests upon the presumption that the ore body belongs to a vein apexing within the surface lines, or at least that it does not belong to a vein apexing outside of them, and that the presumption, and therefore the *prima facie* case as to ownership, falls when it appears, as a matter of fact, that it belongs to a vein that apexes outside those lines, even if the adverse party establishes no title thereto in himself. It is apparent, therefore, that in drawing inferences as to the question of actual ownership by the party within whose lines the ore body is found, from the cases that declare he is the *prima facie* owner, it is important to bear in mind the facts before the court. In the principal case the facts required the court, if it was to allow the plaintiff to recover, to take the first-mentioned view of the *prima facie* case, since it appeared that the ore body belonged to a vein that apexed outside the limits of his claim: and that fact alone would, in the second view, have been fatal to his *prima facie* case. In some of the cases that support the doctrine of the principal case the adoption of the second view would have sufficed to sustain the decision, since there was nothing to show that the ore body belonged to a vein apexing outside the lines of the claim, and therefore nothing to overcome the presumption upon which, according to this view, the *prima facie* case rests.

The opinion in *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887, seems to support the position of the principal case, although it is not apparent from the facts as there stated why it was necessary to go to that extent. The point arose on an assignment of error to the refusal of the trial court to grant defendant's motion for a nonsuit. The action was by the owner of the claim within whose surface lines extended downward the ore in question was included, to restrain the

defendant from entering the lines of that claim and removing certain ore bodies therefrom. The action of the lower court in denying the motion was sustained, but it did not appear, as it did in the principal case, that the ore body in question belonged to a vein apexing without the plaintiff's claim. That being the case, the suggestion just made, to the effect that the adoption of the second view of the *prima facie* case would have sufficed, would seem to be applicable. The same is true of the case of *Doe v. Waterloo Min. Co.* 54 Fed. 935 (an action to enjoin defendant from entering under the complainant's claim), where the court held that the complainant, by producing a certificate of purchase of his claim, made out a *prima facie* case, and that the burden was on the defendant to justify its entry by showing the facts essential to its right under the statute to follow a vein apexing within its own claim. If it had been merely held that it was incumbent on defendant to show that the ore body belonged to a vein apexing outside of the complainant's lines, it would have answered all the purposes of the case, but it is clear that the court intended to go the full length of the position now assumed in the principal case. The decision of the principal case on this point has been followed by the subsequent case of *State ex rel. Anaconda Copper Min. Co. v. Second Judicial Dist. Ct. (Mont.)* 65 Pac. 1020, *supra*, VIII., but in this case a decision that the ore bodies in question did not belong to the Copper Trust would seem to have answered all the purposes of the case, without a decision that they belonged to the senior locations beneath whose surface they were found.

In *Cheesman v. Shreeve*, 40 Fed. 787 (an action of ejectment by an owner of a mining claim against parties seeking to justify upon the ground that they were following the dip of their own vein), Phillips, J., charged the jury that the plaintiffs had made out a *prima facie* case by proof of title through patent and subsequent conveyance, and that the verdict must be for them unless defendants fully established by a preponderance of the evidence that they were owners of a lode mining claim located and held in compliance with statutes of the United States and the state of Colorado, enumerating the requisites of a valid claim.

The burden is upon the defendant in an action of trespass, who justifies upon the ground that he was merely following his vein on its dip into the plaintiff's claim, to show by a preponderance of the evidence that the ore which he extracted beneath the surface ground of the plaintiff's claim belonged to the lode or vein, the apex of which is within the surface lines of his own claim. *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, affirming 73 Fed. 597; *certiorari* denied in 171 U. S. 687, 18 Sup. Ct. Rep. 940.

The introduction of a patent by plaintiff in an action of ejectment for a mining claim establishes a *prima facie* right to all mineral found within the surface lines extended downward, and if the defendants rely upon a claim of the right to follow a vein into the territory included within the side lines of plaintiff's claim they have the burden of proving such right. *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267, 29 Pac. 513.

In *Gilpin v. Sierra Nevada Consol. Min. Co.* 2 Idaho, 662, 23 Pac. 547, 1014, the court reversed an order denying an injunction sought by plaintiff, within whose lines the disputed ground lay, to restrain the removal of ore by defendant, who claimed the same by virtue of a right to follow the dip of a vein apexing within its location. The court sustained the plaintiff's conten-

tion that "wherever the apex of this vein may be, or if it has no apex at all, but is simply a blanket vein, if its apex be not between the defendant's side lines, the defendant has no right to follow it into the plaintiff's grounds, or within the boundaries of the claims of which the plaintiff is in possession."

When the defendant in action of ejectment, notwithstanding the *prima facie* case by plaintiff's proof of title to the surface of the claim in which the ore body is found, seeks to establish a right to reach the same by following a vein on its dip from his own claim, he has the burden of proving the existence of such state of facts as gives him such right under the statute. *Bell v. Skillicorn*, 6 N. M. 399, 28 Pac. 768.

It is not clear in the five cases last cited that the courts intended to go as far as the principal case, even by way of *obiter dicta*. It is true that they say, in effect, that the burden of proof is upon the defendant to prove the facts essential to his right to follow his vein on its dip into the plaintiff's claim, but the statement as to the burden resting upon the defendant may have been put in this form simply because in each of these cases the only real point in controversy was as to the identity of the ore body in question as a part of the vein apexing within the defendant's claim, and if he failed in establishing such identity the case would be left without proof that the ore body belonged to a vein apexing without plaintiff's lines. Therefore, as a practical matter, it was necessary, in either view of the *prima facie* case, for the defendant to establish such identity, as otherwise there would be nothing to overcome the presumption that the ore belonged to a vein apexing within the plaintiff's claim. At any rate, it may be said of these cases, as of the three cases previously cited, that it was not necessary for the court to go further than to hold that plaintiff, by establishing title to the surface, had made a *prima facie* case which, in the absence of proof that the ore body belonged to a vein apexing outside his claim, would be sufficient to sustain the action. It is further to be said with reference to *Bell v. Skillicorn*, 6 N. M. 399, 28 Pac. 768, that the point under discussion was not as to the existence, or extent, of the *prima facie* case, but, assuming that plaintiff had established a *prima facie* case, whether that shifted the burden of proof, in the sense that it relieved plaintiff from the necessity of proving his case by a preponderance of evidence.

In *Stevens v. Gill*, 1 Morrison Min. Rep. 576, Fed. Cas. No. 13,398 (an action of ejectment by a lode claimant, seeking to follow a vein on its dip, against the owner of an adjoining claim within whose lines the ore body in question was found), the court charged that the burden was on the plaintiff to prove his right of action, not only because he was the plaintiff, but also because, where one party seeks to go out of his own territory into that claimed by another, the burden is upon him to show his right to do so,—that is, he must prove by a preponderance of testimony that he has a lode within his own territory, and that he has the top or apex of it, in order to go out of his own territory in pursuit of that lode.

There is a presumption of ownership in every locator as to the territory covered by his location, and, within his own lines, he is to be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere. *Leadville Min. Co. v. Fitzgerald*, 4 Morrison Min. Rep. 380, Fed. Cas. No. 8,158.

The burden of proof is upon the plaintiffs, as they are holding the affirmative in the action, to show by a preponderance of testimony every 53 L. R. A.

fact which is necessary to support a finding in their favor; that is to say, that there is a lode in their ground, and that they have the top or apex of it, and that it extends in well-defined boundaries from their territory into that of the defendants. *Ibid*.

The owner of a mining location has the undoubted right to say to one claiming the right to mine ore within his surface lines extended downward: "Hands off of any and everything within my surface lines extending vertically downward until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner." Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 540.

In each of the three cases last cited, it will be observed, the owner of the claim within whose lines the ore body was found was the defendant. He could therefore insist that the plaintiff establish title in himself; and it was not necessary, in order to defeat the action, that it should appear that the defendant was the owner of the ore body in question. In other words, in those cases the plaintiff was obliged to rely on the strength of his own title and not on the weakness of defendant's.

While, as indicated in the opinion in the principal case, the application of the doctrine there adopted seems necessary to justify the results reached in *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510, and *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177, no question as to this point seems to have been raised in either case.

Persons entering beneath the surface within the side lines of another's claim, and seeking to mine and take ore therefrom, are *prima facie* trespassers. *Cheesman v. Shreve*, 37 Fed. 36.

The doctrine that the owner of the surface owns all beneath it until it is shown to belong to another is only applicable when there is doubt to what apex an underground body of ore may belong. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 106 Fed. 471.

These cases are neutral as to the point in question, *viz.*: whether the *prima facie* case is overcome by proof that the ore body belongs to a vein apexing outside the surface lines, without reference to the right of the adverse party to follow the dip.

*Jones v. Prospect Mountain Tunnel Co.* 21 Nev. 339, 31 Pac. 642, is opposed to the doctrine of the principal case on this point, and takes the second-mentioned view of the *prima facie* case. The court, in that case, said: "Doubtless, the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiffs; that is, in the absence of any evidence tending to prove that the ledge apexes outside of the exterior lines of the plaintiffs' patented ground, it would be presumed to apex inside those lines. . . . But when evidence is produced tending to show that the ledge apexes outside those lines, this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge; and they must now meet this evidence and overcome it, or they will fail in establishing their title. . . . The plaintiffs must recover upon the strength of their own title; if they do not own the ledge from which the ore was extracted it matters not who does own it."

*Roxanna Gold Min. & Tunneling Co. v. Cone*, 100 Fed. 168, holds that the party within whose surface lines extended downward two veins, apexing without those lines, united on their dip, could not, in an action against the owner of a claim within which one of such veins apexed, insist that the right to the mineral below the

point of union belonged to the person having the apex of the other vein within his line.

So, also, *Montana Co. v. Clark*, 42 Fed. 626, while it held that defendant had no right to follow the dip of his vein within the complainant's line because the defendant's end lines were not parallel, nevertheless held that, the ore body in controversy, not being a part of a lode or claim apexing within complainant's lines, he could not maintain a bill to enjoin the defendants.

*Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726, was an action for claim and delivery of ore taken by defendant from beneath the surface of a claim occupied by plaintiff. The defendant did not attempt to justify by virtue of an alleged right to follow the dip of a vein into the plaintiff's claim, but upon the ground that the ore in question belonged to a vein apexing without the lines of plaintiff's claim and within the lines of a claim belonging to a third person. The court said that the plaintiff having established his right by occupancy, which was a good title as against a trespasser, to the surface of the claim, he had a prima facie right to all ores within the vertical planes of the boundary lines; but that, to meet such prima facie proof, the defendant was entitled to show that the apex of the vein was outside of the plaintiff's claim and within that of a third person. This statement was made incidentally. The real point decided by the court was that the plaintiff might show in rebuttal that the apex was within his boundary lines. The statement, however, is of value on the point.

There is this difference between the facts in this case and the principal case bearing on the point in question: In this case it not only appeared that the vein to which the ore body belonged did not apex within the plaintiff's claim, but also that it apexed within the claim of a third person, not a party (presumably one who could reach the ore body by following his dip), while in the principal case, though it appeared that the vein did not apex within the plaintiff's claim, it did not appear that it apexed within the claim of a third person who could reach the ore body by following the dip. It is true that it also appeared in the principal case that it apexed within the defendant's claim. This fact, however, does not seem to be of any special significance on the point in question, since it does not negative the possibility that the ore body might have been reached by following the dip from some other claim located on the vein. Eliminating this fact, therefore, the only difference in the situations involved in the two cases is that what in the principal case was only a possibility (*vis.*: the existence of a claim belonging to a third person who might reach the ore body by following the dip), in the other case appeared as a fact. It is difficult to see how this difference could affect the legal rights of the parties, unless, perhaps, in the situation that existed in the principal case the presumption would be indulged, in favor of the plaintiff, that no such third claim had been, or could be, so located on the vein that its owner would have the right to reach the ore body by following the vein on its dip. The statement that there was a possibility in the principal case that a claim belonging to a third person might have been, or might be, so located on the vein that the ore body in question could be reached by following the dip from such claim, is made, notwithstanding the fact that the court decided that the Oden claim, which, so far as appears, did not belong to either party to the action, could not reach the ore body by following the vein on its dip. We do not understand, however, that the court by so deciding exhausted the possibility of there being a claim that could. The diagram printed with the case does not

show whether the vein strikes across the Never Sweat location, but if it continued in the same course it would apparently cross the two located side lines of that claim, which would then become end lines, and it is apparent from the diagram that if those side-end lines were extended they would include the ore body in question. This is merely by way of illustrating the possibility referred to.

If the view expressed in *Lindley on Mines*, § 568, is correct, *viz.*: that the effect of § 2322, U. S. Rev. Stat., is to carve out of the fee which the locator acquires a separate fee with respect to ore bodies that appertain to veins apexing outside the lines of the location, there is an apparent difficulty in the position taken by the principal case, even assuming the correctness of its theory that the patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge, and that the common-law principle *usque ad coelum et aërum* applies. In any event, this grant, as the opinion admits, is subject to the right of another locator, whose claim is properly located for that purpose, to follow his vein upon its course downward beneath the surface covered by the patent. If this right exists by virtue of an exception of the fee with respect to the dip of such vein, it would seem that the exception must be at least coextensive with the possibility of a claim being so located on a vein apexing without the lines of the claim in which the ore body is found that such ore body may be reached by following the vein on its dip. Assuming that the effect of that statute is to except a fee, and not merely to reserve an easement, it is difficult to see how, so long as this possibility exists, the owner of the claim within the lines of which the ore body is found can maintain any action depending upon the title to such ore body, unless, as already suggested, a presumption against the existence of such a possibility be indulged in his favor. The following quotation from the principal case, however, seems to indicate that in the court's view it would have made no difference if it had appeared, as a fact, that the vein apexed within a claim of a third person: "He [the claimant] may assert this prima facie title to prevent intrusion by anyone who cannot show that he comes with the right acquired by a compliance with the provisions of the statute." It may be, even on the assumption that the effect of the statute is to except a fee, that the owner of a claim would have it in his power to prevent anyone not establishing a right to follow the vein on its dip, from availing himself of the implied easements with respect to the other ground within the lines of the claim that may be essential to the exploitation of the ore in question; but this would be, not by virtue of his ownership of the ore body, but because the implied easements to which the ground is subject can only be availed of by the owner of the fee of the ore body to which they are appurtenant. If the entire right as to following the dip is a mere easement, and not a fee, the objection here considered does not, of course, apply, since one having no title could not defeat even an action of ejectment by virtue of the existence in a third person of a mere easement, as distinguished from a fee.

### XIII. Miscellaneous.

No location can be made on the middle part of a lode, or otherwise than at the top or apex, which will enable the locator to go beyond his line. *Iron Silver Min. Co. v. Murphy*, 3 Fed. 368 (charged to jury by Hallett, D. J.).

In *Hyman v. Wheeler*, 29 Fed. 847, the northern end of the plaintiff's location was nearly parallel with defendant's claim, located some



distance west; and its northerly end line was 750 feet northerly of the southern end line of defendant's claim. The court charged that the plaintiff, in order to follow the dip of his vein into the defendant's location, must show an apex or outcrop within his own claim as far south as the defendant's claim extended.

In asserting the right to follow a vein on its dip without the side lines of one's location and into another's location, the former must show the outcrop or apex of such vein or lode to be in his own location throughout the ground in controversy, being the extent of the locations parallel to each other. *Cheesman v. Shreeve*, 40 Fed. 787.

While the owner of a vein may follow it in its descent into another's territory beyond his own side lines he cannot beyond his end lines; and the vein beyond those end lines is subject to further discovery and appropriation. *Larkin v. Upton*, 144 U. S. 19, 36 L. ed. 830, 12 Sup. Ct. Rep. 874.

The right to follow the dip exists if the statutory requirements have been complied with, irrespective of whether it has been expressly given by the patent or not. *Doe v. Waterloo Min. Co.* 54 Fed. 935.

In determining the extralateral rights the patent to the claim is not necessarily conclusive as to the course and direction of the vein through the claim, although it purports to describe the same, but the real fact in that respect may be shown. *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540.

The location as made on the surface by the locator determines the extent of rights below the surface. *Del Monte Min. & Mill. Co. v. East Chance Min. & Mill. Co.* 171 U. S. 55, 48 L. ed. 72, 18 Sup. Ct. Rep. 895.

The actual possession of the apex of a vein in the surface of a claim extends to all that belongs to the claim, and is sufficient to support an action of trespass against a party interfering with the vein on its dip underneath the surface of another claim. *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 42 C. C. A. 415, 102 Fed. 430.

A complaint in an action for trespass which alleges that the complainant owns all the precious metal contained in any vein or lode of mineral-bearing rock through its entire depth whose apex is within the surface of his lode mining claim, and that the ores in controversy were mined through a vein which so apexes within the surface of the claim, is sufficient without expressly alleging that the discovery vein of the plaintiff's claim runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim rather than across, or that it dips in any given direction. *Ibid.*

Ledges are to be followed between end-line planes without any extension as to dip or courses. *Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 108 Fed. 189.

A patentee of a claim under the act of 1866 cannot "adverse" in the land office the application of a locator of another claim for a patent in the usual form, under the act of 1872, upon the ground that the right to follow the vein on its dip, given by such a patent, would conflict with his own rights under the act of 1866, as the courts may protect his rights under the act of 1866, notwithstanding the issuance of the patent. *New York Hill Co. v. Rocky Bar Co.* 6 Land Dec. 318. G. H. P.

## TEXAS SUPREME COURT.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, *Appt.*,  
v.  
Charles McCARTY.

(.....Tex.....)

A release in full by one injured by the negligence of a railroad company, upon a consideration adequate for the injury then known, cannot be set aside on the ground of mistake, upon the subsequent discovery of internal injuries not known or suspected at the time of the settlement, and a recovery permitted for such injuries, although the compensation received is wholly inadequate in view of the injuries actually received.

(January 21, 1901.)

QUESTIONS certified by the Court of Civil Appeals for the First Supreme Judicial

NOTE.—The right of a person executing a release for present injuries to recover for those subsequently developing was considered in *Och v. Missouri, K. & T. R. Co.* (Mo.) 36 L. R. A. 442, but in that case the right was expressly reserved.

As to the effect of ignorance of a fact upon the surrender or cancellation of an insurance policy, see *Riegel v. American L. Ins. Co.* (Pa.) 11 L. R. A. 857, also on second appeal, 19 L. R. A. 166; and *Duncan v. New York Mut. Ins. Co.* (N. Y.) 20 L. R. A. 387. 53 L. R. A.

District, which arose upon an appeal by defendant from a judgment of the District Court for Waller County in favor of plaintiff in an action brought to recover damages for personal injuries caused by defendant's negligence and which were alleged not to have been included in the release given by plaintiff to defendant for the injuries caused by the accident. *Reply favorable to defendant.*

The facts are stated in the opinion.

Messrs. Baker, Botts, Baker, & Lovett and Frank Andrews, for appellant:

The release could be impeached only for fraud, and, the uncontradicted evidence showing that the plaintiff fully understood it at the time he signed it, and knew that its purport and effect were a settlement in full for all injuries received by him in the Fairbanks wreck, he could not recover for an injury unknown to the parties at that time and not considered by them, if any such existed.

*Seeley v. Citizens' Traction Co.* 179 Pa. 334, 36 Atl. 229; *Kane v. Chester Traction Co.* 186 Pa. 145, 40 Atl. 320; *Rideal v. Great Western R. Co.* 1 Fost. & F. 706; *Homuth v. Metropolitan Street R. Co.* 129 Mo. 629, 31 S. W. 903; *Kowalke v. Milwaukee Electric R. & Light Co.* 103 Wis. 472, 79 N. W. 762; *Alabama & V. R. Co. v. Turnbull*, 71 Miss. 1029, 16 So. 347; *Squires v. Amherst*, 145 Mass. 192, 13 N. E. 609; *Maine v. Chicago*,

*B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 631, 80 N. W. 315.

The release, being manifestly intended to cover all injuries received by the plaintiff in the Fairbanks wreck, whatever they might be, could only be considered and set aside or sustained as a whole by the jury, and a consideration of its non-application to injuries which the plaintiff received, but of which he did not know at the time of executing the release, and which he claims he did not consider, is a contradiction of the terms of a written instrument, and cannot be allowed.

*Roundtree v. Gilroy*, 57 Tex. 176; *Bigham v. Talbot*, 51 Tex. 450; *Floyd v. Brawner*, 1 Tex. App. Civ. Cas. (White & W.) § 135, p. 53; *Belcher v. Mulhall*, 57 Tex. 17; *Cooper v. McCrimmin*, 33 Tex. 383, 7 Am. Rep. 288; *Bruner v. Strong*, 61 Tex. 555; *Bedwell v. Thompson*, 25 Tex. Supp. 245; *Wright v. Hays*, 34 Tex. 253; *Saunders v. Brock*, 30 Tex. 421; *Smith v. Garrett*, 29 Tex. 48; *Rockmore v. Davenport*, 14 Tex. 602, 65 Am. Dec. 132; *McMichael v. Jarvis*, 78 Tex. 673, 15 S. W. 111; *Eckford v. Berry*, 87 Tex. 421, 28 S. W. 937; *Collins v. Ball*, 82 Tex. 267, 17 S. W. 614; *Vickery v. Hobbs*, 21 Tex. 574, 73 Am. Dec. 238; *Lanes v. Squyres*, 45 Tex. 387; *Hunt v. White*, 24 Tex. 653; *Heidenheimer v. Bauman*, 84 Tex. 182, 19 S. W. 382; *Lynch v. Ortlieb*, 70 Tex. 730, 8 S. W. 515; *Soell v. Hadden*, 85 Tex. 187, 19 S. W. 1087; *McCauley v. Long*, 61 Tex. 80.

*Messrs. Jacob C. Baldwin and J. V. Meek*, with *Mr. R. E. Hannay*, for appellee.

**Gaines, Ch. J.**, delivered the opinion of the court:

This case comes to us upon a certified question. The certificate is as follows:

"Appellee, while a passenger upon one of appellant's passenger trains, was injured in a wreck caused by the actionable negligence of appellant. He was promptly taken to appellant's infirmary at Houston, that his injuries might be dressed and cared for. While there appellant's claim agent began to negotiate with him for the settlement of his claim against the company. At that time appellee appeared to have sustained no other injury except a dislocation of his ankle, and it was shown by the evidence that no other injuries were considered by the parties to the settlement, and no other injuries entered into and in fact formed any part of the consideration for the settlement, except the loss of the watch, which was included in the settlement at a valuation of \$30. Neither the appellant's agents nor appellee knew or suspected injury to any other part of appellee's person, and appellee exercised reasonable care to ascertain if he was otherwise injured. The sum accepted in settlement was grossly inadequate and out of proportion to the injuries to other portions of his body, which, though at that time unknown, were shortly thereafter discovered to exist, and appellee could not have been induced to settle for the sum named in the release had he been aware of his real condition. When the amount was agreed upon, appellee executed

a release in writing, which was prepared by the company's agent for his signature. Said release is in the following language:

"Know all men by these presents, that I, Charles McCarty, of the town of Welborn, Texas, for and in consideration of the sum of four hundred and thirty dollars to me in hand paid by the Houston & Texas Central Railroad Company, of the state of Texas, have remised, released, and forever discharged, and by these presents do, for myself, my heirs, executors, administrators, and assigns, remise, release, and forever discharge, the Houston & Texas Central Railroad Company of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever which I had or have now, or which I or my heirs, executors, administrators, or assigns can, shall, or may have, by reason of any damage or personal injury sustained by me in the wreck of the south-bound passenger train, No. 4, of said Houston & Texas Central Railroad at Fairbanks yesterday morning at five o'clock, on which train I was a passenger, and on my way from Welborn to Houston, or by reason of any matter, cause, or thing whatsoever. In testimony whereof, I have hereunto set my hand and seal on this, the twenty-eighth day of April, 1897.

"[Signed] Chas. McCarty. [L. S.]

"Witness: { J. R. Stuart,  
E. L. Adams."

"Shortly after the execution of this release, appellee discovered that he had sustained injuries to his spine and bowels, which were of a much graver and more permanent nature than the injuries settled for, and which would practically destroy his usefulness for the remainder of his life. Whereupon he brought this suit to set aside the release and recover for the additional injuries. The grounds upon which he sought to set it aside were that both he and appellant's agents were mistaken in supposing he had sustained no other injuries than a dislocated ankle; that no other injury save that to the ankle was considered or entered in any way into the settlement; that he could not have been induced to settle, had he known of these other and graver injuries; and that, believing and having reason to believe that he had no other claim against the company, he was induced to receipt them in full in the general terms used in the release. The question of primary liability on the part of appellant, and the issue of mistake as affecting the validity of the release, in so far as it purported to be a bar to recovery for the unconsidered injuries, were submitted to a jury, and the trial resulted in a verdict for appellee: the recovery being confined by the charge of the court to only such damages as appellee had sustained by reason of the unconsidered injuries; no damages being allowed for the injury to the ankle, which the court held had been settled for in full, as evidenced by the release.

"The question presented, and which we re-

spectfully certify, is as follows: Can the release in question be set aside, except in so far as it evidences a discharge for injuries to the ankle, on parol proof that the parties thereto were mistaken in supposing that the injury to the ankle was the only injury which appellee had sustained; it also being made to appear by parol that, notwithstanding the language of the writing, no other injury was in the minds of the parties, and that if the other injuries had been known the release would not have been executed?"

In *Gilliam v. Alford*, 69 Tex. 267, 6 S. W. 757, the court, speaking through the late Chief Justice Stayton, and quoting from *Pomeroy's Equity*, announced the rule in regard to voluntary settlements as follows: "The rule in such cases is that 'voluntary settlements are so favored, that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge concerning the circumstances involving those rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they have voluntarily entered must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed, had the controversy been brought before it for decision.'" We are unable to see any circumstance in this case to take the release out of the general rule. The appellee, who was the plaintiff in the court below, had at least the same knowledge and the same means of obtaining knowledge as the appellant, and if there was no fraud in the transaction the settlement was binding upon him. That where a party who has a claim against another for personal injuries agrees upon a settlement of his claim, and accepts a sum of money or other thing of value in settlement of such claim, he is, in the absence of fraud or concealment, concluded by the settlement, is a proposition sustained, as we think, by the great weight, if not by an unbroken line, of authority. We cite some of the cases: *Rideal v. Great Western R. Co.* 1 Fost. & L. 706; *Kowalke v. Milwaukee Electric R. & Light Co.* 103 Wis. 472, 79 N. W. 762; *Seeley v. Citizens' Traction Co.* 179 Pa. 334, 36 Atl. 229; *Alabama & V. R. Co. v. Turnbull*, 71 Miss. 1029, 16 So. 346; *Homuth v. Metropolitan Street R. Co.* 120 Mo. 643, 31 S. W. 903. The case first cited (*Rideal v. Great Western R. Co.*) was very like the case before us, in the respect that the injuries, at the time of the release, appeared trivial, but that there was testimony tending to show that afterwards they proved to be serious and permanent. In the charge to the jury the court says: "No doubt, a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still if, in fact, a man has done so, he is bound by his bargain." In the *Wisconsin Case* (*Kowalke v. Milwaukee Electric R. & Light Co.*) the court disposes 53 L. R. A.

of the question of a mistake of fact, and thus announces the limitations upon the rule which justifies an interference by the courts upon that ground: "The most philosophical definition we have found is that presented by Pom. Eq. Jur. § 839: 'An unconscious ignorance or forgetfulness of the existence or nonexistence of a fact, past or present, material to the contract.' This definition contains several elements, each of which, as above suggested, must be explained and qualified in its practical application. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so. Kerr, *Fraud & Mistake*, 432. This idea is involved in, and furnishes a reason for, the exception pointed out by Dixon, Ch. J., in *Hurd v. Hall*, 12 Wis. 112, 127, on authority of *Kelly v. Solari*, 9 Mees. & W. 54, viz. where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense. These limitations are predicated upon common experience, that, if people contract under such circumstances, they usually intend to abide the resolution either way of the known uncertainty, and have insisted on and received consideration for taking that chance."

The cases relied upon by counsel for appellee do not, in our opinion, sustain their contention. We will notice some of them. In *Lyall v. Edwards*, 6 Hurlst. & N. 337, the defendants to an action of trover pleaded a release; and the plaintiff replied, in substance, that, the defendants being insolvent, they, in connection with the other creditors, and in consideration of an assignment of the property of the defendants for the benefit of all their creditors, executed the release, but that at the time of its execution, without default on their part, they were ignorant that their goods had been converted. Upon demurrer it was held that the replication was good. There the claim in dispute was a distinct cause of action, of which the plaintiffs had no knowledge, and of the existence of which they had no reason to suspect at the time the discharge was executed. It seems to us, the release was properly construed not to embrace such claim. The gist of the ruling in *Ramsden v. Hylton*, 2 Ves. Sr. 304, appears in the following headnote: General release from a sister to a brother not binding as to particular rights under the marriage settlement or articles of the parents; the sister being ignorant of them, and the brother having covenanted that he was seised in fee, contrary to the fact. In passing upon the release, Lord Hardwicke says: "The strongest and most material objection is the release; but I am of opinion it would not be construed as a release of this demand, either in point of law or in a court of equity. First, it is certain, that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent such surprise, will construe it to relate to the particular matter recited, which was un-

der the contemplation of the parties and intended to be released." There, too, the matter in dispute was the release of a separate demand. The case of *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66, is more like the case before us. But in that case the release specified certain injuries, but concluded with a general release of all demands growing out of the accident. In their opinion the court says: "We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given, specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties, of a character so serious as to clearly indicate that if it had been known the release would not have been signed. This jurisdiction is well known, and has frequently been applied in cases of release affecting property rights, both in courts of law and equity." This, it seems to us, is a mere application of the rule announced by Lord Hardwicke in the case of *Ramsden v. Hylton*, above cited. The same rule was applied in the case of *Union P. R. Co. v. Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365. The other cases cited by appellee are less applicable to the facts before us, and require, as we think, no especial comment. The case before us is, in our opinion, clearly distinguishable from *Lyall v. Edwards*, cited above. There the unknown matter was a separate cause of action, which could not have been concluded by a judgment upon the claims which were in contemplation of the parties at the time the release was executed.

Here there is but one cause of action, and, if the plaintiff had sued and recovered for the injuries of which he had knowledge at the time of the release, he would have been precluded from an additional recovery. This case is also clearly to be distinguished from the *Lumley Case* and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the release. There, by a rule of construction, the operation of the release is restricted to the particulars mentioned. Here no particular injuries are mentioned. The release is of all damages which have accrued or which may accrue to the plaintiff by reason of the accident in which he was injured. Here, then, the terms of the release are not to be mistaken, and the contract is not open to construction. In the face of such an instrument, it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries has been clearly developed, they may be more or less than appearances would indicate, and therefore in every settlement of the character of that under consideration the parties take the chances of future development,—the one of paying more than an adequate compensation for the wrong inflicted, and the other of receiving less.

Our conclusion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it cannot be varied by parol evidence tending to show that other injuries than that to the ankle were not in the contemplation of the parties.

We therefore answer the question in the negative.

#### VERMONT SUPREME COURT.

##### CONNECTICUT GENERAL LIFE INSURANCE COMPANY

v.

Myron F. CHASE et al.

(72 Vt. 176.)

Failure to disclose to persons signing an agent's bond in ignorance of the fact, that he has been short in his accounts, and is retained in his employment only on condition that he pays the shortage and executes a new bond, is such a fraud on their rights as will discharge them from all liability on the bond.

(March 8, 1900.)

**EXCEPTIONS** by defendants to rulings of the Washington County Court made during the trial of an action on an agent's bond given by defendants to plaintiff which

NOTE.—As to liability on guaranty or surety obligation obtained by fraud, see also, in this series, Page v. Krekey (N. Y.) 21 L. R. A. 409, and note, and Lachman v. Block (La.) 28 L. R. A. 255.  
53 L. R. A.

resulted in a judgment in plaintiff's favor. *Reversed.*

The facts are stated in the opinion.

*Messrs. Senter & Goddard*, for defendant Marvin:

It was the duty of the plaintiff, having an opportunity, to put the sureties to this bond in the same condition they were in as to knowledge about Chase's responsibility and honesty.

*Sooy v. State*, 39 N. J. L. 143.

Neither in morals nor in law can an obligee stand by and knowingly allow an obligor to take a risk which the former knows the latter has no intention to assume.

*Sooy v. State*, 39 N. J. L. 144; *Smith v. Bank of Scotland*, 1 Dow, P. C. 272; *Dougherty v. Savage*, 28 Conn. 155; *Brandt, Suretyship & Guaranty*, § 419; 1 Story, Eq. Jur. § 215.

When these transactions of Chase were of such a character that it was their duty to inform the sureties on the old bond before they could hold them liable for any future

shortages, it certainly was their duty to inform the new sureties of these transactions. *Brandt, Suretyship & Guaranty*, § 419.

To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances and having an opportunity to make them known and withholding them, must be regarded as a legal fraud by which the surety will be released from his contract.

*Franklin Bank v. Cooper*, 36 Me. 179; *Smith v. Josselyn*, 40 Ohio St. 409; *Doughty v. Savage*, 28 Conn. 146; *Smith v. Bank of Scotland*, 1 Dow, P. C. 292; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *Lee v. Jones*, 14 C. B. N. S. 386; *Guardian Fire & Life Assur. Co. v. Thompson*, 68 Cal. 209, 9 Pac. 1; *Dinsmore v. Tidball*, 34 Ohio St. 418.

Plaintiff was bound, in point of law, to disclose to Marvin and his codefendants all the facts within its knowledge that it was in any way material that the surety should know, and whether it neglected to disclose those facts from one motive or another is entirely immaterial.

*Railton v. Mathews*, 10 Clark & F. 934; *Wilmington, C. & A. R. Co. v. Ling*, 18 S. C. 116; *United States L. Ins. Co. v. Salmon*, 91 Hun, 535, 36 N. Y. Supp. 830; *Commonwealth Bldg. & L. Co. v. Fromlet*, 6 Ohio Dec. 184; *Harrison v. Lumbermen & M. Ins. Co.* 8 Mo. App. 40; *Morse, Banks & Banking*, 3d ed. § 21, and note 1; 2 *Parsons, Contr.* 267; *Story, Eq. Jur.* § 324.

*Messrs. Dillingham, Huse, & Howland*, for plaintiff:

The creditor's failure to inform the sureties of the principal's previous shortage did not discharge the sureties, inasmuch as the surrounding circumstances lack several of the ingredients necessary to bring the case within the applicable rule of law.

The shortages did not amount to embezzlement or dishonesty. They were the "breaches of duty and contract obligations" held in *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196, and *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, to involve no obligation on the creditor, in the absence of inquiry, to inform the sureties.

The basis of the defense of nondisclosure is fraud.

*House Mach. Co. v. Farrington*, 82 N. Y. 121; *North British Ins. Co. v. Lloyd*, 10 Exch. 523.

There is no obligation on the master to disclose facts not a "material part of the transaction itself between the creditor and his debtor to which the suretyship relates."

*Wythes v. Labouchere*, 3 De G. & J. 609; *Hamilton v. Watson*, 12 Clark & F. 109; *Mages v. Manhattan L. Ins. Co.* 92 U. S. 93, 23 L. ed. 699.

It does not appear that the company was aware that the sureties were ignorant.

*Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23 L. ed. 699.

Neither does it appear that the sureties

were not, in fact, aware of the previous shortage. The court has no right to presume that fact, and this alone should be controlling.

*State v. Bates*, 36 Vt. 399.

The strictness of the ancient rule respecting sureties has been much modified, and the old cases have been overruled.

*Hamilton v. Watson*, 12 Clark & F. 109; *Warren v. Branch*, 15 W. Va. 21; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196.

*Watson, J.*, delivered the opinion of the court:

Prior to April, 1888, Frank C. Griswold was in the employ of the plaintiff as superintendent of agencies, and as such had authority to appoint agents and make arrangements and trades with them, subject to the approval of the company; and thus he continued until after the execution and delivery to the company of the bond in question by the defendants on the 17th day of October, 1893. Acting in that capacity, Griswold in April, 1888, employed the defendant Myron F. Chase to work for the plaintiff, and within a month thereafter Chase entered upon his employment, and thenceforth thus continued until April, 1896. At the time of Chase's first employment, the plaintiff advanced to him about \$300, understanding from his statement to Griswold that he was to use it to pay a note of the same amount to Mr. Bull, agent of the Phoenix Mutual Life Insurance Company, which amount Chase afterwards, and before the giving of the bond in question, repaid to the plaintiff. On the 1st day of April, 1893, Chase and the plaintiff entered into a written contract whereby the former was made the general agent of the latter at Montpelier and vicinity, to solicit and procure applications for insurance, and deliver policies issued thereon, and also premium receipts, upon payment to him of the moneys named therein; and Chase was to hold the moneys thus collected as a fiduciary trust, not apply them to any personal use or purpose whatever, keep full and accurate accounts thereof, and on or before the 5th day of every month transmit to the plaintiff a full and true report of all collections made and of all expenses incurred, and therewith transmit and pay over the amount of moneys due the plaintiff, received by him as such agent, and not before paid over, and that he should furnish to the plaintiff, and maintain with it, a sufficient and satisfactory bond for the faithful performance of the duties pertaining to his agency, and for the prompt payment of all moneys and securities received by him. About two weeks prior to the giving of the bond in suit, Griswold came to Montpelier, in his representative capacity for the plaintiff, and found that Chase had collected and not accounted for premiums of the plaintiff amounting to between \$1,000 and \$1,200, whereupon Griswold and Mr. Hudson, the plaintiff's secretary, who was also present, agreed with Chase that he might continue in the plaintiff's employment upon condition

that he pay the shortage and furnish a new bond. Thereafter, and before the giving of the new bond, Chase, through his friends, procured the amount of his arrearage and paid the same to the plaintiff. With matters standing in this way, the bond in question was executed and delivered to the plaintiff on the 17th day of October, 1893, conditioned that: "Whereas, the above-named M. F. Chase has been appointed by said company its agent for the purpose of procuring applications for life insurance, collecting premiums thereon, and performing such other duties in connection therewith as may be intrusted to him: Now, if the said Myron F. Chase shall promptly pay and deliver over all moneys belonging to said company, in his possession or under his control, or for which he shall be liable and responsible, under the terms of this contract with said company, and shall render regular, true, and full accounts to said company of all property belonging to it in his hands, and shall faithfully discharge his duties as agent of said company, then this obligation shall be null and void, otherwise," in full force. This bond was signed by the other defendants as sureties for Chase, and the plaintiff's agent, Griswold, was present when Ellis and when Marvin signed it, and had an opportunity to disclose to them, respectively, all facts in reference to advancement of money to Chase by the plaintiff, and in reference to Chase's previous delinquencies and defalcations while in the plaintiff's employ, but made no disclosure to either of them, nor to either of the other sureties, relative thereto, by reason whereof the sureties contend that they are not liable upon the bond. Chase ceased to do business for the plaintiff on April 15, 1896, at which time he had failed to pay over to the plaintiff its moneys that he had collected, in the performance of his duties as agent, to the amount of \$1,029.04. This money he had converted to his own use. The facts reported show that Chase's shortages occurred from the beginning of his agency, and continued throughout the same, and that a part of the money used by him, causing the defalcation discovered just prior to the giving of this bond, was used to repay to the plaintiff the advancement of \$300, and that the money borrowed by Chase to pay that defalcation was repaid by again using the plaintiff's money, and thereby causing the defalcation for which recovery is sought in this suit. All of this money came into Chase's possession or under his care by virtue of his employment, and he fraudulently converted the same to his own use in violation of the terms of his trust, and evidently it was to guard against any loss resulting to the plaintiff by reason of a similar breach of trust in the future that a new bond was demanded, as one of the conditions of his remaining in the plaintiff's employ.

It is contended in behalf of the plaintiff that the prior shortages did not amount to embezzlement or dishonesty on the part of Chase, but with this contention we cannot agree. The facts reported show him guilty

of a fraudulent conversion to his own use, without the consent of his employer, of money that came into his possession or under his care by virtue of his employment as agent, for which he was liable criminally, under the provisions of § 4951, Vt. Stat. It was the duty of the plaintiff, knowing that the other defendants were about to sign, as sureties, Chase's bond, conditioned as is the one in question, to fully disclose to them, and each of them, the facts relative to Chase's previous defalcations or fraudulent conversions, and the conditions under which he was allowed to remain in the plaintiff's employ. No such disclosure was made, and the sureties had a right to understand that the plaintiff was acting in good faith towards them, and that the previous dealings of Chase with the plaintiff had been with integrity, and not in criminal breach of his trust. The plaintiff, through its authorized agent, then knew or had reason to believe that, were the facts as to Chase's previous malpractices made known to the sureties, their intended actions relative to the signing of the bond would probably be changed; and to allow them to sign it, under the circumstances, without giving them such information, was not acting in good faith, and was such a fraud upon their rights by the plaintiff, unless they were otherwise informed relative thereto, as will operate to discharge the sureties from all liability upon the bond. *Richmond v. Standolift*, 14 Vt. 258; *Sooy v. State*, 39 N. J. L. 136; 1 Story, Eq. Jur. § 215. We think the law upon this subject is well stated by Chief Justice Beasley in *Sooy v. State*, that "it is the duty of a person, taking a guaranty for the good conduct of an employee to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and that if such duty is not performed the instrument so taken is, *ipso facto*, invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implication inevitably arising from his own conduct."

But it is contended by the plaintiff that the facts reported do not show the sureties without knowledge or information concerning the past malpractices of Chase when they signed and delivered the bond, and therefore, under the law as laid down in *State v. Bates*, 36 Vt. 387, they are not relieved from liability.

It is true, the record does not show how the fact was in that regard, and the plaintiff's contention is sound, as the case now stands; but we think that no final disposition of the case should be made until the fact of whether the sureties did or did not have such knowledge or information is made a part of the record, and that then judgment should be rendered accordingly; and *judgment will be reversed, pro forma*, and cause remanded for that purpose.

## NEW YORK COURT OF APPEALS.

STATE BANK OF PIKE, *Respt.*,

v.

George M. BROWN *et al.*, *Appts.*

(165 N. Y. 216.)

- 1. Entries in the books of a bank, not made by the cashier, are not admissible against his sureties** in an action on his bond, in the absence of proof as to who made them, that the one making them was dead or without the jurisdiction of the court, or that they were made in the usual course of business in accordance with a uniform practice to make them when and precisely as the transactions occurred, where the books were not referred to in the bond, and the sureties had no right of access to them.
- 2. Computations by an expert, made solely from the books of a bank, are not admissible in evidence when the contents of the books themselves are not admissible.**

(January 8, 1901.)

**NOTE.**—*Use of person's books of account as evidence upon issues between other parties.*

- I. Scope.
- II. The general rule.
- III. Exceptions—enumerated.
- IV. Entries against interest.
  - a. The general rule.
  - b. Application to particular classes of cases.
    1. Entries as to receipt of rent.
    2. Receipted charges for services.
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- V. Entries constituting part of the *res gesta*.
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  - b. Application to particular cases.
- VI. Entries required by legal or particular duty.
  - a. The general rule.
  - b. Application to official entries.
  - c. Application to entries or memoranda of notice of dishonor.
- VII. Entries in the course of business.
  - a. The general rule.
  - b. Application to entries by an agent.
    1. In his own books.
    2. In the books of his principal or employer.
    3. Entries by an attorney.
  - c. Application to bank books.
  - d. Application to books of carriers.
  - e. Application to other miscellaneous entries.
- VIII. Ancient books.
- IX. Use of, to contradict, corroborate, or explain other evidence.
- X. Entries treated as admissions, or as creating an estoppel.
  - a. The general rule.
  - b. Application to books of debtor to show fraud.
  - c. Application to corporate books generally.
  - d. Application to bank books.
  - e. To establish personal liability of a stockholder or director.
  - f. Application to partnership books of account.
  - g. Application to other miscellaneous entries.
  - h. Necessity of knowledge of, or consent to, entry.

**A**PPPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment entered in the office of the clerk of Wyoming County upon the report of a referee in favor of plaintiff in an action to recover upon a cashier's bond the amount of shortage found in his accounts. *Reversed.*

Statement by Vann, J.:

Appeal from a judgment of the appellate division of the supreme court in the fourth judicial department, entered May 17, 1898, unanimously affirming a judgment in favor of plaintiff entered upon the report of a referee. This action was brought upon a bond dated January 2, 1893, signed by Earle S. White as principal, and by the defendants and others as sureties, to recover the sum of \$2,467.36 alleged to be due the plaintiff thereon by reason of a breach of the condition thereof. The bond was in the penal

XI. Necessity of authentication and proof of death or absence.

XII. Variation of rules by statutory and constitutional provisions.

XIII. Conclusion.

## I. Scope.

This note is confined to the question of admissibility and effect of books of account on issues between third persons. It does not include questions as to procuring, or compelling the production of, such books. And it only includes cases in which the fact that the books were sought to be used on issues between third persons had some bearing or effect on the decision. Cases turning upon the mere question of the admissibility or effect of books of account as such, without reference to the parties between whom the issue arose, are omitted, though the issue may have been between persons other than the parties to the entries in question, but will be found collected in a note to Smith v. Smith (N. Y.) 52 L. R. A. 545, on *A party's books of account as evidence in his own favor*, in another to Hall v. Chambersburg Woolen Co. (Pa.) 52 L. R. A. 689, on *What is provable by books of account*, and in another to Chick v. Robinson (C. C. App. 6th C.) 52 L. R. A. 833, on *Partnership books of account as evidence*, and other notes in this series.

## II. The general rule.

The general rule is that a person's books of account cannot be used as evidence upon issues between third persons; that entries in such books as to such third persons are *res inter alios acta*, and cannot be used against persons not parties to them. *Boyd v. Yerkes*, 25 Ill. App. 527; *Schwartz v. Southerland*, 51 Ill. App. 175; *Harrison v. Lagow*, 1 Blackf. 307; *Ridgley v. Johnson*, 11 Barb. 527; *Sloan v. McDowell*, 75 N. C. 29; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 420.

Though he by whom they were made is dead. *Ridgley v. Johnson*, 11 Barb. 527.

Unless a foundation is laid for their admission on special grounds. *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429.

That the account books of a party are not evidence, except of charges by the creditor against the debtor, when they stand to each other in the relation of plaintiff and defendant.

sum of \$20,000, with the obligatory part in the usual form, and the following recital and condition underwritten: "Whereas, the above-bounden Earle S. White has been elected cashier of the State Bank of Pike, located and doing business in the village of Pike, N. Y., by reason whereof divers sums of money, goods, and chattels, the property of said bank, will come into his hands: Now, therefore, the condition of the above obligation is such that if the said Earle S. White, his executors or administrators or assigns, at the expiration of his term of office, upon request to him or them made, shall make or give unto the said State Bank of Pike, or its agent or attorney, a just and true account of all such sums of money, goods, or chattels, and other valuable things, as have come into his hands, charge, or possession, as cashier of the said bank, and shall pay over and

deliver to his successor in office, or such other person as may be duly authorized to receive the same, all such sums of money, goods, and chattels and other valuable things as shall appear to be in his hands and due by him to the said bank, then the above obligation to be void; else to remain in full force and virtue." White was not a party to the action, but the answer of his sureties, among other defenses, set forth, in substance, a general denial. The referee found that on the 12th of April, 1892, the plaintiff, a banking association incorporated under the laws of this state, employed White as its cashier; that on the 2d of January, 1893, the bond in question was given; that White ceased to be cashier on the 15th of August, 1895; and that he had failed to pay over and deliver the following sums, which came into his possession as cashier: \$223.04 of bills and

They are not evidence when the dealing between the debtor and creditor is, as to the parties to the suit, a mere collateral matter. *Woodes v. Dennett*, 12 N. H. 510; *Little v. Wyatt*, 14 N. H. 23; *Batchelder v. Sanborn*, 22 N. H. 325; *Lassone v. Boston & L. R. Co.* 66 N. H. 345, 17 L. R. A. 527, 24 Atl. 902; *Perrine v. Hotchkiss*, 58 Barb. 77; *Juniata Bank v. Brown*, 5 Serg. & R. 226.

As, for instance, the books of a third party to establish for the benefit of the maker of the note in suit that certain of the indorsers were partners. *Juniata Bank v. Brown*, 5 Serg. & R. 226.

And that a party's book of accounts is competent evidence for the plaintiff only to prove the account which is the foundation of the suit, and for the defendant only to prove a set-off against the claim of the plaintiff. *Little v. Wyatt*, 14 N. H. 23; *Batchelder v. Sanborn*, 22 N. H. 325. But the question here was as to an alleged error in the date of the entry.

Thus, the books of a third person, containing charges against the plaintiff in an action for the recovery of moneys paid to him, are not competent evidence for the defendant to prove payments made by such third person, where he did not act as agent or clerk of the defendant, or in his behalf. *McKenney v. Waite*, 20 Me. 349; *Miller v. Clark*, 5 Lans. 388.

So, entries in the books of a bank, made by its cashier since deceased, are not admissible in favor of the defendant in an action on a note payable to the order of such cashier, which was found among the papers of the bank after his death, either as admissions against interest, or as entries made by a person deceased in the regular course of business. *Wheeler v. Walker*, 45 N. H. 355.

And the books of account of the cashier of a bank are not evidence against one against whom the bank held a judgment on a proceeding to quash an execution issued on it in favor of one who claimed to hold the judgment by assignment from the bank. *Union Bank v. Call*, 5 Fla. 409.

Nor are entries in the books of a bank which was the former holder of a promissory note, made while it was such holder, admissible to show that the note was paid when it became due, against one to whom it was subsequently transferred for value, as such entries are only equivalent to the oral declarations of a former holder. *Jermain v. Worth*, 5 Denio, 342.

And the books of a bank are not admissible in evidence in an action brought to close up and settle matters of account between two parties, one of whom became indorser for the other, and loaned him money from the avails of the dis-

counts of notes indorsed, for the purpose of establishing the truth of statements therein contained, as to the amount of paper which had been discounted for the defendant, and the number of notes so discounted and renewed, as they relate solely to transactions between the defendant and the bank, which was a third party; and, as the books themselves are not evidence, a statement made up from such books is equally incompetent. *Perrine v. Hotchkiss*, 58 Barb. 77.

So, entries in the books of brokers, made on purchasing stock ordered by a customer through another broker, are inadmissible in evidence in an action by the latter broker against such customer to recover for loss on stocks which it is claimed were purchased and carried by the plaintiff for the customer on his order, and for loss on certain transactions in oats, which it was claimed were conducted by the plaintiff for the defendant on the board of trade. *Boyd v. Yerkes*, 25 Ill. App. 527.

And the manner in which charges were made in the books of a third party seeking to charge one as a partner is not competent evidence to establish the fact of partnership. *McNamara v. Dratt*, 40 Iowa, 418.

Nor are books of a railroad company, kept solely for its own use and convenience in the management of its business, admissible in evidence in favor of the company against a third party seeking to recover damages sustained by the company's negligence. *Pittsburgh & L. E. R. Co. v. Cunningham*, 39 Ohio St. 327.

And the books of account and checks of a contractor for driving logs are inadmissible in evidence in a proceeding by the persons who performed the work under contract with the contractor, against the owner of the logs, to enforce the lien of the persons driving the logs against the owner, for their labor. *Minton v. Underwood Lumber Co.* 79 Wis. 646, 48 N. W. 857.

And books of a lumber company showing a quantity of lumber furnished by the company to a third person are not admissible in evidence in an action by such third person against another for lumber delivered by the former to the latter to prove the quantity of lumber so delivered, though they might serve as memoranda to aid the memory of men who put the lumber upon the cars or shipped it to the purchaser. *Holt v. Pie*, 120 Pa. 425, 14 Atl. 389.

So, the books of account of a party who has been furnishing another with castings for horse-rakes and other implements are not evidence of the performance of a special contract with a third party, by which the third party agreed to furnish such sums of money as might be re-



notes discounted, \$361.08 of moneys deposited in the bank by persons not doing an active business, and \$1,283 of moneys deposited for which certificates of deposit were issued. Judgment was directed and entered for the sum of \$1,867.12, and, after affirmance by the appellate division, the defendants appealed to this court.

**Mr. C. S. Cary**, for appellants:

The bond is limited to the express terms of the contract, which should be construed strictly and favorably to the sureties.

*Ward v. Stahl*, 81 N. Y. 406.

The bond was not intended to apply to any anterior acts of White, nor is it a bond for the honest or faithful performance of his duty, or that he shall be guilty of no misconduct; but it is simply a bond that he shall keep account and pay over from and after the date and delivery of the bond.

quired from time to time to complete the horse rakes and other implements in the course of construction, and can only be used as a memorandum of items to refresh the memory of the witnesses. *Eshleman v. Harnish*, 76 Pa. 97.

And where title to property was claimed by one party, who purchased from her father, who was a member of a partnership, and the property was attached and removed by another as the property of the father, the testimony of a member of the company that he had seen the note book of the company, kept by the father and from time to time exhibited by him to the company, which contained a statement and date of the amount of a note that was due to the plaintiff, in payment of which the property was alleged to have been given, and the time of its payment, offered to prove the existence of her debt against the company in an action for the recovery of the attached property, is mere hearsay, and not admissible, as neither the books of the company nor the testimony of the witness are legal evidence as against third parties. *Treat v. Barber*, 7 Conn. 274.

And a book kept by a forge master for the purpose of settling with his workmen, in which are entered their names, the quantity of iron delivered, and the date and in some instances the price, is not such a book of original entries as is evidence against a purchaser of the iron, though it also contains the names of the purchasers. *Rogers v. Old*, 5 Serg. & R. 404.

So, the same rule applies to memoranda as to matters between persons not parties to the action in question, as distinguished from charges in books of account.

Thus, an entry made by a farmer when he hired a farm servant, of a memorandum of the terms of hiring in his memorandum book according to his usual practice, is not admissible after his death on a question as between two parishes as to the settlement of such farm servant, either as an entry against interest, or as one in the ordinary course of business, or as evidence of the contract of hiring. *Reg. v. Worth*, 3 Gale & D. 376, 7 Jur. 172, 12 L. J. Q. B. N. S. 144, 4 Q. B. 132.

So, the memorandum book of a jeweler and copies therefrom with reference to a package of jewelry to be sent to a salesman in his employ, relating to matters solely between himself and the salesman, are inadmissible in evidence, in an action by the jeweler against the proprietor of a hotel in Chicago, to whom the package of jewelry was sent by express from New York for delivery to the salesman, for appropriating the same to his own use, or negligently permitting the same to be lost and never delivering it, as 63 L. R. A.

*Union Bank v. Closssey*, 10 Johns. 271; 17 Am. & Eng. Enc. Law, p. 69.

The burden is upon the plaintiff to establish the negative proposition that White failed to pay over all sums, etc., appearing to be in his hands.

*Algie v. Wood*, 11 Jones & S. 46; *Schlesinger v. Hester*, 2 Jones & S. 500; *Noe v. Gregory*, 7 Daly, 283; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Panama R. Co. v. Johnson*, 58 Hun, 557, 12 N. Y. Supp. 499; 1 Greenl. Ev. § 80.

The admission of the books of the bank was error, and the exceptions are well taken.

*White v. Ambler*, 8 N. Y. 170; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Melvin v. Wood*, 4 Abb. Pr. N. S. 441; *Okenango Bridge Co. v. Lewis*, 63 Barb. 111.

In no view of the case could the entries made in these books prior to the giving of

there is no issue of debt or credit between the parties to the suit, and the action is for tort, and not upon an account. *Palmer v. Goldsmith*, 15 Ill. App. 544.

The error, if any, however, in receiving evidence of what the books of account of a third party showed as to the state of the account between the defendants and the third party, is cured by a finding of the referee before whom the action was tried that the balance of the account for the purpose of showing which such books were introduced, was as testified to by the defendant. *Collis v. Bull*, 75 Hun, 466, 27 N. Y. Supp. 478, Affirmed in 148 N. Y. 747, 48 N. E. 986.

### III. Exceptions—enumerated.

To make entries upon account books admissible in evidence it is not always necessary that the transactions to which they apply should have been directly between the original creditor and debtor. *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415.

The contents of books of third persons, and especially of bank books which have been regularly kept, are in a proper case and when properly proved, admitted as evidence as matter of necessity in case of the death or absconding of the persons by whom they were kept. *Poor v. Robinson*, 13 Bush, 290.

Original entries made by third persons have been received as evidence affecting the rights of others, because they have been supposed to furnish some evidence against the person making them, or in proof of pedigree, or when made in the usual course of business by a person now incapable of giving testimony, who had knowledge of the fact and no motive to misrepresent it, and, more especially, when made with the presumed assent of the person to be charged with them. *Livingston v. Tyler*, 14 Conn. 493.

And there are a number of different kinds of admissible entries made by third persons in their books of account. One consists of entries against the interest of the party making them at that time, deriving their admissibility from this circumstance alone. *Sill v. Reese*, 47 Cal. 294. And see *infra*, IV.

Another consists of entries made contemporaneous with the principal fact, and constituting a part of the *res geste*. *Sill v. Reese*, 47 Cal. 294; *Jones v. Howard*, 3 Allen, 223. And see *infra*, V.

Another consists of entries required in the execution of a legal or particular duty. *Welsh v. Barrett*, 15 Mass. 379. And see *infra*, VI.

Another kind consists of entries made in the

the bond be admissible against White's sureties, even if they had been made by him.

*Kellum v. Clark*, 97 N. Y. 390; *Thomson v. MacGregor*, 81 N. Y. 592; *Bissell v. Saxton*, 66 N. Y. 55; *Hatch v. Elkins*, 65 N. Y. 489.

None of the preliminaries necessary to make the books evidence, as memoranda or otherwise, was presented.

*Irish v. Horn*, 84 Hun, 121, 32 N. Y. Supp. 455; *Dykman v. Northbridge*, 80 Hun, 258, 30 N. Y. Supp. 164; *Silverman v. Simons*, 14 Misc. 222, 35 N. Y. Supp. 668; *Laurence v. Barker*, 5 Wend. 301.

A bookkeeper cannot be allowed to explain, as an expert, books not shown to have been kept under any technical and scientific system of bookkeeping, and which do not appear to require explanation.

*McKay v. Overton*, 65 Tex. 82.

regular and usual course of business. *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628. And see *infra*, VII.

And another consists of ancient entries. See *infra*, VIII.

So, entries made by third persons in their books of account may sometimes be used to contradict, corroborate, or explain other evidence in the case. See *infra*, IX.

And entries made by a party to a suit in account with a third person, or entries in such an account which the party to the suit has sanctioned or admitted to be correct, may be used against him in a proper case upon the theory that, having made them or sanctioned them, he is estopped to deny their truth. See *infra*, X.

#### IV. Entries against interest.

##### a. The general rule.

If a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death, if he could have been examined as to it in his lifetime. *Higham v. Ridgway*, 10 East, 109; *Percival v. Nanson*, 7 Exch. 1, 21 L. J. Exch. N. S. 1; *Bridgewater v. Roxbury*, 54 Conn. 214, 6 Atl. 415; *Field v. Boynton*, 33 Ga. 239; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *State v. Woodward*, 20 Iowa, 541; *Sypher v. Savery*, 39 Iowa, 258; *Zimmerman v. Bloom*, 43 Minn. 163, 45 N. W. 10; *Jones v. Howard*, 3 Allen, 223; *Peck v. Glimmer*, 20 N. C. (4 Dev. & B. L.) 249; *Heidenheimer v. Johnson*, 76 Tex. 200, 13 S. W. 46; *Rand v. Dodge*, 17 N. H. 848; *Chase v. Smith*, 5 Vt. 556; *Foray v. Atlantic Mut. Ins. Co.* 2 Robt. 79.

Especially when the entries were made in the usual course of business and in the books usually kept in that business, for the purpose of showing the items of account, in connection with the testimony of the person who made them. *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129.

And this is so without reference to the time when they were made. *Bridgewater v. Roxbury*, 54 Conn. 214, 6 Atl. 415.

And it has been held that their admissibility is not affected by the fact that the party making them could not have been called and examined as to the fact in his lifetime. *Short v. Lee*, 2 Jac. & W. 464.

And where the person who made entries in an account book which are admissible in evidence is beyond the reach of process, or is incompetent to testify, it is the same as if he was 53 L. R. A.

*Mr. G. S. Van Gorder*, for respondent: It was the cashier's duty to keep the books in an accurate manner.

The evidence in this case, by witnesses produced by both plaintiff and defendants, shows that White's bookkeeping was bad, unskilful, negligent, and inaccurate. It was as much his duty to properly and accurately keep the books as it was to account for cash received. He was to make "a just and true account."

2 Am. & Eng. Enc. Law, p. 120; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305.

An error against the bank, in the addition of a column of figures by the cashier, is *prima facie* evidence of a loss to the bank to the amount of such error, and the cashier and sureties are liable therefor, unless they show there was no loss therefrom.

dead, and his handwriting may be proved. *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415.

If a party having knowledge of a fact, makes an entry of it, whereby he charges himself or discharges another upon whom he would otherwise have a claim, the entry is admissible in evidence after his death, in a controversy between the parties or their representatives, or between third parties. *Short v. Lee*, 2 Jac. & W. 464; *Crease v. Barrett*, 1 Crompt. M. & R. 918, 4 L. J. Exch. N. S. 297.

Though it appears that the facts stated in the entry were not known to him of his own knowledge. *Crease v. Barrett*, 1 Crompt. M. & R. 918, 4 L. J. Exch. N. S. 297.

In order to render the books of account of a party admissible to show admissions against interest, it is only necessary that they be shown to be his books kept in the regular course of business, and that entries therein were made by himself or an agent authorized to make them. *Zang v. Wyant*, 25 Colo. 561, 56 Pac. 565.

And an entry in the handwriting of a deceased person, which purports to charge him with the receipt of money, is admissible in evidence between third parties as well as between parties to the entry, for all purposes irrespective of its effect or value when received; and the fact that it might have indicated a loan to another instead of a charge against himself, and that it was followed by other entries pointing to such a loan, will go to the weight, and not the admissibility, of the entry. *Taylor v. Witham*, 45 L. J. Ch. N. S. 798, L. R. 3 Ch. Div. 605, 24 Week. Rep. 877.

See also *Wheeler v. Walker*, 45 N. H. 355, *supra*, II.; *Foray v. Atlantic Mut. Ins. Co.* 2 Robt. 79, *infra*, V. b; *Field v. Boynton*, 33 Ga. 239, *infra*, VI. b.

##### b. Application to particular classes of cases.

###### 1. Entries as to receipt of rent.

The admissibility of entries of the receipt by an agent of rents, after the decease of the agent, has been long settled, and has become elementary law. They constitute an exception to the general rule, which excludes evidence of the acts of third persons. *Jones v. Howard*, 3 Allen, 223.

Thus, entries made by the steward of a former owner of realty, of the receipt of different sums of money from different persons for rent, are admissible in evidence after the death of the steward, in a subsequent action for trespass wherein the right to the soil and freehold was at issue. *Barrie v. Bebbington*, 4 T. R. 514; *Wynne v. Tyrwhitt*, 4 Barn. & Ald. 376.

Morse, Banks & Banking, § 324; *Bank of Washington v. Barrington*, 2 Penr. & W. 27; *American Bank v. Adams*, 12 Pick. 303.

In a suit to recover a deficiency in money, or the value of securities which ought to be, but are not, forthcoming, it is sufficient for the bank in the first instance to allege and prove that they came into the hands and possession of the officer, and have not since been returned or accounted for by him.

Morse, Banks & Banking, § 42.

The cashier of a bank is bound to exercise reasonable skill and ordinary care and diligence in the performance of his duties. If he fails in such skill, or omits such care and diligence, and the bank suffers damage in consequence, he is liable.

*Bostwick v. Van Voorhis*, 91 N. Y. 353; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Commercial Bank v. Ten Eyck*, 48 N. Y.

305; 2 Am. & Eng. Enc. Law, p. 120; Morse, Banks & Banking, § 172.

The books introduced in evidence were the journal and the ledger, commonly called "daily statement register," and were kept by White; and the entries therein, made in the course of his duties as cashier, were evidence both against him and his sureties.

Wharton, *supra* § 1212; *Metropolitan L. Ins. Co. v. Callan*, 23 N. Y. S. R. 629, 4 N. Y. Supp. 833; *Humphrey v. People*, 18 Hun, 393; *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391; *Abbott*, Trial Ev. 2d ed. 636; *Bank of Brighton v. Smith*, 12 Allen, 243, 90 Am. Dec. 144; *Union Sav. Assn. v. Edwards*, 47 Mo. 445; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Olney v. Chadsey*, 7 R. I. 224; *Snell v. Allen*, 1 Swan, 208; *Bartlett v. Freeport Bd. of Edu.* 59 Ill. 364.

And the same rule applies in an action of ejectment against a third party claiming the property. *Doe ex dem. Lichfield v. Stacey*, 6 Car. & P. 139; *Doe ex dem. Strode v. Seaton*, 2 Ad. & El. 171, 4 Nev. & M. 81, 4 L. J. K. B. N. S. 13.

And entries in the books of a steward, kept in account with his employer, in which he is credited with the rents of the estate paid over to the employer, and balances are struck each half year, and there was a balance against the steward at the end of the last half year with the receipt of which he charged himself over his signature, are admissible in evidence in ejectment in which the question is as to whether the premises in question were part or parcel of the manor, to establish the payment of rent for the premises in question. *Doe ex dem. Ashburnham v. Michael*, 17 Q. B. 278, 20 L. J. Q. B. N. S. 480, 15 Jur. 677.

And entries of the receipt of rents in books of a previous tenant for life are admissible in evidence as a declaration made by the previous tenant as to the existing rent of the tenement in question, as against a succeeding tenant for life of the estate, in an action of ejectment, where both had a limited power of leasing, reserving the ancient rent, and the books showed the receipt of a lesser amount, as such entries would be adverse to the title of the person who had possession of it, and would diminish his interest in the fine on renewal. *Roe ex dem. Brune v. Rawlings*, 7 East, 279, 3 Smith, 254.

So, entries in the account book of a deceased steward of the receipt of money by the steward, in the handwriting of his clerk, are evidence of such receipt as between third parties, as well as between the parties to the entry, though the clerk who made the entries was alive and not called as a witness, where the steward had adopted such entries by presenting them to be audited. *Doe ex dem. Graham v. Hawkins*, 1 Gale & D. 551, 6 Jur. 215, 10 L. J. Q. B. N. S. 285.

And entries of the receipt of rent, made by a deceased executor in his books of account under whom the defendant in a writ of right claimed, are admissible in evidence for the defendant on the trial, where the entries were not made by him in the character of a landlord, but in the character of executor, and as such charged himself with the amount received. *Spiers v. Morris*, 9 Bing. 687, 2 L. J. C. P. N. S. 153.

And entries in the account book of a deceased receiver of a claimant to a right to a fishery, produced from the custody of the claimant, charging himself with the receipt of rent from a sub-receiver due from certain persons, of whom the sub-receiver was one, for the privilege

of fixing a net in the fishery, are admissible in evidence on an issue as to the claimant's right. *Percival v. Nanson*, 7 Exch. 1, 21 L. J. Exch. N. S. 1.

So, an entry in a rent book in the handwriting of the plaintiff's deceased mother, who had managed his affairs, admitting the receipt of rent by her, was held in *Richards v. Gogarty*, Ir. Rep. 4 C. L. 300, to amount to a recognition by her that certain entries of payments recorded in the preceding part of the same page in the handwriting of a person since deceased, which ought to have been received by her, represented receipts for which she was accountable, and were consequently held admissible on the question whether there had been a continued tenancy on the part of the plaintiff during a certain period.

Nor are the books of account of a deceased receiver, charging himself with money paid to him, rendered inadmissible in evidence as between third parties by the fact that on the opposite side of the account the receiver discharges himself to the same extent by credits. *Rowe v. Brenton*, 3 Mann. & R. 133, 268, 8 Barn. & C. 765.

Or by the fact that the balance of the account was in favor of the steward. *Williams v. Greaves*, 8 Car. & P. 592.

The balancing of an account is the mere mechanical operation of subtracting the debtor from the creditor side, and the fact that an account has been balanced, and that the balance is in favor of the person keeping the account, does not affect the admissibility of such account in evidence, in an action between third parties, as an admission against interest, the debt side of the account consisting of charges against himself. *Whaley v. Carlisle*, 17 Ir. C. L. Rep. 792, 15 Week. Rep. 1183.

But an ancient rule found amongst the muniments of a manor containing the reeve's account of money received by him on account of the lord, followed by an account of moneys expended by him on account of the lord, is not admissible in evidence to establish a fact stated in one of the items of discharge for which the reeve took credit in the account, where it does not appear on the face of the account that he gave credit for any sum applied to the discharge of that particular item. *Doe ex dem. Kinglake v. Bevisa*, 7 C. B. 456, 18 L. J. C. P. N. S. 128. And see *Whaley v. Carlisle*, 17 Ir. C. L. Rep. 792, 15 Week. Rep. 1183, *infra*, IV. b. 2.

And an entry in a steward's books of a payment or allowance for a land tax and poor rates on the tithes made in his favor, and not connected with other entries made against him with reference to the receipt of the tithes, is not ad-

Vann, J., delivered the opinion of the court:

The burden of proof was upon the plaintiff to show that the condition of the bond was broken by the failure of White, "at the expiration of his term of office," and "upon request to him" made, either to render the just and true account required, or to pay over and deliver the moneys and other valuable things which had come into his possession as cashier. In order to meet the burden of proof, the plaintiff read in evidence, under objection and exception, its by-laws, which, in specifying the duties of the cashier, among other things provided that he should "keep a full and complete set of books of the association, showing a systematic and accurate exhibit of the affairs of the association, such as are usually kept in well-conducted banking institutions." They

also provided that he should have "personal supervision . . . of the taking and discounting of commercial paper." Next, without any preliminary proof, it offered in evidence the books of the bank, or such parts thereof as were applicable. The books were separately received, subject to the objection that each was immaterial and incompetent as against the defendants, who duly excepted to the various rulings admitting them. Under exceptions founded on similar objections, certain computations, made by a witness from these books, were received, which tended to show the different items of shortage precisely as found by the referee. The following questions, rulings, and answers illustrate the nature of this evidence and the method of introducing it: "Q. State what you have done with reference to the items, bills discounted, in the same manner. State

missible in evidence on a bill against the owners and occupiers of the lands for an accounting and satisfaction of the tithes thereof. Knight v. Waterford, 4 Young & C. Exch. 283.

In the above case, Stead v. Heaton, 4 T. R. 669, *infra*, IV. b, 3, was distinguished upon the ground that in that case the matter referred to something else, and required that other thing to be read in order to explain the fact as stated, the court by Alderson, B., saying that that case goes to the extreme verge of the law.

Where, however, a charging item in the books of account of a deceased person may not be intelligible unless the other side of the account be looked into, the statement on the other side may be receivable in evidence as between third parties; but where the discharging entries are not necessary to the understanding of the charging items, they are properly excluded. *Doe ex dem. Kinglake v. Bevis*, 7 C. B. 456, 18 L. J. C. P. N. S. 128.

So, accounts for rents received, signed by a person styling himself clerk to a steward, but not shown to have been employed by such steward otherwise than as appears in the accounts themselves, are not admissible in evidence after the death of both the clerk and steward to prove the receipt by either of the sums of money therein mentioned in order to establish the right of a party to a market for which the rents were received, which right had been disturbed. *DeRutzen v. Farr*, 4 Ad. & El. 53, 5 Nev. & M. 617, 1 Harr. & W. 735.

And entries by a deceased landowner upon his rent book, charging two persons with the rent of designated premises, and crediting them with the payment thereof, are not competent evidence of a tenancy by one of such persons in favor of the heir of the deceased landowner in a suit brought by him for rent, where both alleged tenants continued to occupy after the death of the former owner. *Austin v. Thomson*, 45 N. H. 113.

And entries made by a person from whom the owner of a particular estate in lands claimed the rent, as to the rent paid therefor, are not admissible in evidence to prove the identity of the land in a cause between other persons claiming a different estate therein. *Outram v. Morewood*, 5 T. R. 121.

In the above case *Barrie v. Bebbington*, 4 T. R. 514, *supra*, was distinguished by Grose, J., upon the ground that there the entry was made by a steward, who charged himself with the receipt of money.

As to what constitutes an admission against interest, and as to the effect of a favorable balance of the account, see also *infra*, IV. b, 2, 3. 53 L. R. A.

## 2. Receipted charges for services.

The same rule of admissibility as that applicable to entries of the receipt of rent applies to receipted charges for services.

Thus, an entry of tender and refusal made by a deceased clerk of the plaintiff's attorney in a daybook kept for the purpose of entering his daily transactions is admissible in evidence as the entry of a fact within his knowledge which renders him subject to a pecuniary demand, to prove a tender in an action of trover for property seized by the defendant to satisfy a lien thereon for money loaned and advanced, which the plaintiff claimed had been satisfied by such tender. *Marks v. Lahee*, 3 Bing. N. C. 408, 4 Scott, 137, 6 L. J. C. P. N. S. 69.

So, a charge by an attorney in his books of account against a client for suffering a recovery and drawings a surrender and other legal services, it appearing by the book that the bill was paid, is admissible in evidence in an action between third parties to verify a presumption of a surrender. *Goodtitle v. Chandos*, 2 Burr. 1072; *Warren v. Greenville*, 2 Strange, 1129.

And the books of a deceased solicitor, containing entries of charges for the preparation or execution of a deed of appointment, are admissible in evidence to establish the deed when only a copy is produced to support a decree for raising money thereunder. *Skipwith v. Shirley*, 11 Ves. Jr. 64.

And they would also be admissible in evidence upon an issue as to the distribution of the fund. *Rawlins v. Richards*, 28 Beav. 370.

So, entries of charges, made by an attorney in his books, showing the time when a certain lease prepared for a client was executed, which charges appear to have been paid, are evidence after the attorney's death to show that the lease executed under a power to lease in possession and not in reversion was executed at a date later than that named as the time from which it should take effect, in support of the claim that the lease was one in possession, and not in reversion. *Doe ex dem. Reece v. Robson*, 15 East, 32.

But an entry in the diary of a solicitor's clerk who had become a lunatic is not admissible in evidence in an action between third persons, where it concerned matter with reference to which it was not his duty to make entries. *Coleman v. Mellersh*, 2 Maon. & G. 309.

Nor are entries by an attorney who is still alive admissible, though he is out of the jurisdiction and cannot be produced. *Stephen v. Gwenap*, 1 Moody & R. 120.

And entries of a debtor and creditor account in the books of a deceased attorney are not to

the computation you have made, and the statement as contained of that item of bills discounted, and the result of your computation." This was objected to by the defendants "as immaterial and incompetent; that the entries upon the books from which the computation is made are not evidence as against the defendants;" and "that it does not appear that the defendants' principal made those entries or was in any way responsible for them." The objection was overruled, the defendants excepted, and the witness answered: "I took the accounts themselves representing notes and bills discounted, listed them, and footed them. I found there was \$90,813.33. The daily statement register shows \$91,036.37, a difference of \$223.04. That was a shortage in the bills discounted. I proved up the certificates of deposit, and made the computation of them.

Q. State what you found with reference to that." This was objected to as before, and upon the further ground that the certificates of deposit should be produced, as they were the best evidence; but the objection was overruled, and the defendants again excepted. The witness then stated his computations as before, and testified that they showed a shortage in certificates of deposit of \$1,283. Subsequently the certificates were produced, but as to the other accounts there was no evidence to establish a breach of the condition of the bond, except the bare fact that the books showed a shortage. The expert who made the computations testified: "The question as to whether there was this discrepancy of \$223.04 is determined by me from the examination of the entries in the books made prior to January, 1893, and my examination of books and bills receivable, as

be admitted in evidence as between third parties merely because there are items on the other side of the account that are admissible as declarations against interest. *Whaley v. Carlisle*, 17 Ir. C. L. Rep. 792, 15 W. R. 1183.

So, in *Gale v. Pakington*, 2 McClell. & Y. 357, it was held that entries by a deceased attorney are not evidence as to business done by him.

But the books of a man midwife attending upon a woman at childbirth and making charges for such attendance, payment of which he thereby acknowledges, are evidence of the time of the birth of such child as noted in such entries in a subsequent proceeding, in which the child suffered a recovery. *Higham v. Ridgway*, 10 East, 109.

And a deceased physician's daybook containing charges against the former employer of a pauper for services rendered to the pauper as a surgeon is, when properly authenticated, admissible in a controversy between towns as to the settlement of the pauper, where the time of the injury to the pauper was material in determining when his residence was changed. *Augusta v. Windsor*, 19 Me. 317.

And in such case the physician has not such an interest, from the fact that he was an inhabitant of the town, as will warrant the rejection of entries made by him in his books of account with reference to such services, where it appears that no controversy respecting the pauper had arisen or was in contemplation at the time of the rendition of the services. *Bridgewater v. Roxbury*, 54 Conn. 214, 6 Atl. 415.

But a daybook of a deceased surgeon, produced by his son, the entries in which the deceased was under no obligation to make, and which did not charge himself, is not admissible in evidence in an action between third parties involving the question of the legitimacy of a person at whose birth the surgeon attended; though an entry in the ledger of the deceased in his handwriting, which was marked "paid," is admissible. *Webster v. Webster*, 1 Fost. & F. 401.

And the rule is the same with reference to entries upon the books of account of a physician who afterwards became mentally incompetent, and who was employed by a town to attend a pauper, in an action by another town against the town employing him to recover for supplies furnished to the pauper, where they were made in the regular course of his business, charging the town for his attendance upon the pauper and crediting it with payment, for the purpose of showing the time when the services were rendered. *L. R. A.*

*dered. Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415.

And entries in the books of a deceased attorney for the defendant in a foreclosure case, who had charge of the affairs of the defendant at the time of the mortgage, are admissible in evidence therein on behalf of the plaintiff, to show that all of the money loaned had been paid to the defendant, and that there was no usury, in reply to a plea of usury, and that a part of the moneys had been retained, where they were found in an account in which there were entries against the attorney's interest, though such entries were not against his interest. *Clark v. Wilmot*, 1 Younge & C. Ch. Cas. 53.

But in *Re Paige*, 62 Barb. 476, it was held that a memorandum found in an account book of a deceased physician who attended at the birth of a testator, charging the mother of the testator for services, is not admissible in evidence to show the age of the testator in a proceeding for the revocation of the probate of his will on the ground that it was made when he was under eighteen years of age, without being sustained by proof of its truth. But see *Higham v. Ridgway*, 10 East, 109, *supra*.

So, in *Doe ex dem. Haden v. Burton*, 9 Car. & P. 254, *Rex v. Hendon* was cited by counsel, in which it was said that Lord Denman allowed the books of a deceased person who repaired a bridge to be given in evidence to show that the parish had paid him for so doing.

See also, however, as to attorney's charges, *infra*, VII. b, 3; and as to what constitutes entries against interest, see *supra*, IV. a, and *infra*, IV. b, 3.

### 3. Other miscellaneous entries.

All other similar entries against the interest of the person making them have been treated as being within the same class, and as governed by the same rules.

Thus, an entry in the books of a bank, charging the bank with a deposit of money and therefore against its interest, is admissible in evidence where the bookkeeper who made it is shown to be dead, in an action between third persons for the purpose of establishing fraud and collusion with reference to the deposit. *Heidenheimer v. Johnson*, 76 Tex. 200, 13 S. W. 46; *Anderson v. Edwards*, 123 Mass. 273.

And the books of a bank and the vouchers returned by the bank to a cable company having common stockholders with the bank, showing deposits as well as payments, are admissible in evidence in an action by the receiver of the bank against the assignee in insolvency of the

I found them on August 15, 1895." This necessarily included entries made before the bond was given. After the books and computations were thus received, it appeared that the journal and ledger were kept principally by White, but that the auxiliary books were kept by other persons, one of whom was living within the state at the time of the trial. It did not appear whether White was then within reach of a subpoena or not, but it was shown that he disappeared about the 15th of August, 1895, and no further evidence was given on the subject.

The entries made by White after the bond was given were admissible against his sureties, because they were the acts of their principal relating to the money and property in his custody which they had promised he should account for and pay over. The en-

tries read in evidence, however, did not appear to have been made by him. The defendants were not responsible for the way in which he discharged his general duties as cashier, but only for his failure to render a just account of what came into his hands in that capacity, and to pay over and deliver accordingly. They were strangers to the books of the bank. They had no right of access to them, and the entries made therein by persons other than White were no more binding upon them than upon the public generally. Neither the books nor the by-laws are referred to in the bond. The duties imposed upon White by the bond were not those imposed upon him by the by-laws, and the former were not to be performed until after the latter had ceased through the expiration of his term of office as cashier. The bond did not make the books evidence,

cable company upon promissory notes executed by the cable company to the bank, and for attorney's fees in an action by the bank against the cable company, and for moneys alleged to have been paid by the bank at the request of the cable company. *Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29.

So, where in an action on a promissory note the defendant claimed, and there was evidence, that it was procured by false representations and without consideration, and that the note sued upon was given in renewal of an earlier note, to reimburse the plaintiff's intestate for payments which he claimed to have made upon obligations of the defendant, and that such intestate executed with the defendant and his brother a note to a third party, the intestate being a surety for the other maker, entries in the private books of such third party to whom the note was made, properly proved, showing that the third party had accepted the note of the intestate alone in payment of the joint note of the intestate and the two other persons, and acknowledged the receipt of interest on the note, and that the intestate had paid the same, are admissible in evidence after the death of such third person, as declarations against interest. *Zimmerman v. Bloom*, 43 Minn. 163, 45 N. W. 10.

And books of account kept by a husband in his own handwriting and covering a considerable period of time prior to the date of a note, containing no charges against his wife, but containing an account against him alone, are admissible in evidence in behalf of the wife in an action on the note, to show that the note was the debt of the husband alone, where it appears that the principal of the note was exactly the same in amount as would be due upon the account contained in such books after computing interest thereon to the date of the note. *Jones v. Hough*, 98 Ga. 492, 25 S. E. 566.

And where the proceeds of a life insurance policy are sought to be recovered on the ground that they had been assigned to the defendant in trust, and that the trust had been violated, the defendant denying the trust and alleging that the policy was assigned as collateral security for a debt due on account of a payment to a third person of a claim against the assignor, the books of such third person in his handwriting, are admissible in evidence after his decease to establish the defense. *Sands v. Hammell*, 108 Ala. 624, 18 So. 489.

So, an entry by a deceased person, showing that a payment made by him had been made in breach of trust to a third person instead of to trustees, is admissible in evidence in contradiction of a deed evidencing a rightful payment by 53 L. R. A.

him, to show the receipt of the third party, upon the ground that such entry tended to charge the maker of it. *Orrett v. Corser*, 21 Beav. 52.

And an entry of the receipt of money by the officers of a township from the officers of another township constituting a given proportion of rates, made in a parish book, is evidence to charge the latter officers with the same proportion in the future, as it charges the parish officers with the receipt of money, and is an entry against interest, and another entry explaining and referring to it, made on the same page, would likewise be admissible. *Stead v. Heaton*, 4 T. R. 669.

And an account book kept by a deceased rector, containing receipts and payments by him relative to a living, is admissible in evidence in favor of a subsequent incumbent on the trial of an issue, under Stat. 6 & 7 Wm. IV. chap. 71, whether a *modus* had been, during the statutory period, payable by the occupiers of land in the hamlet to the rector in lieu of tithes, it appearing that glebe lands therein were in the occupation of the rector in the beginning of the previous century, and at one time the occupants of the land in the hamlet occupied the glebe lands, and that for more than the statutory period no tithes had been paid by the occupants of the lands. *Young v. Clare Hall*, 17 Q. B. 529, 29 L. J. Q. B. N. S. 12, 16 Jur. 81.

But an admission of the payment of a charge for publication of a notice of sale in a foreclosure action by an entry in books of account is not sufficient to prove, as against a third person, the actual performance of the service, to do or for the doing of which the money was received. *Osborn v. Merwin*, 50 How. Pr. 183.

And an entry in the daybook of a stock broker, though made regularly and in the ordinary course of business, consisting of a memorandum of the sales and purchases effected by him during the day, is not admissible in evidence in an action between third persons under the rule as to entries made by a deceased person against pecuniary interest, because it might, according to the turn of the market, be available for the advantage of the stock broker as well as against him; nor is it admissible within the rule as to entries made in the ordinary course of business, where it does not appear that the entry was made or the book kept by the broker in the discharge of any duty resting upon him. *Massey v. Allen*, 49 L. J. Ch. N. S. 76, L. R. 13 Ch. Div. 558, 41 L. T. N. S. 480, 28 Week. Rep. 212.

So, in *Doe ex dem. Haden v. Burton*, 9 Car. & P. 254, it was held that entries in the books of a deceased tradesman of charges for the building of a cottage, stated to have been paid by the

and, aside from the entries made by White after the date of the bond, they could be lawfully received against the defendants to the extent only that they were admissible against strangers generally, according to the principles of the common law governing the subject.

Without any preparatory proof, the books were admitted *in solido* as evidence *per se* against the sureties. They were received upon the mere statement that they were the books of the bank, made by a witness who never saw them until after White had ceased to be cashier. There was no proof of original entries by the persons who made them, and none even of their handwriting, custom, or duties. The testimony subsequently given did not relieve the situation; for, while it appeared that the journal and ledger were mainly kept by White, it did not appear that

the entries in question were made by him, and the auxiliary books were kept by other persons, one of whom, at least, could have been produced as a witness. The computations were not admissible unless the books were admissible, because they were made solely from the books, and were of no importance except as summary statements of the contents of the books. They were made in part from entries of an earlier date than the bond.

All the entries, except those made by White after the execution of the bond, were hearsay evidence as against the defendants. They were the written statements of third persons, made without the sanction of an oath, with no proof as to who made them, or that the person making them was dead, or without the jurisdiction of the court, or that they were made in the usual

lord of the manor, are not admissible in evidence on behalf of the defendant, in an action of ejectment brought by parish officers to recover possession of the cottage, from a tenant put into possession by the lord of the manor.

For entries treated as constituting admissions, but not falling within the definition of admissions against interest as declared in the above cases, see *infra*, X.

#### V. Entries constituting part of the *res gesta*.

##### a. The general rule.

The fact that entries in books of account were not against, but for the interest of, the party who made them, does not render them inadmissible in evidence in an action between third persons, where the account was a corroborative circumstance and one of a series of facts tending to prove the matter in issue. *Sill v. Reese*, 47 Cal. 294; *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415.

Entries made contemporaneously with the principal fact, forming a link in the chain of events and being a part of the *res gesta*, consisting of a contemporaneous act, belonging not necessarily, but ordinarily and naturally, to the principal thing, are admissible as to third persons. *Sill v. Reese*, 47 Cal. 294.

Thus, the general rule is that entries made by a third person in the usual course of professional employment, or of a clerkship, or of an agent, are, after the death of the person making them, competent evidence as part of the *res gesta*. *Arms v. Middleton*, 28 Barb. 571.

But entries in a book of accounts, to be admissible as declarations and admissions of an agent binding upon the principal, as part of the *res gesta*, must be explanatory of some contemporaneous act within the scope of the agent's authority, and this cannot be proved by the declarations and admissions themselves, but must be shown by evidence *aliunde*. *Terry v. Birmingham Nat. Bank*, 98 Ala. 598, 9 So. 299.

And they must speak only of that which it was the duty or business of such third persons to do, and not of extraneous or foreign circumstances; and the persons making them must have had competent knowledge of the fact, or it must have been part of his duty to know of it; and there must have been no particular motive to enter the transactions falsely; and the entry must have been made at or about the time of the transaction recorded. *Wood v. Coosa & C. River B. Co.* 32 Ga. 273.

##### b. Application to particular cases.

The foregoing general rule of admissibility on 53 L. R. A.

issues between third persons seems to be applicable to all classes of entries of the designated nature.

Thus, pass books and other books of a savings bank, accompanied by testimony of the bank officers, showing that the pass books were issued by numbers having no name indorsed, and that a book was kept in which the depositor's signature was written opposite his number, showing to whom the money was to be paid, are admissible in evidence on a trial for perjury in which the question of fact involved related to the existence of certain deposits in the savings bank as forming part of the *res gesta*. *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027.

And the contents of a blotter of a savings bank, being in constant demand, may be shown in a prosecution for perjury relating to the existence of deposits therein, without the production of the original in ordinary cases, where no question of genuineness is likely to arise requiring a personal inspection. *Ibid*.

Also a book kept by the treasurer of a savings bank in the regular course of business is admissible to show the amount of money received in a prosecution of the secretary of the bank for embezzlement. *Humphrey v. People*, 18 Hun, 393.

And the books of a savings bank, supported by the oath of the bookkeeper, are admissible in evidence in an action by a husband to recover money deposited in the bank by his wife, and transferred by her order to a third person, to prove such deposit and transfer in an action against the third person for the recovery thereof. *McKavlin v. Bresslin*, 8 Gray, 177.

So, the ledger of the president of a bank, duly verified, is admissible in evidence in an action against the sureties of the cashier, in which it was claimed that the president had misappropriated the bank's money with the cashier's aid for the purpose of showing the dealings of the bank with its president. *American Surety Co. v. Pauly*, 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 470, Affirmed in 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552.

And pages of the book of a teller of a bank are admissible in evidence in such an action by the receiver of the bank to recover for a loss suffered through the fraud or dishonesty of the cashier, to show that on days on which it was alleged drafts had been sold no money was received by the bank. *Ibid*.

And entries in the books of a bank respecting a note discounted by it after having been proved and identified as genuine upon proof of the death of the person making them are admissible in evidence as part of the *res gesta*, in an action by the payee of the note against the

course of business, in accordance with a uniform practice to make them when the transactions occurred, and to make them precisely as they occurred. For aught that appears, they may have been false when made, to the knowledge of the person making them. Neither the books nor the computations made, therefore, were admissible against the defendants, because the necessary conditions precedent were not complied with by the plaintiff. *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *White v. Ambler*, 8 N. Y. 170; *Bank of Monroe v. Culver*, 2 Hill, 531; *Brewster v. Doane*, 2 Hill, 537. This case should not be confounded with those which authorize books to be read in evidence after a proper foundation has been laid (*Smith v. Smith*, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300; *McGoldrick v. Traphagan*, 88 N. Y. 334; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Vosburgh v. Thayer*, 12 Johns. 461; 1 Greenl. Ev. 14th ed. § 115; 2 Wharton, Ev. 3d ed. § 681; 2 Rice, Ev. 815); nor with those which sanction as competent entries

made upon the books of a copartnership in the regular course of business as against the copartners having access thereto (*Hotopp v. Huber*, 160 N. Y. 524, 55 N. E. 206; *Flour City Nat. Bank v. Widener*, 163 N. Y. 276, 57 N. E. 471). We do not hold that the pertinent entries in the books were not admissible under any circumstances, but simply that they were not admissible when offered, and were not made admissible by any evidence subsequently received. As the books were the foundation of the judgment rendered by the referee as to all of the recovery, at least, except the part relating to certificates of deposit, the incompetent evidence necessarily affected the result, and requires a reversal.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

**O'Brien, Bartlett, Haight, Martin, Landon, and Cullen, JJ., concur.**

maker to establish and enforce a resulting trust arising under an agreement between them that the complainant was to furnish land warrants for the entry of land in the name of himself and the defendant toward which the defendant was to give the note in question, not to be renewed until the expiration of a year, when he was to pay it, the funds arising from which he invested in his individual name. *Reynolds v. Sumner* (Ill.) 14 N. E. 861.

Also, an entry made by a clerk in the book of a bank of a deposit made by a customer immediately before an entry made by him of the same deposit in the customer's bank book, and supported by the oath of the clerk, is evidence to go to the jury, together with the customer's book and the testimony of the clerk, in an action by the depositor to recover an alleged balance of deposits for the purpose of showing that the two entries referred to the same deposit, and had by mistake been credited to the wrong person. *Farmers' & M. Bank v. Boraef*, 1 Rawle, 152.

So, the journal and ledger of an insurance company, properly authenticated, are competent evidence and properly admitted, in an action by the insurance company upon an agent's bond for the recovery of the balance claimed to be due from the agent. *Union Cent. L. Ins. Co. v. Smith*, 119 Mich. 171, 77 N. W. 706.

And the entries in the books of an agent of an insurance company who was also the agent of another insurance company are admissible in evidence as part of the *res gestæ*, in an action by the one company against the other, in which it was claimed that the plaintiff was made to pay through the fraudulent act of the agent to a third party a sum of money which should have been paid by the defendant. *Continental Ins. Co. v. Insurance Co. 2 C. C. A. 535*, 1 U. S. App. 201, 51 Fed. 884.

And where all the owners of a ship separately authorized and instructed insurance brokers to keep their several interests in her insured, valuing her at a certain sum, each giving such direction separately without reference to the interest of the others, and the brokers insured the ship in their own name on account of whom it may concern, losses if any payable to themselves, without disclosing to the company at the time anything as to the parties or interests to be insured, and charged the premiums paid upon their books to the different owners, according to the usual mode of dealing by insurance bro-

kers, the entries in their books to be transferred subsequently into the account to be rendered, such entries become substantially a part of the *res gestæ* upon a subsequent contest between different owners claiming the same fractional interest in the policy, and constitute an admission by such brokers, against their interests, that they themselves were not the parties insured. *Forgay v. Atlantic Mut. Ins. Co.* 2 Robt. 79.

So, the books of a bridge company, proved by its treasurer to have been kept by him and to contain correct entries of tolls as given to him by the toll gatherer, coupled with proof by the toll gatherer that he had made correct reports of the tolls received, are admissible in evidence to establish damages suffered by the diversion of tolls from the erection of another bridge near to that of the former company, and to prove the extent of such diversion. *Chenango Bridge Co. v. Lewis*, 63 Barb. 111.

And the books of account of a corporation are admissible in evidence in an action against the sureties upon a bond given by its secretary for the faithful performance of his official duties, in which the complaint alleged that he had a specified amount in his hands upon a designated day and collected a certain sum between that time and another designated day, to show the amount in the hands of the secretary up to the latter date, but they are not admissible to show subsequent collections. *Anahelm Union Water Co. v. Parker*, 101 Cal. 483, 35 Pac. 1048.

Nor are the books of a university admissible in evidence in an action by it against a third person for an alleged breach of an agreement to pay a designated sum in stock as an endowment to the university. *Jones v. Florence Wesleyan University*, 46 Ala. 626.

But a final settlement made by agreement between partners by an expert accountant from the books, papers, and vouchers of the firm, is admissible in evidence in an action against the sureties on a bond given by one partner to another. *Bricker v. Stone*, 47 Mo. App. 530.

So, an entry in the daybook of an agent, showing a sale on behalf of his principal, which entry was made by the agent's clerk, since deceased, on the day of the sale, is admissible for his principal as part of the *res gestæ* to prove the agency, in an action against the purchaser for breach of the contract including the sale. *Oelrichs v. Ford*, 21 Md. 489; *Oelrichs v. Arts*, 21 Md. 534; 1 Greenl. Ev. § 115.



And entries in the books of a person to whom wheat was shipped to be sold and the proceeds credited to the shipper, made in the ordinary course of business by a deceased bookkeeper, are admissible in evidence as part of the *res geste*, in an action against a sheriff for conversion by wrongful attachment of such wheat as the property of a third person. *Smith v. Hawley*, 8 S. D. 363, 68 N. W. 942.

And an account book of a vendor is admissible in evidence as part of the *res geste* on an issue as to the bona fides of a debt, which formed the consideration for the sale. *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137.

But anything suspicious about it is not evidence against the vendee unless there is proof connecting him with it. *Ibid.*

And entries of charges made by a grantee against his grantor are admissible in evidence as *res geste* in an action on certain notes and to set aside a conveyance of real estate as fraudulent as against creditors, where the consideration was denied, to corroborate the assertion of the grantee that the consideration for the conveyance was made up from such charges. *Fleming v. Yost*, 137 Ind. 95, 38 N. E. 705.

So, an account book of a firm, tending to show that it built a house and furnished the materials therefor and charged them to a certain person, is admissible in evidence in an action of ejectment between third persons to show that the person for whom the materials were furnished and the house built owned the lot upon which it was placed, as one of a chain of events indicating ownership, such entries having been made contemporaneously with the building of the house. *Sill v. Reese*, 47 Cal. 294.

And the books of account kept by a bookkeeper for a merchant in his mercantile business are admissible in evidence on behalf of the merchant in an action by the bookkeeper against him for services as bookkeeper and clerk, upon the issue of the value of his services. *Crusoe v. Clark*, 127 Cal. 341, 59 Pac. 700.

Entries made by insurance brokers in their books are made in season to be regarded as part of the *res geste* in a contest between part owners of a ship, upon which the brokers secured insurance, as to their relative interests in the policy, if made before anything occurred to accuate them by any other motive than that of discharging their equal duty to all. *Forgay v. Atlantic Mut. Ins. Co.* 2 Robt. 79.

But to be admissible as *res geste* the connection of the entry with the principal fact must be immediate and direct, and not remote.

Thus, the books of account of a principal are not admissible in evidence against a third party to prove the state of the account between him and his agent: as to the third party such books would be nothing more than hearsay evidence. *Mercier v. Copelan*, 73 Ga. 636.

And the book of accounts of the defendant in an action by a patient against a surgeon for alleged unskilful and careless treatment, purporting to contain his daily entries at the times indicated, and showing charges for professional services against other persons, is not receivable in evidence to show the time of a professional visit of the defendant to the plaintiff testified to have been made on the same day. *Leighton v. Sargent*, 31 N. H. 119.

So, books of account kept by a contractor for the grading of a section of a railroad with the laborers employed by him to do the work, showing the price allowed them for their labor, are inadmissible in evidence in an action against the railroad company upon the contract for such work when offered for the purpose of showing what prices were agreed to be paid by the railroad company to the contractor. *Currier v. Boston & M. R. Co.* 31 N. H. 209.

And the books of an employer containing his account of the trade in his store and other daily transactions are inadmissible in an action brought by him to recover damages of an employee intrusted with the care of his mill, for managing it so heedlessly and for so neglecting it that it was frozen up, in which it was claimed by the defendant that he was at work in the mill on a day preceding the freezing and until a late hour doing what he could to prevent it, for the purpose of showing by entries therein that the defendant was absent that afternoon. *Woods v. Allen*, 18 N. H. 28.

And books of account of a deceased person, containing an account consisting of debit and credit items, are inadmissible in evidence, in an action by a judgment creditor against the wife of the debtor to reach property of the debtor alleged to be in her hands, for the purpose of proving that the husband had paid the deceased for a quantity of stone, which the latter had furnished for a house, which the husband had built on the wife's premises. *Isham v. Schafer*, 60 Barb. 317.

So, an entry by a printer upon an account book kept by him, of payment of a charge for printing, is not competent to establish the fact that an advertisement of real estate under a mortgage sale had been made for a sufficient length of time to render a sale in foreclosure valid. *Osborn v. Merwin*, 50 How. Pr. 183.

## VI. Entries required by legal or particular duty.

### a. The general rule.

The general rule is that what a person having in charge a particular trust or duty does in pursuance of that trust or duty is a fact which may be proved by other testimony than that of the party who does the act, where he is dead and his testimony entirely lost. And where he has actually performed such trust or duty and committed the same to writing, there can be no danger after his decease in submitting the writing to the consideration of a jury, though the rights and interests of a third party are involved. *Welsh v. Barrett*, 16 Mass. 380.

Entries and memoranda made by a person since deceased in the ordinary course of professional and official employment are competent secondary evidence of the facts contained in them, where they had no interest to misrepresent or misstate them. *Livingston v. Arnoux*, 56 N. Y. 507.

It would appear that entries of this class might also be admissible on issues between third persons in nearly, if not quite, all the cases as entries made in the ordinary course of business under the principles stated *infra*, VII. See, particularly, *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628, *infra*, VI. c, and VII. a.

### b. Application to official entries.

Entries made by public officers or others pursuant to a requirement of law are always evidence as to the matters stated in them in accordance with such requirement, whether or not the rights or interests of third parties are involved.

Thus, books of accounts of a city, town, county, or school treasurer, the correct keeping and making of which are duties expressly enjoined by law, are conclusive against him and his sureties in an action on his bond, as to the balances on hand, and estop both him and his sureties from showing, in avoidance of their liability, that the balances stated and reported as being in the treasury were not at the time actually there. *Chicago v. Gage*, 95 Ill. 593, 35

Am. Rep. 182; *Longan v. Taylor*, 31 Ill. App. 264; *Trustees of Schools v. Peak*, 43 Ill. App. 50; *Com. v. Tate*, 89 Ky. 587, 13 S. W. 113; *Butte v. Cohen*, 9 Mont. 435, 24 Pac. 206; *Otsego Lake Twp. v. Kirsten*, 72 Mich. 1, 40 N. W. 26; *Union v. Bermes*, 44 N. J. L. 269, 43 Am. Rep. 369.

And the books of a city treasurer elected as his own successor, in which he has entered balances in his hands at the close of the first term as moneys coming from his predecessor, and continued from time to time to report the same as in his hands, concludes both him and his sureties in an action on his bond, given for the second term, from denying that such balances did actually come to his hands as treasurer. *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182.

But where no element of estoppel appears, it is competent for the sureties to show that such entries were not true in fact. *Union v. Bermes*, 44 N. J. L. 269, 43 Am. Rep. 369.

And it is not error to permit a supervisor, who was a member of the township board and took part in the settlement, and examined his books and vouchers, to testify as to the amount found to be due from the treasurer to the township. *Otsego Lake Twp. v. Kirsten*, 72 Mich. 1, 40 N. W. 26.

And persons who are competent to investigate and understand books of account kept by a treasurer and auditor, and who had investigated them sufficiently to explain them to the jury in reference to the question at issue, may be permitted to do so in an action by the state against the treasurer and his sureties upon his official bond for an alleged official defalcation. But such person should be able to tell what the books show in reference to such questions, and should refer to the books themselves if required to do so. *Com. v. Tate*, 89 Ky. 587, 13 S. W. 113.

So, entries in the pass books of a bank, made by the officers and persons in charge of its business, showing its receipts of deposits, are competent evidence in an action by a county depositing moneys with it against sureties of the bank upon a bond conditioned for the prompt repayment of the county funds. *Myers v. Kiowa County Comrs.* 60 Kan. 189, 56 Pac. 11.

But a private book of a banking firm and its pass-book with a county treasurer are inadmissible in evidence in an action by the county against sureties on the bond of the treasurer to recover moneys unaccounted for by him to show the amount of moneys deposited in the bank by the treasurer at the time of the execution of the bond, so as to limit the defendant's liability to the amount thus deposited and the amount afterwards received, less withdrawals, as such books would not tend to show that all the money received by the treasurer was deposited in that bank. *Mahon v. Kinney County (Tex. Civ. App.)* 28 S. W. 1024.

On the other hand, books of account kept by a city treasurer, showing the amount of licenses collected and turned into the city treasury, and that the treasurer had received only 10 per cent of collections made as compensation, whereas he was entitled to 16½ per cent, should be admitted and considered in an action against his sureties for a misappropriation on his part as a bar to a recovery to the extent of the sum to which he was entitled. *Butte v. Cohen*, 9 Mont. 435, 24 Pac. 206.

So, entries by a collector on a tax roll are within the rule with reference to entries kept by persons in a public office, in which the officer is required, either by statute or by the nature of his office, to write down particular transactions occurring in the course of his public duties and under his personal observation, and are admissible in evidence in an action upon his

official bond against his sureties. *Welland v. Brown*, 4 Ont. Rep. 217; *Guardians of the Poor v. Sutcliffe*, Ir. L. R. 26 C. L. 332.

And entries made by a deceased collector of taxes in a public book handed down to him by his predecessor in office, and afterwards delivered to his successor, are evidence against his surety in an action on a bond given by him, conditioned for the due performance of his duty and the delivery up of the books kept by him in his office. *Goss v. Watlington*, 3 Brod. & B. 182, 6 J. B. Moore, 355.

And a book kept by a collector of taxes, containing entries, wherein he acknowledges the receipt of sums of money in his character as collector, is admissible in evidence against his surety, the collector having been appointed to collect the taxes mentioned in the bond pursuant to statute, though the book was a private one, and one which he was not bound by law to keep. *Middleton v. Melton*, 10 Barn. & C. 317.

So, the account books of the auditor of public accounts, charging a delinquent tax collector with the amount of his defalcation, are admissible and sufficient evidence to establish the liability of a surety on the collector's bond. *State v. McDonnell*, 12 La. Ann. 741.

And certified extracts from the books of the auditor of public accounts, showing the condition of a tax collector's account with the state, are competent evidence and prima facie proof in a suit by the state against the tax collector and his sureties for a default on the part of the collector. *State v. Powell*, 40 La. Ann. 234, 4 So. 46.

And such extracts are admissible in evidence against the successor of the defaulting collector and his sureties, though the originals were not accounted for. *State v. Masters' Succession*, 26 La. Ann. 268.

And the books of the auditor of a state are not only competent evidence in an action by the state against the secretary of state for embezzlement of public money while in office, but are sufficient evidence for the purpose of showing a balance against him and a refusal to pay. *State v. Strong*, 39 La. Ann. 1081, 3 So. 266.

But, a county ledger required by statute to be kept by the county clerk, in which entries charging the collector are taken from receipts given by him from the tax roll, is inadmissible in a suit against the sureties upon his bond for moneys not paid over to the county, for the purpose of showing the extent of the collector's defalcation, as the account made from them is a mere statement, no more than hearsay, that the collector gave such receipts. *King v. Ireland*, 68 Tex. 682, 5 S. W. 499; *Webb County v. Gonzales*, 60 Tex. 455, 6 S. W. 781.

So, entries made by the clerk of the division court in the course of his business, in books kept under the provisions of the statute providing therefor, are evidence against his sureties in an action brought by a bailiff to recover moneys which came to the hands of the clerk. *Middlefield v. Gould*, 10 U. C. C. P. 8.

And entries or memoranda of sales by a sheriff in a book kept by him in his office for that purpose are admissible in evidence after his death in an action involving the title to a lot of land shown by such entries to have been sold by him, on the ground that they were entries made in the course of his official business and against his interest at the time they were made. *Field v. Boynton*, 33 Ga. 239.

And copies of an account current and a money-order account of the postmaster with the postoffice department, which were transcripts from the books of account of the postoffice department duly authenticated, under the seal of the treasurer of the department, are competent

evidence, in an action by the United States against the postmaster and his sureties, for moneys alleged to have been misappropriated by the postmaster. *Alexander v. United States*, 6 C. C. A. 602, 15 U. S. App. 158, 57 Fed. 828.

And a book kept by the cashier of a bank since deceased, containing an account of moneys deposited by an internal revenue collector, to the credit of a person pursuant to an agreement therefor, is properly admitted as one of the books of the bank, in an action against the principal and sureties upon his official bond, for moneys claimed to have been collected by the principal obligor in his official capacity and unaccounted for, where it is shown by the officers of the bank that the book was found among the books of the bank at the death of the cashier; that it contained many other deposit accounts with other parties, none of which appeared in the regular deposit account book of the bank; that the bank had adopted the book as a regular deposit account book, and had settled the accounts of depositors contained in it; and that, prior to the death of the cashier, the other officers of the bank did not know of the existence of this book, but upon his death the balance standing thereon to plaintiff's credit was transferred to and continued on the regular books of the bank. *Glover v. Hunter*, 28 Ind. 185.

So, books kept by a person proved to have acted as a commissioner of sales for lots at a designated place under a statute providing therefor, found among his papers after his decease, are admissible in evidence to show the sale of a lot and to whom it was sold, in an action between strangers on a question of title. *Struthers v. Reese*, 4 Pa. 129.

And books kept by selectmen of a town, containing accounts of the finances and expenses of the town, are evidence in an action brought to recover for supplies furnished to a pauper alleged to have his settlement in the town, for the purpose of showing that the selectmen in former years had admitted the settlement of the pauper in that town by a course of procedure which could not have been justified unless that settlement existed, and unless the fact asserted by the plaintiff had been true. *Thornton v. Campton*, 15 N. H. 20.

The certificate books of canal collectors, however, are not admissible in evidence in an action for a penalty against a party for having in his possession certain distilled spirits for the purpose of sale with the design to avoid duties imposed thereon, to show the quantity of spirits distilled from the defendant's distillery and shipped over the canal, such books not being public records. *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908.

And an account book of the county clerk not required to be kept by statute, and which was not a record of daily transactions but a mere statement of conclusions which the clerk drew at the end of each six months from an examination of other records and writings, and consisted of a mere summary statement of accounts, is not admissible in evidence in an action brought by a bank against the county commissioners to recover upon coupons cut from certain bonds. *Lake County Comrs. v. Keene Five Cents Sav. Bank*, 108 Fed. 505.

So, in *Victoria Mt. F. Ins. Co. v. Davidson*, 3 Ont. Rep. 378, it was said by Burton, J. A., that he was inclined to think that admissions made by an officer by entries in an official book in the handwriting of a clerk, even when made in the ordinary course of business and by a person filling a position as a public officer, though good evidence as against himself, are only evidence against his surety when the death of the principal is shown.

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### c. Application to entries or memoranda of notes of dishonor.

Since the full performance of a daily or frequently recurring duty like that of demand of payment of negotiable paper and notice of nonpayment to charge indorsers, by notaries or messengers, would require a written record of the acts done, in view of the fallibility of human memory, such a record when made is admissible in evidence after the death of the party making it, whether such record is required by positive law or not.

Thus, the books of a notary public, kept by him in the usual course of his business, are admissible in evidence in an action between third persons upon a promissory note brought after his decease to prove a demand of payment and notice of nonpayment of such note. *Nicholls v. Webb*, 8 Wheat. 328, 5 L. ed. 628; *Bank of Wilmington v. Cooper*, 1 Harr. (Del.) 10; *Hatfield v. Perry*, 4 Harr. (Del.) 463; *Lathrop v. Lawson*, 5 La. Ann. 238, 52 Am. Dec. 585; *Brewster v. Doane*, 2 Hill, 537; *Butler v. Wright*, 2 Wend. 369; *Hart v. Wilson*, 2 Wend. 513; *Ocean Nat. Bank v. Carll*, 9 Hun, 239.

Though if the notary is alive and competent to testify it is deemed necessary to produce him; but if he is called as a witness to the fact the entry of it is not thereby excluded. *Hatfield v. Perry*, 4 Harr. (Del.) 463.

And entries made by a deceased clerk of a notary in the notary's register in the regular course of his business are admissible in evidence in an action brought by a holder against an indorser of a promissory note to show presentment and demand to charge the indorser. *Gawtry v. Doane*, 51 N. Y. 91; *Poole v. Ducas*, 1 Bing. N. C. 649, 1 Scott, 600, 1 Hodges, 162, 7 Car. & P. 79.

And a register kept by a deceased notary, containing notes and memoranda in his handwriting proved by a witness, stating that he had made diligent search and inquiry for the maker of a note at the place where the note was dated for the purpose of demanding payment of him, and that he could not be found, and that notice of nonpayment was mailed to the indorser, is sufficient to show due diligence in an action against the indorser, upon the question of demand of payment of the maker. But in order to show notice thereof to the indorser, the memoranda should state his place of residence and the place to which the notice was directed, though it would be sufficient if it were made to appear that the indorser after diligent search and inquiry could not be found. *Halliday v. Martinet*, 20 Johns. 168, 11 Am. Dec. 262.

So, a memorandum made by a deceased cashier or teller of a bank, that on a designated day he sent notice by mail to the indorser of a note, is admissible in evidence in an action on a note against an indorser, and prima facie sufficient to charge him. *Nichols v. Goldsmith*, 7 Wend. 160; *Sheldon v. Benham*, 4 Hill, 129, 40 Am. Dec. 271.

And the rule is the same whether he attended to the business on the retainer of a notary, or as part of his duties to the bank. *Sheldon v. Benham*, 4 Hill, 129, 40 Am. Dec. 271.

And the books of a deceased messenger of a bank, containing memoranda sworn to have been in his handwriting of demands and notices to promisors and indorsers upon notes left in the bank for collection, are admissible in evidence where they were kept for that purpose, in an action by the indorsee against an indorser of a promissory note to show a demand on the maker, and notice to the defendant as indorser. *Weish v. Barrett*, 15 Mass. 380; *Washington Bank v. Prescott*, 20 Pick. 339.

Though not verified by the supplementary oath of

anyone. *Washington Bank v. Prescott*, 20 Pick. 339.

And the rule is the same where the messenger had absconded before the trial, where the testimony of the cashier explaining the manner of keeping, and the purpose for which the book was kept, was taken. *North Bank v. Abbot*, 13 Pick. 465, 25 Am. Dec. 334.

In *Brewster v. Doane*, 2 Hill, 537, however it was held that notices and memoranda made in the usual course of business of notaries, clerks, and other persons may be received in evidence after the death of the person who made them, but not if the person who made them is still alive though out of the state. In such case he must be called or examined on commission.

And in *Bank of Wilmington v. Cooper*, 1 Harr. (Del.) 10, *supra*, *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628, *supra*, was explained and limited, the court saying that the books should be held as evidence of all the facts it gives as to the time, dishonor, notice, etc., by reason of the notary's death; but to go farther would make the notary the judge of what is legal notice to fix the indorser, which is a question of law for the court, and not for the notary; that the notary should state the facts when he gave notice,—to whom, the mode, etc. These are facts, and his record would be sufficient to prove them; and that if that case goes to the extent of holding that the notary's books would be proof that legal notice was given, it is not approved as sound law.

But a book kept by a messenger of a bank, containing entries from which it is sought to prove demand and notice of nonpayment of promissory notes in an action thereon by the bank against an indorser, will not be rejected as unintelligible, where, taking the notes and the book together into comparison, it would be difficult to find any two intelligent and competent jurors who would understand them differently, or come to a different conclusion on the question whether a demand and notice had been made and given as alleged. *Washington Bank v. Prescott*, 20 Pick. 339.

And such a book, labeled with the name of the bank and with the words "Notice to an indorser," is not subject to objection as evidence of demand and notice of nonpayment in such an action, on the ground that it does not purport to be a record of notice to makers or promisors, but merely to indorsers. *Ibid.*

## VII. Entries in the course of business.

### a. The general rule.

The early cases tended in the direction of regarding no entries in books of account as admissible in evidence on issues between third parties, unless they were against the interest of the party making them, or such as to constitute part of the *res gestæ*. But the tendency of the later cases, particularly in America, has been to eliminate the condition that the entry should be against interest; and the more modern rule would seem to be that entries and memoranda made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, are, in case of his death, admissible evidence of the acts and matters so done. *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628; *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281; *Dow v. Sawyer*, 29 Me. 117; *State v. Phair*, 48 Vt. 366; *Hatfield v. Perry*, 4 Harr. (Del.) 463; *Wood v. Coosa & C. River R. Co.* 32 Ga. 273.

In *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628, *supra*, *Higham v. Ridgway*, 10 East, 109, *supra*, IV. a. was criticised and explained by *Story, J.*, saying that stress was laid in that case upon the circumstance that the entry ad-

mitting payment was to the prejudice of the party, but it seems very artificial reasoning, and could not apply to the original entry in the day book which was made before payment; and even in the ledger the payment was alleged to have been made six months after the service. So that in truth at the time of the entry it was not against the party's interest; and it was said the safe principle was that above stated.

So, entries made in the usual course of business upon the books of a third person, by persons whose duty it was to make them, and who testify to their correctness when made, but who have now forgotten the transactions, are admissible in evidence. *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224.

But entries made by private parties are not admissible in evidence, either between themselves or between third parties, unless they were made contemporaneously with the facts to which they relate by parties having personal knowledge thereof, and are corroborated by their testimony if living and accessible, or by proof of their handwriting if dead, insane, or beyond reach. *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908; *Bridgewater v. Roxbury*, 54 Conn. 214, 6 Atl. 415.

To make entries in books of account made by third parties admissible in evidence, the books in which they were made must have been fairly and regularly kept, the entries must have been made by a deceased person whose duty it was to make them in the regular course of business, who had personal knowledge of the subject-matter entered, and whose situation was such as to exclude all presumption of his having any interest to misrepresent the facts. *Lord v. Moore*, 37 Me. 208; *Ridgeley v. Johnson*, 11 Barb. 527.

And the rule that entries made by a party in accordance with his duty, from the reports made by a subordinate as to services rendered, of which he had no knowledge, are admissible in evidence to establish the value of the services rendered, does not apply to a mere private memorandum not made in pursuance of any duty owing by the person making it, or to a memorandum made upon information derived from another who made the communication voluntarily, and not under the sanction of duty, or to accounts entered upon the reports of those who did not have personal knowledge, but who made them upon the representations of others. *New York v. Second Ave. R. Co.* 102 N. Y. 572, 7 N. E. 905.

And entries made by third persons in a book kept in pencil by a large number of different persons, who had access to them when they desired, the most material one of which was in a handwriting unknown to the witness, will not be admitted as original evidence. *Lord v. Moore*, 37 Me. 208. See also *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129, *supra*, IV. a.; *Massey v. Allen*, 49 L. J. Ch. N. S. 76, L. R. 13 Ch. Div. 558, 41 L. T. N. S. 788, 38 Week. Rep. 212, *supra*, IV. b. 8; *Wheeler v. Walker*, 45 N. H. 355, *supra*, II.; *Field v. Boynton*, 33 Ga. 289, *supra*, VI. b.; *Victoria Mut. F. Ins. Co. v. Davidson*, 8 Ont. Rep. 378, *supra*, VI. b.

### b. Application to entries by an agent.

#### 1. In his own books.

Books of account kept by a deceased agent, proved to be in his handwriting, are admissible in evidence in favor of his principal against a third party, where on inspection, they appear to have been fairly kept, the making of the entries therein being in the regular course of business of his agency, and relating to the matter in controversy. *Dow v. Sawyer*, 29 Me. 117; *Grover v. Morris*, 73 N. Y. 473; *Rand v. Dodge*,

17 N. H. 343; Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Though the entry is not contrary to the interests of the party making it. Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Thus, entries in the business books of a decedent in his handwriting are admissible on a claim by a third person of whose business the decedent had charge in his lifetime, as evidence tending to show that at a time when the decedent suddenly left the business of his employer he took a sum of the employer's money with him, to which he was not entitled. Roberts' Appeal, 126 Pa. 102, 17 Atl. 538.

And where a regular business entry is made by an agent as such in the usual course of his business, which would be admissible in evidence in an action between third persons in case of his death, the fact that the person having charge of the books at the time of the action was a nonresident of the state, and could not be compelled to attend at the trial as a witness, justifies the introduction of a copy of the entry as though he were dead. Vinal v. Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

So, entries in the books of a local insurance agent, kept by an employee in his office, are admissible in evidence in an action on an insurance policy to show that the local agent had actual, as well as record knowledge of a mortgage on the property insured when he delivered the policy, where the entry shows, among other things, that the policy contained a mortgage clause. Corkery v. Security F. Ins. Co. 99 Iowa, 382, 68 N. W. 792.

And an entry in the books of a broker employed by a property owner, for the purpose of securing insurance on the latter's property, is admissible in evidence in an action upon a policy of fire insurance secured by such broker upon the property of his principal, upon the question as to whether or not a mistake was made in canceling the policy, and the credibility of the agent and of his clerk. Standard Oil Co. v. Triumph Ins. Co. 64 N. Y. 85, Affirming 3 Hun, 591.

So, books of account of stock brokers recording sales of stock in blocks of from 100 to 5,000 shares, for the conversion of which recovery is sought, in the ordinary course of business and in open market about the time of the alleged conversion, are not only competent, but the best, evidence of the value of the stock. Continental Divide Min. Invest. Co. v. Billee, 23 Colo. 160, 46 Pac. 633.

And entries in the books of a stock broker, showing the purchase of stock from another broker for the purpose of the purchase of which he was employed by a third party, is admissible in evidence in an action by the original owner of the stock against the person for whom the broker purchased it, for the recovery of an assessment on the stock, which the original owner was compelled to pay, by reason of the purchaser having neglected to have the shares transferred to himself on the books of the company. Hutzler v. Lord, 64 Md. 534, 3 Atl. 891.

So, a book in which an apprentice doing work for another on account of his master kept an account of the work done by his master and his hands, making entries therein on the last day of each week, is admissible in evidence in an action by his master against a third person to recover for the work done. Heart v. Hummel, 3 Pa. 414.

And the testimony of a witness sent by a vendor of a crushing mill to superintend its erection and observe its workings, given from books kept by him showing the capacity of the mill as observed by him, is admissible in evidence in an action to recover for the price of the mill when offered by the purchaser, such 53 L. R. A.

books not being regarded as account books technically, but as memoranda made for the purpose of preserving a record of certain facts under such circumstances as to be worthy of a measure of credence. Chataugay Ore & Iron Co. v. Blake, 144 U. S. 476, 36 L. ed. 510, 12 Sup. Ct. Rep. 731.

So, an account book kept in the ordinary course of business, of laborers employed and materials used in repairing streets, based upon daily reports of foremen who had charge of the work, and who reported the time and materials to another subordinate of the same common master of a higher grade, who entered them as reported, is admissible in evidence in an action for breach of a covenant to repair streets, when accompanied by the evidence of the foremen that they had personal knowledge of the facts and that they made true reports, and of the person who made the entries that they were correct. New York v. Second Ave. R. Co. 102 N. Y. 572, 7 N. E. 905.

And firm books of account are admissible in evidence in favor of a third person employing the firm to work on the house of another to show the amount of work done, after testimony by the person performing the work that he gave his partner, who kept the firm books, a correct statement of the transactions as they took place, and upon testimony by the partner that he made the entries in the account; that he knew that the work had been done; that the charges were correct of his own knowledge; and that he could not state the items from memory, but could from refreshing his recollection from the books. Liscomb v. Agate, 67 Hun, 388, 22 N. Y. Supp. 126.

A book of accounts kept by an agent, however, showing his dealings with his principal, cannot be regarded as evidence tending to show that a firm of which the agent was a member had not accounted to the principal for the money which the agent, acting as such, had committed to the keeping of the firm. Smith v. Lanier, 101 Ga. 137, 28 S. E. 653.

And the rule that a ledger kept by an agent who was a member of a partnership is not admissible in an action by his principal against the partnership, either to disprove the correctness of an account current rendered by the partnership to the principal, or for the purpose of proving an independent liability on the part of the partnership to the principal, applies though the account current was made out by the agent as a member of the partnership, and contained numerous items identical with those appearing on the ledger kept by him as agent. *Ibid.*

And a ledger kept by an agent, and containing entries of amounts received and paid out by him in conducting the business of his agency, is not, on the trial of an action by his principal against a partnership of which the agent is a member, admissible in evidence in behalf of the principal, either for the purpose of disproving the correctness of an account current rendered by the partnership to the principal and purporting to contain a statement of its dealings with him with respect to the business intrusted to the agent, or for the purpose of proving an independent liability on the part of the partnership to the principal. *Ibid.*

So, in Cooper v. Morrel, 4 Yeates, 341, it was held that an invoice book of an agent is not evidence of the sale and delivery of goods by his principal; but the ruling was put upon the ground that the invoice book did not consist of original entries, and that the daybook, containing the original transactions as they occurred, should be produced, or parol evidence given of the delivery.

Entries in books of agents have also been admitted in proper cases as entries against inter-

est (see *supra*, IV. b); and as part of the *res gestæ*. See *supra*, V. b.

## 2. In the books of his principal or employer.

Books kept by an agent in the business of his principal or employer are the books of the principal or employer, and the question of the use by an employer of his books against others has been covered in a note to *Smith v. Smith* (N. Y.) 52 L. R. A. 545.

All that is intended to be covered in this subdivision of this note is the right of the principal or another to use his books kept by an agent in a proceeding against the agent and his sureties in a bond given by the agent for the proper performance of his duties. Such entries seem to have been admitted upon the theory that under ordinary circumstances they are entries made in the ordinary course of business, and it is thought that they might also be sustained as a general rule as part of the *res gestæ*, or as admissions which the agent would be estopped to deny.

Thus, books of account of an agent kept by him in the regular course of his agency are admissible as against the sureties on his bond, given for the faithful performance of his duties as such agent, in an action on the bond by his principal. *Agricultural Ins. Co. v. Keeler*, 44 Conn. 161; *Glover v. Hunter*, 28 Ind. 185; *Merrill v. Adams Exp. Co.* 1 Walker (Pa.) 388; *Whitnash v. George*, 8 Barn. & C. 556.

And the making of such entries by the clerk as against his sureties is to be taken *prima facie* to have been made in the discharge of his duty. *Whitnash v. George*, 8 Barn. & C. 556.

And a book kept by the agent of an insurance company is admissible in evidence against the agent and the sureties on his bond, conditioned that the agent should keep true and correct books of account, and pay over and apply all sums of money received by him as agent, for the purpose of showing what policies had been issued by him and the amount of the premiums, and which of them had been paid. *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391.

And the admissibility in evidence of the books of account of an agent of an insurance company in such an action is not affected by the fact that the agent stood charged thereon with sums not actually received, and for which he might not ultimately be liable, as such fact would go to the weight, and not the admissibility, thereof. *Agricultural Ins. Co. v. Keeler*, 44 Conn. 161.

So, entries made by the teller of a bank in a book kept by him for the bank are admissible in evidence in a proceeding by the bank to charge him and his sureties. *State Bank v. Johnson*, 1 Mill, Const. 404, 12 Am. Dec. 645.

But entries made by partners in partnership books after dissolution are not admissible in evidence in an action to charge sureties on a bond given by one partner to indemnify the other against the separate debts of the other partner assumed by the firm. *Simonton v. Boucher*, 2 Wash. C. C. 473, Fed. Cas. No. 12,877.

And it has been held that the books of account of an agent or clerk of a public company during his lifetime are not evidence against his surety sued on his bond for a deficiency in the agent's accounts, the entries therein being evidence against the surety only after the death of the principal. *Ferris v. Jones*, 8 U. C. Q. B. 192.

## 3. Entries by an attorney.

Entries by an attorney or solicitor were held admissible on issues between third persons by the earlier cases only when they were against

interest, charging the person making them or discharging some other person. Such cases are collected *supra*, IV. b. 2. Under the more modern rule, particularly in America, however, such entries are admitted in such actions when they were made in the regular course of business, and need not be against interest.

Thus, to render an entry by an attorney in his register of the making of an order or decree in a proceeding conducted by him admissible in evidence between third parties, it is sufficient that the entry was the natural concomitant of the transaction to which it related, and usually accompanied it. *Fisher v. New York*, 67 N. Y. 73.

And an entry by a deceased attorney in his register of the issuing of an execution is admissible in evidence to show the fact of the issue and the contents of such execution, in an action in which a title acquired under such execution is in question. *Leland v. Cameron*, 31 N. Y. 121.

And an entry of the making of an order in the official register of a corporation counsel, made at the time in question in the course of his professional employment, is admissible in evidence in an action to recover a balance alleged to be due on an award, to show confirmation of such award. *Fisher v. New York*, 67 N. Y. 73.

Likewise, entries in the account books of an attorney and counsel who drafted a partnership agreement and documents relating thereto, which had long since been destroyed, and his drafts of such instruments and the other papers drafted by him at the same time relative to the subject, are admissible in evidence after his death, in an action to establish the existence of the copartnership agreement and for a dissolution and an account and division of the assets, for the purpose of corroborating the testimony of witnesses as to their recollection of the dates and contents of the missing documents. *Moffat v. Moffat*, 10 Bosw. 468.

And a book of accounts belonging to and in the handwriting of the magistrate before whom a deed purported to have been acknowledged, and whose name appeared as a subscribing witness, containing charges against the grantor for the acknowledgment of three deeds only, which had been acknowledged before him on the same day, but not including the deed in question, is competent evidence after the death of the magistrate upon the question as to whether or not the deed, an exemplification of which had been read in evidence without the production of the original, was a forgery. *Nourse v. McCay*, 2 Rawle, 70. It was said, however, that while such evidence is admissible it does not follow that it is either conclusive or weighty.

But entries in the books of an attorney in a foreclosure action are not admissible in evidence as proof that a printer did his duty and advertised the sale for the time required by law. *Osbourne v. Merwin*, 50 How. Pr. 183. The bearing on the principal fact is too remote.

And entries in the books of a firm of lawyers are inadmissible in a proceeding by other lawyers to recover for services rendered to executors, to reduce the amount of the recovery, where such entries related to other and different transactions between other parties than those for whom the recovery was sought. *Re Simpson*, 24 N. Y. S. R. 685, 5 N. Y. Supp. 863.

## c. Application to bank books.

When the question how much ready money a party who is shown to keep a bank account has on hand at a particular time becomes important in a judicial inquiry, the state of his bank account at the time in question is competent evidence upon such an issue, and the books of the bank may be admitted in evidence for the pur-

pose of proving it. *Lehmann v. Rothbarth*, 111 Ill. 185.

And original entries made in the books of a bank are admissible in evidence to show the state of a depositor's account at a designated time, in an action to recover from a depositor the amount called for by a check, where they were made in the usual course of business by authorized bookkeepers in the discharge of their duties, and are shown to have been correct when made. *Culver v. Marks*, 122 Ind. 554, 7 L. R. A. 489, 23 N. E. 1086.

And a written statement of a depositor's account, made by an expert bookkeeper from the books of a bank, may be given in evidence and read to the jury in an action on a check on that bank between third persons, where the bookkeeper is introduced as a witness and opportunity is given for cross-examination. *Ibid.*

And the bank book of the assured, showing deposits in a savings bank, is admissible in evidence in an action by him against an insurance company upon a fire insurance policy, in which his possession and ownership of the property alleged to have been destroyed was denied for the purpose of showing that he had the means of purchasing such goods and his ownership of them. *Manchester F. Assur. Co. v. Felbelman*, 118 Ala. 308, 23 So. 759.

So, in an action by an indorser of a promissory note to recover from the maker the amount of the note paid by the indorser, the books of the bank to which the money was paid, showing the amount paid on the note, are, in connection with the check given by the indorser for the amount, competent evidence of the payment of the note. *Parker v. Sanborn*, 7 Gray, 191.

And on an accounting between alleged joint owners of a boat, books of a bank containing an account of all the receipts and disbursements on account of the boat are the best evidence to show those receipts and disbursements, and they must be produced. But a synopsis of the account as contained in the bank books is properly excluded. *Ritchie v. Kinney*, 46 Mo. 298.

So, the books of the bank, supported by the oath of the bookkeeper, are admissible in evidence in an action of replevin of goods alleged to have been purchased on credit by means of false representations, as to the pecuniary condition of the purchaser upon the issue of his insolvency. *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 803.

And the books of a deceased banker are admissible in evidence in an action in equity brought by an assignee of a mortgage against one to whom it had been transferred, for a decree requiring the transferee to surrender the mortgage to her on the ground that the transfer and delivery thereof by her son was without her authority or consent, where they show a credit to the son for a draft which the transferee gave him for the mortgage in question, and that immediately he drew his check upon the bank payable to the order of the person who assigned the mortgage to his mother, for which he had not been fully paid, as bearing upon the question of the son's authority to transfer the mortgage, and as tending to show an equity in the transferee, though such authority did not exist. *Bentley v. Falker*, 24 App. Div. 560, 49 N. Y. Supp. 691.

And the books of a bank are admissible in evidence in an action by another bank against the receiver of the former bank for the recovery of a sum of money claimed by the former to have been loaned to it, and by the latter to have been loaned to its president personally, as tending to shed some light upon the character of the transaction. *Blanchard v. Commercial Bank*, 21 C. C. A. 319, 44 U. S. App. 556, 75 Fed. 249.

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And while the testimony of the teller of a bank as to what the books of the bank showed with reference to one of a series of notes deposited in the bank, not from personal knowledge, but from the record, is not the best evidence in an action on the note, the admission of such evidence is not reversible error where it was objected to as incompetent, immaterial, and irrelevant, and not because it was secondary. *Buettner v. Steinhilber*, 91 Iowa, 583, 60 N. W. 177.

Likewise the books of a national bank may be used by the prosecution in a proceeding against the president of the bank to convict him of making a false report to the comptroller concerning the financial condition of the bank, when properly identified, to show its condition, without first producing other evidence to show that they had been truthfully kept and were in all respects correct. *Bacon v. United States*, 38 C. C. A. 37, 97 Fed. 85.

And the books of a national bank which was succeeded by a state bank to which its books, papers, and assets were turned over, for which state bank receivers were subsequently appointed, who turned the books of the national bank over to the United States government, are not subject to objection when offered in evidence in a prosecution against the president of the national bank for making false reports with intent to defraud the bank on the ground that possession thereof was improperly obtained in violation of a constitutional provision against unreasonable searches and seizures. *Ibid.*

And bank books and the testimony of the teller and bookkeeper of the bank with reference to the payment of the defendant's checks are admissible in evidence on a prosecution for unlawfully using public money for profit and receiving and accepting interest upon a deposit thereof; and the fact that the checks themselves were not produced does not affect their admissibility as tending to show that the charges upon the books of the bank were proper and legal, and the defendant's knowledge of the credits made to his personal account, where it appears that his pass-book was balanced from time to time with the books, and found to agree therewith, and that thereafter the book was returned to him together with the checks. *State v. McCauley*, 17 Wash. 83, 49 Pac. 221, 51 Pac. 382.

But a book kept by the teller of a bank, in which he recorded the names of persons whose checks were paid at the bank and the amount of such checks, is not evidence *per se*, in a prosecution for forging a check drawn on the cashier of the bank in question, to establish the facts appearing in the books, but may be given in evidence in connection with the evidence of the teller if the evidence of the teller makes it proper that the books shall be referred to, to prove that the check in question was entered as paid in that book by the teller. *Courtney v. Com. 5 Rand. (Va.) 666.*

And a bank's pass-book showing an account between the bank and a person alleged to hold a fraudulent conveyance of real estate is inadmissible in evidence in an action by the owner of the real estate for the removal of a cloud from his title, for the purpose of showing that the grantee in such deed was not a fictitious person. *Hirsch v. Jones* (Tex. Civ. App.) 42 S. W. 604.

See also *Wright v. Towle*, 67 Mich. 255, 34 N. W. 578, *infra*, IX.

Entries in bank books have also been admitted in evidence in proper cases as entries against interest (see *supra*, IV. b); and as part of the *res gestae* (see *supra*, V. b); and as constituting a binding admission or estoppel (see *infra*, X. d). And see *State Bank v. Johnson*, 1 Mill, Const. 404, 12 Am. Dec. 645 (*supra*, VII. b, 2); *STATE BANK v. BROWN*; *Philadelphia Bank v.*

Officer, 12 Serg. & R. 49; *Silverman v. Simons*, 14 Misc. 222, 35 N. Y. Supp. 668, *infra*, IX.

#### d. Application to books of carriers.

Books of carriers such as railroad and express companies are also admissible in evidence on issues between third persons on the same principle.

Thus, it is competent for a common carrier to show, by the verified records and books of another common carrier having a connecting line, the disposition and delivery of produce or other articles in good order to the latter carrier, in an action by a shipper against it for the loss of goods shipped over its line. *Schaefer v. Georgia R. Co.* 66 Ga. 39.

So, freight books and testimony of freight agents upon a line of transportation are admissible in evidence in an action for the price of goods sold, for the purpose of establishing a delivery of the goods, the receipt of which the defendant denied, and such books may be used as memoranda from which the freight agent may be permitted to testify, though he had no personal recollection of the transaction, where he states that he has no doubt the entries in his handwriting are correct, and that the transaction took place as there entered. *Adams v. Couillard*, 102 Mass. 187.

And the rule is the same where the plaintiff's shipping clerk testified that he shipped the goods and delivered them to the carrier, and it appears that cases of goods were delivered to the defendant's drayman at dates corresponding with dates of shipment. *Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505.

And freight books of a railroad company are admissible in evidence in an action between third parties on contracts to recover the price of rum sold, defended upon the ground that the sale was for illegal purposes, to the knowledge of the plaintiff, and that the rum was to be sold at retail at the defendant's place of business, for the purpose of showing that the plaintiff had previously sent liquors to the defendant at the same place. *Briggs v. Rafferty*, 14 Gray, 525.

And entries in such a book showing the delivery of prior consignments, to the defendant, of beer made by the consignor, are admissible in evidence in a prosecution against the defendant for keeping liquors with intent to sell the same contrary to law, in which a large quantity of beer had been seized and the railroad company had filed a claim for possession of the liquor, alleging a mistake in the delivery, as tending to show the course of business between the parties and to establish the good faith of the railroad company, and to raise a presumption that it had notice that the beer should be held until paid for. *State v. McAvoy*, 60 Iowa, 63, 28 N. W. 437.

So, entries in a book kept by an express company in its office are admissible in evidence in a prosecution for unlawfully selling intoxicating liquors, where they show the delivery of liquors to the defendant, as tending to show the alleged illegal sales. *State v. Kriechbaum*, 81 Iowa, 633, 47 N. W. 872.

And the book of a freight company properly kept, and which was a true record of the freight carried by it, showing the transportation of two horses upon a designated date between specified points, is admissible in evidence in a prosecution against a third person for stealing one of the horses while being transported, though the clerk who made the entries could remember nothing of the matter except as he saw it on the book. *Moots v. State*, 21 Ohio St. 653.

#### e. Application to other miscellaneous entries.

The same general rule of admissibility on is 53 L. R. A.

issues between third parties seems to apply to all other entries made in the course of business, though not against interest.

Thus, an entry in the usual course of business, in the books of an elevator company in Chicago, tending to show that the car load of barley in question was weighed and received in store at the elevator at a designated time, is admissible in evidence in an action on the case by the shipper of the barley against a railroad company for breach of duty in not delivering it as agreed in Chicago, under a defense that the barley had been delivered and was destroyed in the great Chicago fire. *Chicago & N. W. R. Co. v. Ingersoll*, 65 Ill. 399.

And entries made by employees of a board of trade as to prices of stock are admissible in evidence in an action brought by a customer against a broker for a balance of moneys placed in the broker's hands as a margin or indemnity against loss in the sale of wheat on the customer's account. *Campbell v. Wright*, 8 N. Y. S. R. 471.

And original entries in respect of bonds purchased by trustees are prima facie evidence against the trustees to show that the bonds were purchased with trust funds, even though it appears that the entries were made by strangers, and that the trustees had nothing to do with them. *Hertzler's Estate*, 15 Lanc. L. Rev. 353.

So, an entry in the shop books of one who repaired a wagon, but who has since died, showing a charge against the owner of the wagon for a number of spokes, is admissible in favor of such owner, against a railroad company for damages, where the character and extent of an injury to the wheel by collision with a locomotive is in dispute. *Lassone v. Boston & L. R. Co.* 66 N. H. 345, 17 L. R. A. 527, 24 Atl. 902.

And books of account kept by a contractor for grading a section of a railroad with the laborers employed by him to do the work, showing the price allowed them for their labor, are admissible in evidence in an action against the railroad company upon the contract for such grading when offered for the purpose of establishing the usual, or market, or reasonable price for such labor. *Currier v. Boston & M. R. Co.* 31 N. H. 209.

And entries in the books of account of a physician attending a mother at the time of the birth of a child are admissible in evidence in a subsequent proceeding on the question of the minority of such child. *Heath v. West*, 26 N. H. 191. See also similar cases set forth *supra*, IV. b, in which the charges were marked paid, and admitted as entries against interest.

Likewise, a book of minutes kept by a third party is admissible in evidence, in an action for the recovery of the purchase price of a patent, to show that the plaintiff had sold his patent to the third party, and therefore could not again sell it to the defendant. *Harrison v. Morton*, 83 Md. 456, 35 Atl. 99.

So, entries properly authenticated in the books of a person running a sawmill are admissible in evidence in an action on a contract by which one party sold to another all the logs owned by him situated on a designated tract at a specified rate per thousand feet, where the logs from such tract were sawed at his mill, and a question arose as to the quantity of the logs. *Gardner v. Wilber*, 75 Wis. 601, 44 N. W. 628.

And entries made by a jeweler in the regular course of business, showing that his firm had repaired a watch belonging to a woman subsequently murdered, are admissible in evidence after his death on a prosecution for murder against one in whose possession the watch was found, for the purpose of identifying the watch. *State v. Phair*, 48 Vt. 366.



And the books of a bridge company proved to have been kept by its treasurer, since deceased, in the business of the company, and to be in his handwriting, are admissible in evidence in an action brought against it for damages for the diversion of tolls and the loss of its bridge by the act of the defendant in erecting another toll bridge near that of the plaintiff, by which tolls were diverted, which latter bridge was carried by a freshet against the plaintiff's bridge, destroying it, under the rule that the entries made in the usual course of business, by one who had no interest to falsify, should be received in evidence after his death. *Chenango Bridge Co. v. Lewis*, 63 Barb. 111.

So, the books of a firm with which two persons alleged to be partners had had dealings, containing accounts of such two persons, are admissible in evidence in an action on a promissory note executed by such persons, one as principal and the other as surety, where it was material to show that the two had been doing business in partnership about the time the note in suit was given. *Cleland v. Applegate*, 8 Ind. App. 499, 35 N. E. 1108.

And an entry in a daybook of a deceased payee of a note properly authenticated as a book kept by him in his lifetime and made in the usual course of his business, showing a sale of the note and crediting the transferee with payment therefor, is admissible in an action by the transferee on the note to show transfer and ownership of the note in him. *Macomb v. Wilkinson*, 83 Mich. 486, 47 N. W. 336.

And entries in the books of account of a party showing certain payments on a designated note, and also describing two other notes with credits of payments of interest, but containing no entry of any payment of principal, are admissible in evidence in a prosecution by the state against the debtor on such notes, for forgery of a receipt of payment thereon, in which the theory of the state was that the payments had been made on account of the former note, and the receipt claimed to have been forged given therefor, and that the forgery consisted in the alteration in names and dates so as to make it apply to the latter note. *State v. Wooder*, 20 Iowa, 541.

Also, daybooks, ledgers, and other books of account kept in the regular course of business of an insured person, showing the value of the goods insured, are competent evidence when properly verified or authenticated, in an action against the insurance company for a loss under the policy for the value of the stock destroyed. *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 68 N. W. 855; *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810.

And the fact that some of the entries in the book of accounts of a person insured against fire were made by the bookkeeper from temporary slips furnished by salesmen does not affect their character as original entries, or their admissibility in an action for a loss under the policy, for the purpose of showing the value of the goods lost. *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 68 N. W. 855.

So, in *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144, the account book of an insurance company was admitted in evidence on a criminal prosecution against the agent of the insurance company for embezzlement, to establish the state of account between the company and the defendant, but the question in the case was as to the effect of an alleged erasure to make the book conform to the claim of the prosecution.

Also, a stock book kept by the owner of a stock farm at the barn office, containing an entry showing the transfer of certain stock to an agent, is admissible in evidence in an action by the agent against a third party brought to replevy such stock, which had been seized under

attachment by the third party as the property of the assignor. *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165.

And the books of account of a person furnishing alleged necessities to a minor, paid for by a third person, and the testimony of the person furnishing the goods, are admissible in evidence, in an action by the person paying for the goods against the minor, to show the character of the goods furnished, and that they were necessities. *Swift v. Bennett*, 10 Cush. 436.

And on an issue as to whether or not a vendor of a mining claim, for the purpose of inducing the sale had, at a time when the purchaser was about to examine the claim, mingled gold dust with the soil in particular places, and then caused the examination to be made at those places where it was found, the account book of a neighboring mine, containing entries of the sale of gold dust to the vendor just previous to the time when the examination of his claim was to be made, accompanied by proof that the book was regularly kept and the entries made in the usual course of business by the clerk, since dead, is admissible to show that the vendor had in his possession gold dust such as was afterward found in the soil, and thus had it in his power to scatter it on the soil. *Ashmead v. Colby*, 26 Conn. 287.

Likewise, the books of account of a mortgagee with the mortgagor are admissible in evidence in an action involving the validity of a mortgage claimed to be fraudulent as against creditors, given to secure alleged advancements, in which evidence was adduced to prove that large sums of money had been received by the mortgagee, which he had not credited or accounted for, to prove a settlement between the mortgagor and mortgagee, after duly accounting for all payments. *Cook v. Swan*, 5 Conn. 140.

And the shop book of a person who assigned his property in trust for the benefit of certain enumerated creditors, kept by one of the trustees who was also a creditor named in the schedule, is proper evidence, in an action brought by such trustee against a third person for taking and carrying away various articles included in the insolvent estate as the property of the insolvent, to show, in connection with other proof, the existence of a debt due from the assignor to the trustee, and the state of the accounts between them. *DeForest v. Bacon*, 2 Conn. 633.

And it is proper to prove that the books of an alleged vendor contained no record of a purchase of property, and no entries concerning the same, on an issue between third persons as to the title thereto, as that fact would go to show how the title was treated by the parties between whom it lay, where there was no interest except to assert whatever rights they respectively had. *Sloan v. Merrill*, 135 Mass. 17.

But entries made in the books of an insolvent in the course of writing them up so that the assignee might ascertain the condition of the estate are not entries made in the usual course of business, within the rule making such entries competent evidence, so that they might be used to impeach the title of the insolvent to stock in favor of a third party laying claim thereto. *Powers v. Savin*, 28 Abb. N. C. 463, 19 N. Y. Supp. 340.

And the commercial books of a merchant cannot be given in evidence by his creditors to establish a debt claimed to be due to him, especially in the absence of any allegation or proof of fraud and collusion between the merchant and his debtor. *Porche v. Le Blanc*, 12 La. Ann. 778.

And an opposition to the account of a syndic or administrator puts the burden on the party whose debt is opposed to sustain it by proof, and neither the admissions nor books of

the insolvent alone will make proof against creditors. *Calder v. Their Creditors*, 47 La. Ann. 1538, 18 So. 520.

So, neither the books of a corporation nor the testimony of its clerk is legal evidence in an action of trespass for attaching and removing goods claimed by the plaintiff as the property of another under the claim that the goods were fraudulently transferred to her, for the purpose of showing a credit by the corporation to her, which she claims to have transferred to her vendor as a consideration for the goods alleged to have been fraudulently transferred to her. *Treat v. Barber*, 7 Conn. 274.

Nor is the account book of a landlord admissible in evidence on a criminal prosecution against his tenant for selling or removing cotton from the leased premises upon which the landlord had a lien without proof of its correctness. *Powell v. State*, 84 Ala. 444, 4 So. 719.

And the books of a company from which trays were purchased, in which entries were made in the regular course of business, showing that the trays, which the plaintiff claimed to have purchased for the defendant to enable it to market its crop of raisins, and the defendant claimed to have purchased itself, the plaintiff being merely surety, were charged to the plaintiff and shipped to the defendant, are not admissible in evidence to show the plaintiff's ownership of the trays, as such entries are not inconsistent with a sale to the defendant to be paid for by the plaintiff, who was to be remunerated out of the proceeds of the transaction in which the trays were to be used. *Butler v. Estrella Raisin Vineyard Co.* 124 Cal. 239, 56 Pac. 1040.

#### VIII. Ancient books.

All entries in books of sufficient age to fall within the general rule admitting ancient records, documents, and books without proof, when produced from the proper custody, would appear to be admissible in evidence on issues between other persons, as well as on issues between the parties.

Thus, an ancient book kept among the records of a town, purporting to be the selectmen's book of accounts with the treasury of the town, is admissible in evidence to establish the facts therein stated; and where the selectmen were at the same time assessors, an entry in such a book of a credit by an order in favor of the collector for a discount of a particular person's taxes is evidence of an abatement of such person's tax. *Boston v. Weymouth*, 4 Cush. 538.

So, ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, are good evidence of their subject-matter though mixed with extraneous matter, and when admitted they may be read throughout for the purpose of proving anything material to the issue, provided it is relevant, although it goes to affect third persons not in privity with it, and who could not have had cognizance of the matter to which it relates, and although no part of such estate be situated in the parish in which the question between the parties to the suit arises. *Bullen v. Michael*, 2 Price, 399.

And the books of a steward, coming from the proper custody, are admissible in evidence in an action of trespass brought by the lord of the manor against a third party for trespasses committed on the wastes of the manor which he claimed as lord; and, where the entries are above thirty years old, they may be admitted without proving the handwriting of the steward. *Wynne v. Tyrwhitt*, 4 Barn. & Ald. 376.

And it is not necessary to prove the death of the steward. *Doe ex dem. Ashburnham v. Michael*, 17 Q. B. 276, 20 L. J. Q. B. N. S. 480, 15 Jur. 677.  
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So, in *Hand v. Savannah & C. R. Co.* 17 S. C. 219, it was held that the books of a railroad company, containing entries made in the handwriting of the treasurer of the company, since deceased, are admissible in evidence on an issue as to an estoppel from the assertion of a preferred statutory lien arising eleven years thereafter, to show who funded the coupons and received in exchange therefor bonds under a later statute, as the best proof the nature of the case affords.

But in *Patton v. Ash*, 7 Serg. & R. 116, it was held that the mere fact that a quarter of a century has elapsed since the transaction took place is not sufficient to justify the want of authentication by the clerk who made the entries, in an action by an indorser of accommodation paper against the maker thereof.

#### IX. Use of, to contradict, corroborate, or explain other evidence.

While, as a general rule, books of account are only admissible as between the parties to them and to the suit in which they are offered, when witnesses refer to books in aid of their statements, and especially when they state that they only know certain matters from having seen them in the books, such books are clearly competent to show improbability or mistake in their testimony. *Davenport v. Cummings*, 15 Iowa, 219.

And entries in the books of a third person not a party to the action, but who is a witness therein, are admissible in evidence for the purpose of impeaching him. *Sill v. Reese*, 47 Cal. 294.

And the rule is the same though the person making the entries is still living. *Ibid.*

Thus, where in an action of assumpsit for moneys paid, the plaintiff's evidence tended to show that a certain corporation had settled with the defendant, and that some of the disputed items in the account sued for were included in that settlement, and the books of the company were put in evidence to show such settlement, the defendant's book of accounts of his dealings with such company is admissible in evidence, in connection with his testimony that he kept correct accounts of his dealings with it, for the purpose of showing that no such settlement was made. *Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 665, 4 Atl. 231.

And where, in an action upon an account for goods, wares, and merchandise, and for labor and for money had and received, and for a balance due for cattle sold, it is claimed by the defendant that one of the items of the plaintiff's account had been paid by an agent of the defendant, by causing a credit to be given to the plaintiff on his indebtedness to a third party with the plaintiff's consent, which the plaintiff denied, and there was testimony pro and con, it is competent for the bookkeeper of the third party to testify as to whether or not the books of such third party showed any such credit, and as to the state of the account between the defendant and such third party. *Ramsey v. Cortland Cattle Co.* 6 Mont. 498, 13 Pac. 247.

So, entries in the books of a person having the charge and superintendence of repairs and additions to the dwelling of another, in account with his employees upon the work, are admissible in evidence, in an action brought by him against the owner of the building for his services, in which the defendant denied that the labor amounted to the sum charged, or that the materials charged were furnished by his direction, merely as contemporaneous memoranda made by him of the time of the workmen on the house in question, who had been examined as witnesses, and who testified that they gave their time correctly to the plaintiff and saw him en-

ter it. *Payne v. Hodge*, 7 Hun, 612, Affirmed in 71 N. Y. 598.

And the books of a county treasurer may be introduced in evidence, in the discretion of the court, on a prosecution against a bank officer for making false entries, in which it is claimed that the county treasurer deposited a sum of money just previous to the visit of the inspector, and withdrew it immediately afterwards, for the purpose of showing whether or not an entry of such deposit or withdrawal appeared therein. *Peters v. United States*, 38 C. C. A. 105, 94 Fed. 127.

And where, on a prosecution for forgery of an indorsement upon a check of the name of a person claimed to be a myth, and for uttering the check so forged as true, evidence is introduced tending to prove that the alleged mythical person worked for a designated party at or about the time the check in question was drawn, and other men who were employed by such third person at that time testified that the alleged myth also worked for him, the books of such third person, he being dead, when properly proved and identified and shown to contain the accounts of the other men employed by him, are admissible in evidence to show that the name of the alleged myth did not appear upon them. *People v. Kemp*, 76 Mich. 410, 43 N. W. 439.

So, the books of a person residing in one township, who had removed a pauper with his family from another township to his home, which contain charges against the pauper, the first one being for moving him from the other town, are admissible in evidence, in an action by the town from which he was removed against the town to which he was taken for improperly removing him from the place of his legal settlement, where a witness had testified to his removal previous to the formation of the plaintiff township, for the purpose of rebutting such testimony, the charges in the book showing that the removal was at a period subsequent to such organization. *Derby v. Salem*, 30 Vt. 722.

But books of account of the former employer of a pauper, containing charges against him, are inadmissible in evidence in a controversy between towns as to the date of settlement of the pauper, where there was a conflict of testimony between the witnesses respecting the date, and the book had no direct tendency to fix it, and none of the entries in the book were made by any of the witnesses. *Cornville v. Brighton*, 35 Me. 141.

And an entry in the books of a bank is not admissible in an action by another bank against a third party for the purpose of explaining an entry in the private bank book of the opposite party, where the private book was only exhibited on notice to produce it, given by the party offering the entry in the bank book. *Philadelphia Bank v. Officer*, 12 Serg. & R. 49.

In *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192, however, it was held that the question whether a book of a person not a party to a suit, the matter in which was foreign to the controversy, should be received in evidence to contradict a witness who had testified on cross-examination, without objection, as to the entries in it, is a matter within the discretion of the court.

See also *Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438, *infra*, XII.; *Orrett v. Corser*, 21 Beav. 52, *supra*, IV. b, 8; *Woods v. Allen*, 18 N. H. 28, *supra*, V. b.

So, on the trial of a person indicted for a conspiracy committed by the defendant and two others, entries in the books of the latter, who are copartners, made by their clerk, a stranger to the conspiracy, may be received as evidence tending to strengthen the testimony connecting the partners with the conspiracy. *State v. Cardozo*, 11 S. C. 195.  
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And a town treasurer's book of account of moneys received and paid out is admissible in evidence to corroborate his testimony upon the question as to whether the moneys borrowed by a selectman for the town had been paid over to him as such treasurer, which he denied, as the fact that the book in question was the book of accounts of the town treasurer does not change the rule of evidence as to admissibility. *Burnham v. Strafford*, 58 Vt. 104, 2 N. E. 128.

So, in an action by a tenant against the landlord for a wrongful distress, where it was claimed that the rent had been paid by check of the tenant, given to the landowner, deposited and carried to the credit of the landowner on the books of the bank, such books are admissible to prove the actual credit given, and that the money had actually gone into his possession by the usual mode. *Oliver v. Phelps*, 21 N. J. L. 597, 20 N. J. L. 180.

And so are the books of account of a mortgagee with his mortgagor, in an action involving the validity of the mortgage, claimed to be fraudulent as against creditors, given to secure advancements, in which evidence was adduced to prove that large sums of money had been received by the mortgagee, which he had not credited or accounted for, to prove a settlement between the mortgagor and mortgagee after duly accounting for all payments. *Cook v. Swan*, 5 Conn. 140.

And where a plaintiff testified that she paid moneys as a consideration for a mortgage, and the defendants sought to impeach the mortgagee by showing on her cross-examination that she paid no consideration, her bank book and a book containing a statement of the moneys she had paid as such consideration are proper evidence for the purpose of supporting her statements as to payment of such consideration. *Wright v. Towle*, 67 Mich. 255, 34 N. W. 578.

And entries of charges made by a grantee in a deed against his grantor are admissible in evidence in an action to set aside the conveyance as fraudulent as against creditors, where the consideration was denied, to corroborate the assertion of the grantee that the consideration for the conveyance was made up from such charges. *Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705.

So, where a judgment is obtained against a debtor, and the employer of the debtor is summoned as garnishee, and the garnishee claims payment in full of the employee's salary, and it appears that the garnishee's books would disclose payments made to the debtor, such books, covering the entire time of the defendant's services, are admissible in evidence in a contest on the answer of the garnishee. *Gray v. Perry Hardware Co.* 111 Ala. 532, 20 So. 368.

And the books of a firm are admissible in evidence in an action against another firm, the two firms having a common member, for the purchase price of goods ordered by such common member, and delivered to the defendant but charged to the other firm at his request on the books of the plaintiff, on cross-examination of such common member called as a witness for the plaintiff, to show that the goods were credited to the latter firm on its books, and to corroborate the testimony of such common partner to the effect that the goods were sold to the one firm and charged to the other. *Miller v. White*, 16 Can. S. C. 445.

And the books of account of the payees of a bill of exchange are admissible in an action by the drawee against the drawer in favor of the drawee, where one of the payees called by the defendant to show that the plaintiff had obtained the bill without value testified that he could not state without access to his books whether the payee received value from the drawee at the time the bill was deposited with him

or afterwards, to prove that when the plaintiff took the bill, and afterwards, he made advances to the payees upon the faith of it, as the drawer of the bill, having executed it for the benefit of the payees, was bound by what they did with reference to it. *Fellows v. Harris*, 12 *Smedes & M.* 462.

In replevin, however, for property which had been attached as belonging to another, account books of a third person who had testified to his having bought other like property of plaintiff containing an account between plaintiff and himself, showing items of property bought of plaintiff and cash paid to him, are inadmissible to corroborate plaintiff's testimony that he was the owner of the property in controversy. *Watrous v. Cunningham*, 65 *Cal.* 410, 4 *Pac.* 408.

And a bank book showing a deposit of \$1,000 by a party therein and the draft of a \$500 check is inadmissible in evidence, in an action brought by the depositor and drawer against the sheriff in which his sureties were substituted, for damages for a conversion of personal property levied upon by him as the property of another, on the ground that it was fraudulently transferred, alleging that it was transferred in consideration of a loan of \$500 in cash and a check for \$500 drawn on the deposit of \$1,000, for the purpose of corroborating the plaintiff's evidence. *Silverman v. Simons*, 14 *Misc.* 222, 35 *N. Y. Supp.* 668, *Rehearing denied* in 15 *Misc.* 64, 36 *N. Y. Supp.* 447.

See also *Fleming v. Yost*, 137 *Ind.* 95, 36 *N. E.* 705, *supra*, V. b; *Moffat v. Moffat*, 10 *Bosw.* 468, *supra*, VII. b, 3; *Rogers v. State*, 26 *Tex. App.* 404, 9 *S. W.* 762, *infra*, X. g.

As to use of person's own books to contradict or corroborate, see *note* to *Hall v. Chambersburg Woolen Co. (Pa.)* 52 *L. R. A.* 689, *What is provable by books of account*.

#### X. Entries treated as admissions, or as creating an estoppel.

##### a. The general rule.

Where a party makes an entry in his books of account in the regular course of business, the facts stated in such entry must be deemed to have been admitted by him, or at least asserted by him as true; and where such an entry is made by a third person the same result is reached where it is brought to his attention and he acquiesces in, or assents to, it. Entries of these classes, therefore, though they do not fall within the class of entries admissible because against interest, considered *supra* IV., are admissible in evidence against the party making or assenting to them, on an issue with a third party, as admissions or declarations, or by way of estoppel, upon the same principle that an entry in a partnership book is admissible against a partner where he had access to such book. But in this class of cases the acquiescence must be made to appear.

Attention is called, however, to the fact that in many of the cases collected under this head the entries in question are such that they might be held admissible as against interest, or as part of the *res gesta*, or as entries made in the regular course of business.

##### b. Application to books of debtor to show fraud.

A bankrupt's or insolvent's books are evidence of fraud as against himself, in an action by a creditor in which the fairness of a purchase by an intervening party is at issue. *Marmiche v. Commagere*, 6 *Mart. N. S.* 658; *Commercial Bank v. Bolton*, 87 *Hun.* 547, 35 *N. Y. Supp.* 138; *Kramer v. Wilson*, 22 *Mo. App.* 173; *Polak v. Searcy*, 84 *Ala.* 259, 4 *So.* 137.

And the books of a debtor are admissible in 53 *L. R. A.*

evidence, in an action by a creditor to set aside as fraudulent against creditors a deed, mortgage, or general assignment, to show whether there was any indebtedness of any kind prior to the assignment in consideration of which the deed, mortgage, or general assignment purported to have been given, the entries therein as to transactions with the alleged creditor being in the nature of written declarations by the debtor. *Loos v. Wilkinson*, 10 *N. Y. S. R.* 297; *White v. Benjamin*, 150 *N. Y.* 258, 44 *N. E.* 956; *New Orleans Canal & Bkg. Co. v. Leeds*, 49 *La. Ann.* 123, 21 *So.* 168.

And the fact that grantors gave a deed in discharge of a debt of which no trace could be found upon their books is a circumstance which can be proved against the parties, in an action by a creditor against the grantor and grantee to set aside a transfer on the ground of fraud on the part of both, where the defendant claims that there was a valid pre-existing debt owing by the grantor to the grantee, which furnished a consideration for the transfer, and the books of the parties are admissible in evidence to show that fact. *Loos v. Wilkinson*, 110 *N. Y.* 195, 1 *L. R. A.* 250, 18 *N. E.* 89.

So, the journal ledger and memoranda of bills payable of an insolvent are admissible in evidence in an action of tort brought by the assignees to recover the value of the insolvent's stock in trade from the holder of a mortgage upon it, alleged to have been made in fraud of the insolvent laws, as tending at least to show what the insolvent thought of his condition at the time of making the mortgage. *Bicknell v. Mellett*, 160 *Mass.* 328, 35 *N. E.* 1130; *Cluett v. Rosenthal*, 100 *Mich.* 193, 58 *N. W.* 1009.

And an account book kept by a creditor against his debtor, showing the latter's indebtedness to the former at the time of the execution of a mortgage on the former's property, exhibited to the debtor and showing a smaller indebtedness than that afterwards claimed, is admissible in evidence to establish the amount of such indebtedness, in an action by way of foreign attachment, brought by a third party to test the validity of the mortgage. *Stockbridge v. Fahnstock*, 87 *Md.* 127, 39 *Atl.* 95.

Likewise, in an action by a residuary legatee to set aside, on the ground of fraud, an assignment executed by an administrator with the will annexed of a claim in favor of the estate and against another estate, evidence concerning the amount due as shown by the books of the two decedents is admissible. *Diffendarger v. Dicks*, 105 *N. Y.* 445, 11 *N. E.* 825.

And the account books of a party selling goods to another are admissible in evidence in an action against the sheriff for seizing the goods on behalf of the party selling to the vendor, on the ground that the sale was fraudulent, as tending to show the condition of affairs of such vendor, and his knowledge of his condition. *Adams v. Bowerman*, 109 *N. Y.* 23, 15 *N. E.* 874; *Archer v. Long*, 38 *S. C.* 272, 16 *S. E.* 998.

And the books of the defendant in an attachment suit are admissible in evidence against the attaching creditor in favor of a claimant of the property attached deriving title to the goods through the defendant, at least to show what other persons were creditors of the defendant, and in what amounts they were creditors. *Meridian Fertilizer Factory v. Bush*, 77 *Miss.* 697, 27 *So.* 645; *Smith v. Collins*, 94 *Ala.* 394, 10 *So.* 334; *Banning v. Marleau*, 121 *Cal.* 240, 53 *Pac.* 602.

So, the books of account of the defendant in an attachment suit are admissible in evidence in a proceeding by a person claiming to have purchased the goods attached, to establish her title to the goods so far as they furnish light

as to the amount or existence of her debt, in payment of which the goods were claimed to have been transferred or payments made on it, if any, as tending to show the state of indebtedness between her and the attachment debtor. *Broach v. Worthelmer-Swartz Shoe Co. (Miss.)* 21 So. 300.

And in an action of conversion against an attaching creditor by a vendee of a stock of goods of the attachment debtor, the defendants are entitled to introduce such parts of the books of the debtor as relate to the purchase by plaintiff and his dealings with the debtor, where there is evidence that goods bought to replace those sold by the vendee in course of trade were bought through the attachment debtor in his own name, and charged to the plaintiff on his books. *Franklin v. Gumerseil*, 11 Mo. App. 306.

And the books of account of a creditor, showing the different transactions between himself and his debtor, are admissible in evidence in behalf of interveners in an attachment suit brought by the creditor against the debtor, under a claim that the attachment suit was the result of a secret and fraudulent agreement between the creditor and debtor for the purpose of defrauding the interveners and other creditors. *Wallace v. Rernheim*, 63 Ark. 108, 37 S. W. 712.

And the fact that some of the items were entered prior to the alleged conspiracy is of no consequence. *Ibid.*

So, books of account and records duly verified, pertaining, not only to the individual business of an assignor in insolvency, but also to that of a copartnership, of which he was a member, are admissible in evidence in an action by the assignee in insolvency to set aside a transfer by the assignor, on the ground that it was in fact made to hinder, delay, and defraud creditors for the purpose of showing the insolvency of the assignor. *Kells v. McClure*, 69 Minn. 60, 71 N. W. 827.

And the books of a firm are admissible in evidence, in a proceeding to set aside liens upon the property of a bankrupt and to annul them on the ground of fraudulent preference, to show that it commenced business without capital, and that its business rested entirely upon credit through the whole course of its business. *McLean v. Lafayette Bank*, 3 McLean, 587, Fed. Cas. No. 8,888.

And a bankrupt's ledger is receivable in evidence in an action by a creditor of the bankrupt to recover money paid to a third party under an alleged fraudulent preference to show the state of the affairs of the bankrupt alleged to have made the fraudulent transfer and his partners before their bankruptcy, and that the third party had no funds in the bankrupt's hands. *Furner v. Cope*, 5 Bing. 114, 2 Moore & P. 197.

And books of account kept by a judgment debtor are admissible in evidence in favor of the defendant in an action brought by a judgment creditor against the judgment debtor and his mother, to set aside certain transfers from the son to the mother as fraudulent, which were attempted to be sustained upon the ground that he was indebted to her for money previously loaned, where they show that whatever money had been loaned to him by his mother had been substantially repaid, and that about the time when some of the money was claimed to have been loaned, the son actually paid money to the mother. *Saugerties Bank v. Mack*, 34 App. Div. 494, 54 N. Y. Supp. 860.

#### c. Application to corporate books generally.

The principle upon which partnership books are evidence against the partners, that they are the acts and declarations of such partners, being kept by themselves or by their authority and under their direction or superintendence, does 53 L. R. A.

not apply to books kept by a clerk of a company, under a charter by which, when he is once appointed, he is not subject to the control of any individual or member, and the access to the books provided for is only for the purpose of inspection. In such case a proprietor entering into a contract with the company must be deemed a stranger, and can be affected by no entries made under orders from the entire body. *Hill v. Manchester & S. Waterworks Co.* 5 Barn. & Ad. 866, 2 Nev. & M. 573, 3 L. J. K. B. N. S. 19.

The books of a corporation, like those of a private person, are private books as to third persons, and such persons are not chargeable with knowledge of matters there recorded. *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Chase v. Sycamore & C. R. Co.* 38 Ill. 215.

And entries in the books of a corporation, relating to other matters of fact than the proceedings of the corporation, are not evidence in its favor in a controversy between it and a stranger, or between it and a member of the corporation holding or claiming adversely to it; or against a member of the corporation, of his contracts and private dealings with it, as he is to be regarded as a stranger in that respect. *Haynes v. Brown*, 36 N. H. 545; *Wheeler v. Walker*, 45 N. H. 355; *Hill v. Manchester & S. Waterworks Co.* 2 Nev. & M. 573, 5 Barn. & Ad. 866, 3 L. J. K. B. N. S. 19.

Entries in corporate books of matters relative to any property or right claimed by them can never be evidence for a corporation against third parties, unless made so by act of the legislature. *Chase v. Sycamore & C. R. Co.* 38 Ill. 215; *Jones v. Florence Wesleyan University*, 46 Ala. 626.

And this is true although the act under which the company was incorporated authorizes each member to inspect and take copies of the books. *Hill v. Manchester & S. Waterworks Co.* 2 Nev. & M. 573, 5 Barn. & Ad. 866, 3 L. J. K. B. N. S. 19.

So, an entry in the public books of a corporation of a private matter of business, or of a fact not of public interest, is not admissible in evidence in an action for trespass by a third party against an officer justifying under an act of the corporation. *Marriage v. Lawrence*, 3 Barn. & Ald. 142.

And an entry in the blotter of the treasurer of a corporation showing payment by the defendant of assessments on stock, is inadmissible in evidence in an action brought against him by a vendor of the stock for the recovery of the amount of calls and assessments paid by the vendor upon the stock transferred alleged to have been made after the transfer. *Tripp v. Appleman*, 35 Fed. 19.

But while the books of a corporation are not usually evidence against a stranger, the books of a mutual insurance company, in which the assured, on receiving a policy, becomes a member of the corporation, are competent evidence in a controversy between him and the company. *Protection L. Ins. Co. v. Dill*, 91 Ill. 174.

And the books of a church are admissible in evidence against the defendant on information in the nature of a quo warranto against members of the church for usurping the office of vestryman of the corporation. *Com. v. Woelper*, 3 Serg. & R. 29, 8 Am. Dec. 628.

And while the books of a corporation are not evidence against third persons, a memorandum in writing in such books, made by an agent of such third parties and at their request, is evidence for and against them, and for and against the persons claiming under them. *New England Mfg. Co. v. Van Dyke*, 9 N. J. Eq. 498.

So, where an action by attachment is commenced against a corporation, and a third party is garnished as a debtor of the corporation, and

another party intervenes, such books may be used against the intervener where it appears that the corporation and the intervener used the same books, as in such case it cannot be said that the intervener was a stranger to the entries therein. *Hamilton Buggy Co. v. Iowa Buggy Co.* 88 Iowa, 364, 55 N. W. 406.

And in an action between stockholders to recover damages arising from the purchase of worthless stock induced by false representations, sworn copies of the books of the corporation, as well as the books themselves, are competent evidence to show the acts and condition of the corporation. *Hubbell v. Meigs*, 50 N. Y. 480.

And in an action against the estate of the maker of a promissory note, which was payable to and indorsed by a corporation, entries in its books are admissible on behalf of the plaintiffs, where the maker of the note was a stockholder, director, and the vice-president of the corporation, and had access to and examined its books. *First Nat. Bank v. Tisdale*, 84 N. Y. 655.

So, the books of account of a corporation, showing accounts against a director, known to him and not objected to, are admissible in evidence in an action by the receiver of the corporation against three of the directors, charging one of them with abstracting large sums of money and diverting them to his personal use, and another with aiding in such diversion, and a third with knowledge and failure, to prevent it as admissions on their part. *Bird v. Magowan* (N. J. Eq.) 43 Atl. 278.

And a book of the treasurer of a corporation, containing a credit for the amount of stock subscribed, is competent in an action on the subscription to show payment by defendant; and it is error to reject it, even though it should appear by resolution of the board of managers of the company that the credit was unauthorized. *Buffington v. Butler & K. Turnp. Road Co.* 3 Penn. & W. 71.

And in an action by an assignee of a non-negotiable note given for certain corporate stock, in which defendant sets up as a counterclaim a note by the payee given for stock in a kindred corporation subsequently organized, and in which both parties have used the books of the original corporation as evidence, all of the contents of such books which in any manner explain or tend to enlighten the jury on the motives and purposes of the parties and their relations to each other in carrying on the corporations are properly submitted to the jury. *Jackson v. Adams*, 100 Iowa, 163, 69 N. W. 427.

So, books of a corporation containing an account of all the business transactions of the corporation, kept by a bookkeeper employed by the corporation but under the immediate care and supervision of an agent, who is sought to be held liable, not only for a personal defalcation, but also for a defalcation of the bookkeeper caused by his failure to exercise due care in seeing that the books were regularly and accurately kept, a duty imposed upon him by his contract of employment, are receivable in evidence against him to show that he had not kept either strict or accurate accounts of all dealings with the property intrusted to him, and for the purpose of showing, in connection with other and independent proof, that part of the property with the custody of which he was chargeable, was not accounted for by him, and was not delivered by him to his principal. *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410.

#### d. Application to bank books.

Where parties deal with each other by notes and checks on a bank, they make the bank their common agent or clerk for keeping an account

of the payment and appropriation of the moneys for which they are drawn, rendering books kept by the bank, containing entries of their transactions, admissible in evidence in an action between them with reference to such notes or checks. *Oliver v. Phelps*, 20 N. J. L. 180.

And the books of a bank are competent evidence against the bank and its officers as their own declarations of the state of a depositor's account, and neither the bank nor its former president subrogated to its rights, is in a position to find fault with the manner in which the books were kept. *Loewenthal v. McCormick*, 101 Ill. 143.

So, entries in the bank journal of all moneys paid out and received on a certain day are admissible in evidence in an action by a depositor against the bank to recover an alleged balance, where it is claimed by the bank that on that day they paid a designated sum in cash to a depositor and received no check therefor, and the depositor denies receiving the money. *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N. W. 165.

And the pass book of a depositor in a bank is admissible in evidence in an action brought by the depositor against members of the banking firm who were partners when he began business with the bank, where the fact of the partnership and the depositor's dealings with the bank, and authority to make the entries of deposits and withdrawals, were established. *Arnold v. Hart*, 176 Ill. 442, 52 N. E. 936, Affirming 75 Ill. App. 165.

So, the cash book of a bank kept in the bank by a bookkeeper, under the direction of the cashier, whose duty it was to enter the amounts of cash on hand as reported to him by the cashier and balance the cash, is admissible as prima facie evidence of the balances of cash on hand at the time when it was important to show such balances in a prosecution against the cashier for embezzlement. *People v. Leonard*, 106 Cal. 302, 39 Pac. 617.

And entries in the bank books and in the pass book of a customer are admissible, in an action against the indorser of a note given to a bank by a customer and thereafter transferred after maturity, to show payment of the note before it went out of the hands of the bank, where the entries were made while the bank held and owned the note. *Jermain v. Denniston*, 6 N. Y. 276.

Also, the books of a bank which was formerly the holder of a note are admissible in evidence, in an action by a receiver of the bank against the maker of the note, to show that the note had been carried on the books of the bank as a discount for the amount to which the note had been altered under a defense of alteration of the note, as tending to show an adoption or ratification by the bank of such alteration, and that the cashier, and through him the bank, had knowledge thereof. *Wyckoff v. Johnson*, 2 S. D. 91, 48 N. W. 837.

And in an action by the receiver of an insolvent bank against its former president and manager to recover a balance of account appearing to be due upon the books of the bank, the bank books, showing the account accompanied by proof that the books were regularly kept and open to the defendant's inspection and were probably examined by him, are proper evidence to go to the jury, not as an ordinary book account in direct proof of the charges in the account, but as an implied admission of them by the defendant. *Olney v. Chadsey*, 7 R. I. 224.

So, the books of a bank are admissible to charge one who was not only a stockholder in the bank but also an officer of it having power of inspection and supervision of such books. *Montgomery v. Exchange Bank* (Pa.) 5 Cent. Rep. 261.

And in a suit by a bank against the surety on the bond of its cashier in which the pleadings put in issue the question whether false entries were made in the bank's books by its clerks with the knowledge and connivance of the cashier, such books are admissible for the bank on proof that they were kept by the clerks of the bank, and that the entries were in their handwriting, not to show the truth of the facts which the entries professed to assert, as in the case of an offer to prove by entries in a book the delivery of the articles charged, but to show as facts what entries were in the books, and to lay a foundation for other testimony to show fraud in relation to the entries and the manner of keeping the books. *Union Bank v. Eldgely*, 1 Harr. & G. 324, 421.

But the books of a bank are not admissible in evidence in an action upon a note between third parties, where the entries therein were made without their agency, knowledge, or consent. *Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248.

And entries in bank books tending to establish a transaction between a creditor and one surety on a note are not admissible in evidence to charge another surety, especially where it is within the power of the plaintiff to introduce the person who made the entries. *Turner v. Mitchell*, 22 Ky. L. Rep. 1784, 61 S. W. 468.

As to bank books as evidence, see also *supra*, VII. c.

**a. To establish personal liability of a stockholder or director.**

There is some conflict of authority as to the competency of the books of a corporation to establish the individual liability of a stockholder or director for a debt of the corporation, there being cases of great weight holding that, of themselves, such books are not competent. But the prevalent rule would seem to be that, with respect to provisions for personal liability of stockholders and directors, they are to be regarded as partners, and the officers making the entries in the books are to be regarded as their agents for that purpose, as well as the agents of the corporation, so that the entries would be their entries by the hands of the agents, and admissible as such.

Thus, on the one hand, it is held that the books of a corporation, relating to its private transactions, are not admissible in evidence, in an action by a creditor of the corporation against a stockholder, to enforce his individual liability for the company's debt. *Hager v. Cleveland*, 30 Md. 478; *Nelson v. Crawford*, 52 Cal. 248; *Rudd v. Robinson*, 126 N. Y. 118, 12 L. R. A. 473, 28 N. E. 1046.

And the cash blotter of a corporation is not admissible in evidence, in an action by a creditor for the collection of assessments on stock under orders made in an action in equity against the corporation, against stockholders for the purpose of showing payment of assessments made by them. *Glenn v. Liggett*, 47 Fed. 472.

And that books of account of a corporation are not competent evidence of themselves in an action brought by a creditor against a director of the company to establish an account or claim against him as trustee. *Rudd v. Robinson*, 126 N. Y. 118, 12 L. R. A. 473, 28 N. E. 1046.

Upon the other hand, however, it is held that while the entries in a bank pass book are made by an officer of the bank, and not by a stockholder, such officer in making such entries acts as the agent and representative, not only of the corporate entity known as the bank, but of the stockholders also, regarded as unincorporated partners, and the written evidence of the

indebtedness is as binding upon the latter as upon the former. *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904; *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565.

Thus, the books of a bank, showing the account of depositors and what certificates of deposit had been issued and the checks or drafts drawn by the bank on the bank in which it kept its balances, are admissible in evidence in an action by creditors against stockholders to enforce their statutory liability for the purpose of showing the amount of deposit for which the bank was liable, and that certain certificates of deposit and drafts were issued by the bank for designated amounts and to designated parties, and that such certificates were still outstanding, upon the theory that the entries in the books were made by authorized agents of the stockholders. *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565.

And in an action to recover from directors a loan made to a corporation through an officer whose authority the defendants deny, entries in the corporate books, tending to show an adoption of the acts of the officer, or that the company had the benefit of the amount loaned, are admissible on behalf of the plaintiff. *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544.

And a claim ledger of a corporation so far as it was made up in the regular course of business is, in a suit to enforce the individual liability of stockholders for the corporate debts, evidence of whatever indebtedness of the company is shown by it; but entries made after the company ceased doing business, whether under the direction or by an employee of the receiver, or by any other person, are not evidence of such indebtedness. *Ailing v. Wenzell*, 27 Ill. App. 511.

And a ledger of a company found, after it had failed, with other papers in the office of a director who had left the state, which had been produced by such director in other proceedings as the ledger of the company, is admissible in evidence as such in an action to recover unpaid subscriptions from stockholders in the corporation, to be applied on a corporate debt, to show the nature and amount of the indebtedness of the company to the plaintiff. *McHose v. Wheeler*, 45 Pa. 32.

So, the books of a bank are admissible in evidence in an action by a depositor against a director of the bank, to establish his personal liability for a deposit for which a certificate was given to the depositor which created an excess of indebtedness upon the part of the bank above that permitted by its charter to exist, for permitting which directors were made personally liable. *Banks v. Darden*, 18 Ga. 318.

And the pass book of a depositor of a bank is admissible in evidence to establish a debt due from the bank to the depositor in a statutory proceeding by an assignor of the depositor against stockholders of the bank, to enforce their proportional individual liability as such stockholders. *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418.

And a bank ledger, though not a book of original entries, is admissible in evidence in an action brought by a depositor to enforce a stockholder's liability as an admission by the corporation on its own books of the amount due the depositor. *Dows v. Naper*, 91 Ill. 44.

The books of a corporation, if competent evidence in its favor to establish the liability of an officer to it for money loaned, in an action to compel the corporate officers to account for their official conduct, are equally good in favor of such defendant as against the corporation. *Stokes v. Stokes*, 91 Hun. 605, 38 N. Y. Supp. 350.

#### f. Application to partnership books of account.

Partnership books of account are usually admitted in evidence on the principle that they are part of the *res gesta*, or that, having been open to access by the partners sought to be charged, they are binding upon them as admissions, and, as far as their admissibility depends upon the fact that the action is between third persons, they are governed by rules above set forth, and the cases are collected under their proper heads. See *McNamara v. Dratt*, 40 Iowa, 413; *Treat v. Barber*, 7 Conn. 274, *supra*, II.; *Bricker v. Stone*, 47 Mo. App. 530, *supra*, V. b.; *Liscomb v. Agate*, 67 Hun, 388, 22 N. Y. Supp. 120; *Smith v. Lanier*, 101 Ga. 187, 28 S. E. 653, *supra*, VII. b. 1; *Cleland v. Applegate*, 8 Ind. App. 499, 35 N. E. 1108, *supra*, VII. e.; *Daniels v. Fowler*, 123 N. C. 35, 31 S. E. 598; *Lang v. State*, 97 Ala. 41, 12 So. 183, *infra*, X. g.; *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773; *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975, *infra*, X. h.; *Simonton v. Boucher*, 2 Wash. C. C. 473, Fed. Cas. No. 12,877, *supra*, VII. b. 2; *State v. Cardozo*, 11 S. C. 195; *Miller v. White*, 16 Can. S. C. 445, *supra*, IX.; *Kells v. McClure*, 69 Minn. 60, 71 N. W. 827; *McLean v. Lafayette Bank*, 3 McLean, 587, Fed. Cas. No. 8,888, *supra*, X. b.

As to the admissibility of partnership books in actions between third parties where the question of admissibility is affected by the fact of partnership, see *note* to *Chick v. Robinson* (C. C. App. 6th C.) 52 L. R. A. 838, on *Partnership books of account as evidence*.

#### g. Application to other miscellaneous entries.

The rule admitting entries in the nature of admissions, or which the person making them is estopped to deny, seems to apply to all other classes of entries, and to all other legitimate purposes.

Thus, the private account book of an intestate, containing accounts with various persons and charges against them for money paid for their labor and services during a time when it was alleged the intestate occupied and used lands with another, is admissible in evidence in an action by the latter against the administrator of the intestate, seeking to recover for his moiety of money received by the intestate, for certain property sold by him and which belonged to them jointly. *Faunce v. Gray*, 21 Pick. 243.

And the books of a judgment creditor are admissible in evidence against a junior judgment creditor to show payment of debts of the judgment debtor by the first judgment creditor, where it appears that the debtor had constant access to the books of the creditor, and assented to the entries therein. *Himes v. Barnits*, 8 Watts, 39.

So, the books of the plaintiff in an action on a stated account, shown to have been correctly kept, are admissible in evidence to show that the debt sued upon was charged therein to a third person, and not to the defendant. *Loomis v. Stuart* (Tex. Civ. App.) 24 S. W. 1078.

But the fact that goods, the price for which is sued for, were charged on the plaintiff's books of account to a third person instead of to the defendant, while proper to be considered by the jury upon the question, To whom was the credit given?—is not decisive against the admissibility of the books in evidence, where the goods were alleged to have been delivered to the third person upon the agreement of the defendant to pay therefor. *Winslow v. Dakota Lumber Co.* 32 Minn. 237, 20 N. W. 145; *Lyons v. Thompson*, 16 Iowa, 62; *Myer v. Graffin*, 31 Md. 350, 100 Am. Dec. 66; *Hetfield v. Dow*, 27 N. J. L. 440.

And it is error, in an action to recover for

merchandise sold to defendant and for money paid out by him to another, to admit in evidence the books of the person to whom the plaintiff paid the money, without first showing some authority therefor, other than the mere charge of money paid on plaintiff's books just previously offered. *Snell v. Eckerson*, 8 Iowa, 284.

Likewise, books of a payee of a promissory note containing an account between himself and the maker thereof, which had been looked over by the maker and admitted to be correct, are admissible in evidence in an action by a subsequent holder against the maker of the promissory note to establish a set-off existing against the payee in favor of the maker, where the account contained the credits claimed, not as any evidence of items, as the payee was not a party, but to identify the account, and show its amount in confirmation of the testimony of the defendants. *Bartlett v. Tarbox*, 1 Abb. App. Dec. 120.

So, where timber lands were leased, and the lessor stipulated to take a quantity of bark from the timber on the premises at a designated price, and allow the same on the rent, and the bark was drawn by the lessee to the lessor without himself keeping any account of the quantity drawn, but entries were made by an agent of the lessor in his books of each load as it came, the agent will be deemed to have been the agent for both parties in keeping the account, although employed by the lessor only, so as to render the books kept by him admissible in an action between the lessor and lessee involving the question of the quantity of bark received, not only to prove such quantity, but also that the whole that was received was entered on the book. *Livingston v. Tyler*, 14 Conn. 493.

And the books of account of a plaintiff suing to recover money belonging to him, received by defendant while in plaintiff's service as manager of his business, and not accounted for, kept by defendant and clerks hired and directed by him, are admissible to show the daily state of the business, and that at the expiration of defendant's term of employment there was a balance unaccounted for. *Bugbee v. Allen*, 56 Conn. 171, 14 Atl. 778.

And statements and books of account of an agent of an express company showing the business of the agent's office for the time in question, kept by a clerk in the employ of the agent, whose duty it was to make out reports and statements of the business upon which the agent had always settled with the company, are properly admitted in evidence as admissions by the defendant, in a criminal prosecution, against the agent for embezzlement of the express company's funds. *Territory v. Meyer* (Ariz.) 24 Pac. 183.

And a book containing memoranda of purchases of ice, sugar, and lemons, and of express charges on liquors paid by a club, taken from the premises of the club, and of which the steward of the club had charge, which was kept where he might have seen it, is admissible in evidence in a prosecution against the steward for keeping and maintaining a place for the purpose of illegally selling, distributing, and dispensing intoxicating liquors. *Com. v. Jacobs*, 152 Mass. 276, 25 N. E. 463.

So, an exhibit to the testimony of a witness, consisting of a copy of footings which he has taken from an agent's account when shown to him by the agent, is admissible in evidence, in a suit by the agent against his employer to recover for services rendered, as a sworn copy of an account which would have been admissible against the agent, as an admission. *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767.

And the fact that some of the entries in books belonging to a corporation were made by its secretary does not render them inadmissible in



an action by the secretary against the corporation for the recovery of salary earned as secretary, as he made the entries, not for himself, but for the corporation as its agent. *Cormac v. Western White Bronze Co.* 77 Iowa, 32, 41 N. W. 480.

And the account books, pay-roll, and stock books kept by an agent and bookkeeper for his employer are admissible in evidence, in an action by the bookkeeper against the employer in which it was alleged that a release of a matter of difference between them executed by the bookkeeper was done by him under duress, to show the nature and extent of the business of the defendant, and the manner in which it had been conducted, for the purpose of showing that it did not appear by them that the plaintiff had abstracted or misappropriated the money which he had repaid, and for which the release had been given. *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

Also, the books of a partnership containing the account of a guardian who was a member of the firm are admissible in evidence in an action on behalf of the wards to set aside a deed of trust made by the guardian to a third person, and for an account as to matters relating to the deed, for the purpose of showing that the balance had been forced in order to make up the sum mentioned in the deed. *Daniels v. Fowler*, 123 N. C. 35, 31 S. E. 598.

And entries in a blotter and cash book of a partnership, and in the handwriting of an employee charged with embezzlement, which show a discrepancy, are competent evidence against him. *Lang v. State*, 97 Ala. 41, 12 So. 183.

And the books of account, properly verified, of a person who had dealings with the defendant in a prosecution for perjury, in swearing that such person previously executed to him on the settlement of accounts a promissory note of a designated amount, are properly admitted in evidence, where it appears the account had been admitted by the accused to be correct and true, as in the nature of an admission. *Halleck v. State*, 11 Ohio, 400.

And entries in the books of account of the defendant, proved to be in his handwriting, and to have been made in the regular conduct of his business, and explanations thereof by an expert witness, are admissible in evidence on a prosecution for the alleged burning of a house, as constituting circumstances which tended to connect him with the commission of the crime, and which corroborated the testimony of an accomplice who was a witness, though the entries were false, representing that corn, millet, and hay had been purchased and received by the defendant into the house immediately preceding the burning, where such articles would have been covered by a policy of insurance held by defendant's father, if received as entered, and the accomplice testified that the defendant told him shortly before the house was burned that he wanted it burned in order to get the insurance money, and that he saw defendant writing on his books, and was told by him that he was fixing the books so as to swindle the insurance company. *Rogers v. State*, 26 Tex. App. 404, 9 S. W. 702.

So, account books kept by a deceased person, in his handwriting, showing advancements made to his children from time to time, are admissible in evidence on a contest of his will between the children as declarations of the deceased with reference to the disposition of some of his property before executing the will. *Re Perkins*, 109 Iowa, 217, 80 N. W. 335.

The regular books kept by a cotton broker, however, who had made advances to a cotton spinner while in possession of the spinner's mills under an agreement by which, among other things, he was to reconvey to the spinner within

ten years if the spinner should repay his indebtedness to him, or if the net profits of the business should repay the principal and interest thereof, the spinner to act as manager of the mills, are not binding upon the spinner; but where he had access to them they will be taken as *prima facie* evidence against him with liberty to surcharge and falsify them. *Ogden v. Bat-tams*, 1 Jur. N. S. 791.

#### *h. Necessity of knowledge of, or consent to, entry.*

Entries in books of accounts, to be admissible in evidence in favor of a third party as an admission or by way of estoppel, must have been made by the party sought to be bound, in which case his knowledge and assent would be assumed as a matter of course, or if made by another they must have been in his knowledge and with his assent or acquiescence.

Thus, a private entry in one's own book of accounts, showing an intention to take seventy-five cents on the dollar on certain notes held as collateral, which were surrendered to the maker in exchange for bonds, cannot be used by a pledgee of the bonds in an action for an accounting, where the pledgee did not consent to such entry, or to such use of the notes as evidence of a sale thereof to the pledgee at their face value. *Griggs v. Day*, 136 N. Y. 152, 18 L. R. A. 120, 32 N. E. 612, *Reversing 29 Jones & S. 124*, 19 N. Y. Supp. 1019.

And entries in the private books of an executor who owed his testator money secured by a bond, which entries were made by the executor, and had never been seen or approved by the testator, are inadmissible in a proceeding to surcharge accounts of the administrator of the executor, as tending to show payment of interest on the bond. *Mertz's Appeal* (Pa.) 7 Atl. 187.

And entries in the books of the plaintiff in an action to recover a balance upon a loan, consisting of a statement that the loan was made to the defendant on his own account, are inadmissible in evidence on an issue as to whether the loan was made to him or to another through him as agent, the defendant having no knowledge of such entries. *Peck v. VonKeller*, 76 N. Y. 604.

So, the testimony of an express company's agent, showing an entry of money on his books in the name of a judgment debtor, is not admissible in evidence in a proceeding by the wife of the judgment debtor to establish title to horses claimed by her, levied upon by a judgment creditor as the property of the debtor, where it appears that the entry was made by his own act without the direction or suggestion of the debtor, or anyone representing him. *Levy v. Holberg*, 71 Miss. 66, 14 So. 537.

And the books of account of an agent kept in the business of his agency, not shown to be in his handwriting, are not legal evidence against him in a prosecution for embezzlement of his principal's property, in the absence of testimony tending to show that his attention was called to them, or that he made admissions in regard to them. *Lang v. State*, 97 Ala. 41, 12 So. 183.

Nor is an account kept in the books of a partnership with the wife of one of the partners, under a contract by which the wife of the partner was to furnish board to workmen engaged in a laboring transaction for the firm, and receive a part of the profits, admissible in evidence in an action against the sheriff for seizing lumber claimed by her under an attachment as the property of her husband, who was a member of the firm, in the absence of anything showing knowledge or acquiescence on her part in the keeping of such accounts, or of anything connecting her with them. *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773.

And the books of account of a partnership which is alleged to have borrowed money from the wife of one of the partners, and for repayment of which he caused a writ of attachment to be levied upon the partnership goods, are inadmissible in evidence in favor of creditors of the firm, who also caused attachments to be issued and levied upon the goods attached by her, alleging that her attachment was in fraud of their rights, for the purpose of establishing the fraud, as the books of the firm are not evidence against her. *Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975.

So, a verified statement of balances on a deposit ledger of a state bank is inadmissible in evidence in a prosecution against an officer thereof for making false entries in its book of accounts under N. Y. Penal Code, § 602, in the absence of proof that it was made by the defendant or under his direction. *People v. Severance*, 87 Hun, 182, 22 N. Y. Supp. 91.

And entries made by an insurance company in its books, showing the cancellation of an insurance policy, are inadmissible in evidence in an action by the beneficiary under the policy for a recovery thereon, where the entries were made without her knowledge, as the company could not deprive her of any right, or affect her rights by any entry in their books to which she did not assent and was not a party. *Dean v. Aetna L. Ins. Co.* 2 Hun, 358.

So, on an issue as to the bona fides of a sale of a stock of goods, entries made by one of the vendors in the books of the person from whom the goods were originally bought, showing payments on the purchase price, are inadmissible against the vendee and in favor of attaching creditors, as acts or declarations of the vendor. *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538.

And where, under an agreement by which one party contracted to sell to another all the timber of stated kinds upon a specified tract, the latter agrees to sell the bark which he might think proper to peel from the logs to a third person not a party to the agreement, the books of such third person are not admissible in evidence, in an action by the vendor against the vendee for timber sold, for the purpose of showing a credit for bark in favor of the vendor, without proof of a request on his part that such an entry should be made. *Winter v. Newell*, 49 Pa. 507.

So, the books of account of a creditor, containing the original entries of his business transactions with a debtor, are not admissible in evidence in an action by other attaching creditors of the debtor against the sheriff, praying for a perpetual injunction restraining him from proceeding to sell on execution property of the debtor under a judgment obtained by the former creditor on the ground that the judgment was obtained with intent to defraud the attaching creditors, and not based upon any actual indebtedness, where the only predicate laid consisted of evidence that the judgment creditor had sufficient capital to have loaned the amount of the judgment to the judgment debtor. *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 319.

And account books of an assignee for the benefit of creditors, introduced in evidence by a creditor of the assignor as an admission by the assignee, must be accepted as a whole, or not at all, there being no testimony outside of the account to discredit any of its items. *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863.

And the account books of the debtor cannot be used against a transferee, where they merely impute the intent to defraud to him, and do not show knowledge thereof on the part of the transferee. *Commercial Bank v. Bolton*, 87 Hun. 547. 35 N. Y. Supp. 138.  
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And the books of account of one who sold lands held in trust, and acknowledged that he held the proceeds in trust, are not evidence, in a proceeding to surcharge the accounts of the administratrix of the trustee, to show the nature of the transaction between the trustee and his *cestui que trust*. *Hess' Appeal*, 112 Pa. 168, 4 Atl. 340.

Nor are the books of original entries kept by a tenant of a farm, containing the receipts and expenditures of the farm, purporting to have been kept by the tenant as agent of the owner, admissible in evidence in an action by the owner against a third person for an unlawful seizure of goods thereon, for the purpose of establishing the relation of landlord and tenant. *Townsend v. Kerna*, 2 Watts, 180.

So, on a proceeding by a receiver of an insolvent corporation to compel a conveyance of land to plaintiff, the title to which is in defendant, and for an injunction, on the ground that the land was bought by defendant for the company's benefit and paid for by it, the company's books of account are not rendered admissible as against defendant by the fact that he was vice president and an active director of the company and a member of its executive committee, where there was no proof, other than that they were found by the receiver in the office of the company, that they were regularly kept, or that the defendant had in fact ever seen them, or that they were open to his inspection, or that it was his business or habit to examine them, or that he was aware of the existence of the entries. *Bartholomew v. Farwell*, 41 Conn. 107. There should have been some proof beyond the mere official character of the defendant and the place where the books were kept,—especially when his official relations to the company were not such as to prima facie necessarily charge him with the custody, keeping, or inspection of the books.

And see *Treat v. Barber*, 7 Conn. 274, *supra*, II.

On this subject see also *STATE BANK v. BROWN*.

#### XI. *Necessity of authentication and proof of death or absence.*

While the rules as to admissibility of proper entries in books of account on issues between third persons are as above stated, such rules do not apply, and entries in such books are not admissible until the proper preliminary proof has been given, which must establish their accuracy and originality, and that they were duly and properly made at or near the time of the transaction, and that the clerk or person who made them is either dead or not within reach of process.

Thus, an entry or memorandum made by a witness, or which he saw made recently after the occurrence of the matters entered, and which on being produced he can verify as the entry he made or saw made, and testify that he knew the entry to be true when made, is admissible in evidence to establish a material fact. *New York v. Second Ave. R. Co.* 102 N. Y. 572, 7 N. E. 905.

But while entries in the pass book of a bank would be evidence against the bank in a controversy between it and the depositor, and under certain circumstances evidence against the depositor also, they cannot be received as evidence against a third party, as they are not books of original entry. *Wills Point Bank v. Bates*, 72 Tex. 137, 10 S. W. 348.

And books of a bank not showing whether checks drawn upon it were payable to bearer or to order, or the names of the persons in whose favor they were drawn, are not admissible in evidence in an action between third parties, to

show the payment of money to any particular person. *Boyd v. Wilson*, 2 Cranch, C. C. 525, Fed. Cas. No. 1,751.

And a statement taken by a cashier from the books of a bank is inadmissible against a customer in an action to which the bank is not a party, where the only evidence of its correctness was the testimony of the cashier, who did not keep the books or receive deposits or pay out money, that the account as shown by the statement appeared on the books of the bank, and he presumed it was correct. *Walling v. Morgan County (Ala.)* 28 So. 433.

Nor are books of a bank produced by a clerk admissible in evidence in a proceeding for an accounting against executors under an agreement for an adjustment or settlement of all differences between them and the legatees and devisees, for the purpose of showing drafts drawn to the order of some of the devisees, where it is not shown that they were books of original entries, and it is not made to appear whether the drafts had been paid, and whether if paid the money was used for the benefit of the payees. *Chandler v. Pomeroy*, 87 Fed. 262.

And a loan book of a banker and broker cannot be used to identify stock pledged by such banker for the benefit of a third person without right or authority from the owner thereof, as stock belonging to such owner, in an action to recover the surplus arising from the sale of the stock after satisfying the loan for which it had been pledged, where the person who made the memorandum had no recollection of its contents, and the bookkeeper who made the entry had no knowledge of the transaction, and could not recollect whether he kept the memorandum, or it was called off to him. *Powers v. Savin*, 28 Abb. N. C. 463, 19 N. Y. Supp. 240.

In the above case, *Adams v. Bowerman*, 109 N. Y. 23, 15 N. E. 874, *supra*, X. 2, was distinguished upon the ground that in that case the person who made the entries was dead, and that the rule applicable in such case has no application where the person making the entries was alive and present, but knew nothing of the facts as to which the entries relate.

And *New York v. Second Ave. R. Co.* 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905, *supra*, was distinguished upon the ground that in that case the books were accompanied by evidence of the foreman of the gang of workmen who did the work testifying to their own knowledge as to the correctness of the reports made by him to the main foreman, and the main foreman testified that he correctly entered the reports as made to him.

So, entries in a bill book of the acceptors of a bill of exchange discounted by a bank for the acceptors are admissible in evidence, in an action against the drawer and indorser thereof, to fix the original date of the bill alleged to have been altered, only in connection with testimony tending to show that they were accurately made from the original or from a correct memorandum of it previous to the time of the alleged alteration. *Ortmann v. Merchants' Bank*, 41 Mich. 482, 2 N. W. 677.

And on a question as to the validity of a note, alleged to have been given for a loan, but which is attacked on the ground that the payee was a poor man, and unable to loan so much money, the payee's books of account containing entries of charges for professional services and goods sold, unaccompanied by any proof of the time when made, or of the fairness of the books, or that he kept account of credit as well as debit, or any corroborating circumstances in connection therewith, are inadmissible to show the value of the payee's estate and his pecuniary condition at the time in question. *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52 (an action of ejectment in which the defendant claimed un-

der the payee of the note by virtue of a sale under execution on a judgment recovered on the note).

Nor is a physician's account of services rendered to a slave and paid for by her purchaser admissible in evidence in the latter's favor, in an action to recover damages for a breach of warranty of soundness, until it is proved that the services were rendered as charged in the treatment of a disease existing at the time of the sale, and that the charges were correct. *Stone v. Watson*, 37 Ala. 279.

And entries in a book kept by a physician, since deceased, who attended a person suffering personal injuries, showing the nature and extent of the injuries, are inadmissible in evidence in an action by the person injured, who was a tenant, against her landlord, for negligently maintaining a heavy pole upon the leased premises in such a condition that it fell upon her causing the injuries, where the entries did not disclose when they were made, and no extrinsic evidence was given tending to show that they were made contemporaneously with the meetings of the physician and the plaintiff. *Schule v. Cunningham*, 22 Jones & S. 302.

And the books of a miller sworn to be the original books kept in the mill and to be correct, containing an account of the delivery of wheat to be ground at the mill and of the flour therefrom to certain wagoners alleged to be in the employ of the plaintiffs, but which did not contain daily entries of the general transactions of the mill, nor of all the flour delivered to the wagoners of the plaintiffs, who generally, though not always, sent with their wagoners written orders for flour, which orders were afterwards destroyed by the miller, are not admissible in evidence to show the number of barrels of flour belonging to the defendant who furnished the wheat, delivered to the plaintiffs, the entries therein not always having been made at the time of the delivery of the flour, but sometimes from memoranda made in the absence of the bookkeeper, which he afterwards entered in the books, the bookkeeper and the wagoners being alive and within the jurisdiction, but not having been called or their absence accounted for. *Smith v. Lane*, 12 Serg. & R. 80.

So, an entry in lead pencil at the bottom of the page in the business journal of a bankrupt, kept previous to his bankruptcy, relating to an assignment by him to his nephew of the proceeds of a judgment against a city in the hands of the comptroller, is not admissible in evidence in an action by the administratrix of the nephew against an assignee in bankruptcy to set aside a reassignment of the fund. *Scott v. Devlin*, 89 Fed. 970.

And the testimony of a syndic and his clerk, neither of whom had any knowledge of the claims they were called upon to prove, except that derived from the books of the insolvent, is not sufficient to support such books and render them admissible as proof against creditors. *Calder v. Their Creditors*, 47 La. Ann. 1538, 18 So. 520.

And where a creditor institutes an attachment suit against a debtor, and summons a third party as garnishee, and the garnishee claims to hold an open account against the debtor firm, and also against an old firm formerly composed in part of the same members, which he seeks to offset against the claim garnished, original entries of the items of the accounts, made in part by the garnishee and in part by his clerk, are not admissible as evidence of the correctness of the accounts, where the witness had no independent recollection of them, and there was no other evidence as to their correctness. *Kling v. Tunstall*, 109 Ala. 608, 19 So. 907.

Nor are the books of a corporation admissible

in an action for money loaned to an alleged trustee thereof, for the purpose of showing that the transaction was a corporate, and not a personal, one, in the absence of evidence to authenticate the books or to warrant the inference that the lender had actual, or was chargeable with constructive, knowledge of their contents. *Powell v. Conover*, 75 Hun, 11, 26 N. Y. Supp. 1028.

And the books of a bridge company, proved by its treasurer to have been received by him as the company's books upon his accession to office, are not admissible in evidence to prove the amount of tolls received prior to that time, upon the question of the diversion of tolls by the erection of another bridge near to its bridge, in the absence of preliminary proof other than that they appeared to be the books of the corporation, and that they were in the handwriting of the former treasurer or toll gatherer. *Chenango Bridge Co. v. Lewis*, 63 Barb. 111.

And minutes or copies taken by a witness from the forwarding book kept by a railroad company at a station are not admissible in evidence in an action between third parties in which it became material to show what shipments had been made to one of the parties by railroad from a certain station, upon mere proof of the uniform usage of railroad companies to keep such a book at stations, in which is entered a statement of all freight received for shipment, from whom received, to whom consigned, and to what place. *Bonner v. Home Ins. Co.* 13 Wis. 677. It was said in this case, however, that if the custom of the company and the general accuracy of that particular book had been first established, secondary evidence of its contents should be received.

So, ordinarily books of account are not evidence in suits to which the party for whom they are kept is not a party, without proving such books by the clerk who made the entries if within process, or proving his handwriting if he is not within the reach of process. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299; *Poor v. Robinson*, 13 Bush, 290; *Gochenauer v. Good*, 3 Penn. & W. 274.

And it is not sufficient to prove the mere conclusions of the witnesses as to their substance and effect. *Poor v. Robinson*, 13 Bush, 290.

An entry in the books of a bank is not admissible in evidence to show a deposit of money in suit in which such bank is not a party, unless it is proved that the clerk who made the entry is dead or beyond the reach of process of the court. *Philadelphia Bank v. Officer*, 12 Serg. & R. 49.

And the same rule applies to the use of a bank book to show that the proceeds of accommodation paper were credited by the bank discounting it to the account of the owner of the book, and by him paid to an indorser, in a contest between the owner of the book and the indorser. *Patton v. Ash*, 7 Serg. & R. 116.

And the fact that a quarter of a century had elapsed since the transaction took place is not sufficient to excuse the want of preliminary proof. *Ibid.*

But the admission in evidence of the books of a bank in an action by a surety on a note to recover the amount paid by him to the bank which held the note, without the testimony of the person who made the entries, or proof of her death or that she was beyond the process of the court, is not reversible error, where that ground of objection was not taken in the trial court. *Lane v. Lockridge*, 20 Ky. L. Rep. 1102, 48 S. W. 975.

So, entries in the books of a broker, offered for the purpose of showing a sale of stock by plaintiff to defendant, ought not to be admitted in evidence without proof of the broker's death. *Hutzler v. Lord*, 64 Md. 534, 3 Atl. 891.

And a regular stock book of sales of the stock exchange is not admissible in evidence to show

that certain stock was sold on the stock exchange as directed by a power of attorney given by a pledgee of the stock and the date and price of the sale, where the secretary of the company, who kept the book, was alive and within reach of process, and no showing was made to account for his absence. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299.

Nor are books of account kept by the treasurer appointed under an agreement between a number of people entered into for the purpose of raising money to be used in erecting and furnishing a hotel, constituting three persons the attorneys in fact for the subscribers, and especially empowering them to collect subscriptions, admissible in an action by one of the attorneys, who was a subscriber, against the person employed to erect the hotel, to recover the amount of an alleged payment for the purpose of charging him with the receipt of subscriptions, where the person making the entries is not shown to be dead, and the entries are not against his interest. *Sypher v. Savery*, 39 Iowa, 258.

And the shop book of a tradesman from whom a purchase by the defendant was made, in which the articles purchased were duly charged on the day of the purchase, is not admissible to show the date of an occurrence which the defendant testified occurred on the day following the day of the purchase, unaccompanied by the testimony of the clerk who made the entry, who was shown to be living and within the jurisdiction, where the plaintiff offered a blotter in evidence containing a charge for the same article of a different date. *Stiles v. Homer*, 23 Conn. 507.

See also cases set forth, *supra*, III.; and see *Higham v. Ridgway*, 10 East, 109; *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415, *supra*, IV. a; *Stephen v. Gwenap*, 1 Moody & R. 120, *supra*; *Augusta v. Windsor*, 19 Me. 317, *supra*, IV. b. 2; *Reynolds v. Sumner* (Ill.) 14 N. E. 661, *supra*, V. b; *Brewster v. Doane*, 2 Hill, 537; *supra*, VI. e; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908; *Lord v. More*, 37 Me. 208; *Ridgeley v. Johnson*, 11 Barb. 527; *New York v. Second Ave. R. Co.* 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905, *supra*, VII. a; *State Bank v. Brown*.

The above is but a partial list of the cases in which the necessity of authentication and proof of death or absence appears either directly or inferentially. It appears in a majority of the cases in this note—in so many that it would appear to be useless to repeat them here, and that it would be fair to infer that the only reason it did not appear in the rest was that such proof was supplied, and accepted as sufficient so that there could be no necessity of adverting to it.

## XII. Variation of rules by statutory and constitutional provisions.

The above rules are varied in some jurisdictions with reference to some subjects by statutory and constitutional provisions.

Thus, Neb. Civil Code, § 346, providing that books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under certain designated circumstances embraces the only legal authority known for the reception of books of account as evidence in legal proceedings in that state, and applies only to books of account containing charges by one party against the other, and does not apply to render admissible entries in the books of account of a father in account with a third person, in an action by his daughter against another for the purpose of contradicting her testimony therein. *Masters v. Marsh*, 19 Neb. 458, 27 N. W. 438.

And in North Carolina entries upon the books of a third person, though made in the course of business, and though the party making them is absent from the state, are not competent evidence, where he is still living, of the facts therein set forth, though material upon the trial of the prosecution against another for crime. *State v. Thomas*, 64 N. C. 74. The above ruling was based upon the theory, among others, that the admission of such evidence would be contrary to the North Carolina constitutional provision, art. 1, § 11, that in all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accuser and other witnesses; since the word "confront" does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmance of the rule of the common law, that in trials by jury the witness must be present before the jury and accused, so that he may be confronted with them, put face to face.

So, a book kept by a loan agent, showing the number of loans made by him, the name and address of the mortgagor and mortgagee and where payable, and the description of the property mortgaged and the mortgage record and the number of applications and date of loan, and time when due and paid, is not admissible in favor of a borrower for the purpose of proving payment, as the book is not a book of account within the meaning of Iowa Code, § 3658, providing that books of account containing charges by one party against the others, made in the ordinary course of business, are receivable in evidence under designated circumstances. *Security Co. v. Graybeal*, 85 Iowa, 543, 52 N. W. 497.

And a provision in the charter of a bank for the examination of its officers by commissioners as to the contents of the books of the bank whenever it shall be a party is in derogation of the common-law rules of evidence, and must be strictly construed, and does not apply to actions in which the bank is not a party, though the parties were depositors in the bank, and its books would show transactions between them. *Williams v. Kelsey*, 6 Ga. 365.

In the above case, however, in which the books of a bank were not permitted to be introduced in evidence in an action between third parties on the theory that the charter permitted examination as to their contents only when the bank was a party, it was said that the bank in question was a public institution, and its officers were public officers, and that therefore a certified copy from the books under the hand and seal of the officer keeping them would, in the judgment of the court, have been competent and the best evidence to prove the transactions of the bank with its debtors, so far as the same is confined to the books of the bank.

But accounts in books, purporting to be between plaintiffs and various third parties with whom he dealt, are admissible in evidence when properly proved under Minn. Gen. Stat. 1894, § 5738, providing that whenever a party in any cause or proceeding produces at the trial his account books, and proves that they are his books of account kept for that purpose, and contain original entries of charges for moneys paid or goods or other articles delivered, or work and labor or other services performed or materials furnished, they are subject to certain restrictions to be received as prima facie evidence of the charges therein contained, such statute not being confined to cases in which the account purports to have been between the parties to the action. *Coleman v. Retail Lumbermen's Ins. Assn.* 77 Minn. 31, 79 N. W. 588.

And the books of a foreign railroad corporation, showing the amount of work done by a contractor and the amount he was to receive

therefor, are admissible in evidence under N. Y. Code Civ. Proc. §§ 929, 930, 931, making the books of a foreign corporation, or a copy thereof, or an entry therein duly verified, presumptive evidence for the purpose of proving an act or transaction of the corporation in an action brought by a broker against the contractor for an agreed commission, based upon the amount of moneys to be received thereon for negotiating the contract between the contractor and the railroad company, to show the amount of work done. *Derham v. Lee*, 15 Jones & S. 174, Affirmed 87 N. Y. 599.

And under the English bankers' books evidence act, 1876, 39 & 40 Vict. chap. 48, providing that the entries in ledgers, daybooks, cash books, and other account books of any bank shall be admissible in all legal proceedings as prima facie evidence of the matters recorded therein, and § 4 thereof providing for the proof of copies of all entries therein, copies of the entries in the books of a banker are admissible in evidence against anyone whether a party to the entries or not. *Harding v. Williams*, L. R. 14 Ch. Div. 197, 49 L. J. Ch. N. S. 661, 42 L. T. N. S. 507, 28 Week. Rep. 615.

And copies of the books of the Bank of England are admissible in evidence both as between the parties to the entries and as between third parties; though, upon a question whether the signature to a transfer is the genuine handwriting of the party purporting to have signed, the book itself must be produced. *Auriol v. Smith*, 18 Ves. Jr. 198.

*Mills's Anno.* (Colo.) Stat. § 4817, providing that any interested person in a civil action may testify to his account book and the items therein contained, and that it is a book of original entries, etc., and that they were made in the usual course of trade, and thereupon the said account book and entries shall be admitted as evidence in the case, is intended to enable a party to use his own books as evidence in his own behalf, and is not applicable where the books are introduced to show admissions against the interest of the party making them. *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 566.

### XIII. Conclusion.

The general use of books of account is as evidence on issues between parties to the entries therein. As a general rule they are not admissible in evidence on issues between third persons. There are a number of well-defined exceptions to this rule, however. Entries in such books are admissible on issues between third persons where they constitute admissions against the interest of the person making them, and in such case it is immaterial whether the entry was made at the time of the transaction recorded or not. But, in order to be against interest within this rule, the entry must have been one by which the party charged himself or discharged some other person.

Entries in books of account are likewise admissible on issues between third persons when they constitute part of the *res gestæ*. But to constitute part of the *res gestæ* they must have been made contemporaneously with the principal fact, and must have formed a link in the chain of events, and belonged ordinarily and naturally to the principal thing.

Likewise, entries which it was the legal or particular duty of a party to make are admissible on issues between third parties. These include official entries, and entries which are a necessary part of the performance of a particular duty. Such entries, however, are probably also admissible under the more modern rule admitting entries on issues between third persons, as well as between the parties to them, which were made in the regular course of business.

This rule formerly had no existence unless the entries were also against interest. But it is now well settled, particularly in the United States, that the condition that the entry must be against interest is no longer necessary. But the books must have been fairly and regularly kept, and the entries must have been made contemporaneously with the fact by a party having personal knowledge and without interest to prevaricate.

Ancient books and ancient entries are also admissible on issues between third persons, under the principle admitting ancient records and documents, and books of account may be used on such issues to contradict, corroborate, or explain other evidence. And entries made by a party, or which have been brought to his notice and acquiesced in by him, are admissible in evidence against him, though the issue is between him and a third person, although they are not entries against interest, as defined by the cases, by way of estoppel, upon the same principle that partnership books are admissible against all partners having access thereto. This rule does not apply, however, to use of the books of a corporation against a stockholder, since the stockholder is regarded as a stranger with reference to the business affairs of the concern. But it does apply to a mutual company in which the persons interested are members of the company, and not strangers; and the prevailing rule is that the books of a corporation may be used against a stockholder or director in establishing his statutory individual liability, upon the theory that the officer making the entries is his agent for that purpose, as well as the agent of the company.

It is necessary, however, to render book accounts admissible in evidence on issues between third persons, that preliminary proof should be made establishing that they are original entries, and that they are accurate and were duly and properly made, and also that the one who made them is dead or beyond the reach of process; otherwise he must be called as a witness, and all entries except those against interest must be shown to have been made at or near the time of the transaction entered.

These rules have been varied in some instances by statutory enactment, but as statutory rules on the subject are in derogation of the rules of the common law they are to be strictly construed. F. H. B.

NEW YORK LIFE INSURANCE & TRUST COMPANY, Substituted Trustee, etc., of James Baker, Deceased, *Appt.*,

v.

William J. BAKER *et al.*, *Respts.*

(165 N. Y. 484.)

In case a trustee has power to change investments under a will establishing a fund the income of which is to be paid to one for life, with remainder over, it is his duty to reserve from the income a sinking fund to offset the premium on bonds purchased, and keep the principal intact.

(*O'Brien, J., dissents.*)

(February 5, 1901.)

NOTE.—For earlier cases in this series as to charging premiums paid for bonds to life tenant, see also *Hite v. Hite* (Ky.) 19 L. R. A. 173; and *Re Hoyt* (N. Y.) 48 L. R. A. 126.

As to decrease in value of bonds by wearing away of premium, see *McLouth v. Hunt* (N. Y.) 39 L. R. A. 230. 53 L. R. A.

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment entered in the office of the clerk of New York County upon the report of a referee charging plaintiff with certain sums on account of maladministration of the trust, in a proceeding to settle its accounts as trustee of the estate of James Baker, deceased. *Modified and affirmed.*

Statement by **Parker, Ch. J.:**

The plaintiff, as substituted trustee under the will of James Baker, deceased, brought this action for the purpose of securing an accounting of its trust. The order appointing the plaintiff as substituted trustee recited that the preceding trustee, James Baker, Jr., had invested the sum of \$91,525 in certain bonds of the United States, of the par value of \$81,000. At the time of the making of the order the 4½ per cent bonds, of the face value of \$31,000, were worth \$35,533.75, and the 4 per cent bonds, of the face value of \$50,000, were worth \$59,814.15, so that their market value exceeded at that time the amount of the original investment therein of the principal of the estate. About five years after the plaintiff's appointment as trustee the \$50,000 of 4 per cent bonds were sold for \$54,750, while the \$31,000 of 4½ per cent bonds were held until their maturity, when they were paid, so that the proceeds of the bonds at maturity and on sale were less by a number of thousands of dollars than the investment therein. The trustee received the quarterly interest on the bonds, and at once paid the whole thereof, less commissions, to the beneficiary of the trust, instead of retaining a part of the interest receipts as a sinking fund with which to keep good the capital of the trust estate, and paying only the remainder thereof to the beneficiary. The sixth clause of the will of James Baker, by which the trust was created, reads as follows: "And, (6) in case my son, William Jacob Baker, is living at the time of the expiration of the estate hereinbefore devised to my executors, I give, devise, and bequeath one of said shares to my friend, John H. Lynde, in trust, however, to collect and receive the rents, income in dividends, and profits thereof, and apply the same to the use of my said son, William, during his natural life; and after his death I give, devise, and bequeath the whole of said share, with all arrearages of income, to the then surviving lawful child or children of my said son, William, and the then surviving lawful issue of any child or children of my said son who may have died before him, leaving issue, in equal shares, the issue of any deceased child of my said son, however, to take only the share which the parent would have taken if living; and, in case my said son, William, shall die without leaving any lawful issue him surviving, then I give, devise, and bequeath the whole of said share and arrearages of income to my own right heirs and next of kin, the same as if I had owned the said share at the time of my death and had died intestate. And, in case my

said son, William, is not living at the expiration of the estate hereinbefore devised to my executors, then I give, devise, and bequeath the said share to his lawful issue, if any there be then living. And I give to the said John H. Lynde full power and authority to sell and convey any or all the property, both real and personal, which may vest in him as such trustee, at public or private sale, and at such times and upon such terms as he may think best, and invest the proceeds thereof in bonds secured by mortgage on real estate in fee in the cities of New York and Brooklyn, or in the public stocks of the United States or of the state of New York or of the city of New York, and such investments from time to time to change into one or other of said securities at his discretion."

**Messrs. Emmet & Robinson**, for appellant:

The will gives no direction that the premiums paid for investments shall be deducted from income, but, on the contrary, indicates an intention on the part of the testator that premiums paid on such investments as those in question shall be paid out of principal.

*Brown v. Chesterman*, 30 N. Y. S. R. 537, 9 N. Y. Supp. 187; *New York Life Ins. & T. Co. v. Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543.

The bonds in question, having been received from the retiring trustee, were to be held and treated by the plaintiff as succeeding trustee as though the investment in them had been made by the testator himself.

Apart from any direction by the creator of a trust, a premium paid upon an investment is to be regarded as a charge against principal,—the life beneficiary being deprived of interest upon it.

*Farrell v. Tweedle*, 10 Abb. N. C. 94; *Bergen v. Valentine*, 63 How. Pr. 221; *Turner v. Newport*, 2 Phill. Ch. 14; *Cox v. Cox*, L. R. 8 Eq. 343; *Re Pollock*, 3 Redf. 100; *People ex rel. Cornell University v. Davenport*, 30 Hun. 177; *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548.

Where the subject-matter of the bequest at the time of the commencement of the trust is invested in securities approved by the court, the tenant for life is entitled to the full income.

*Howe v. Dartmouth*, 7 Ves. Jr. 137; *Gibson v. Bott*, 7 Ves. Jr. 89; *Caldecott v. Caldecott*, 1 Younge & C. Ch. Cas. 312; *Meyer v. Simonsen*, 5 De G. & S. 723; *Daines v. Eaton*, 70 L. T. N. S. 761.

The question, Upon whom should fall the cost of a premium paid on investing?—is a question between life tenant and remainderman. It is not, at least during the existence of the trust, a question between remainderman and trustee.

*Farrell v. Tweedle*, 10 Abb. N. C. 94; *People ex rel. Cornell University v. Davenport*, 30 Hun. 177; *Bergen v. Valentine*, 63 How. Pr. 221; *Re Pollock*, 3 Redf. 100.

53 L. R. A.

**Mr. Rastus S. Ransom**, with **Mr. Porte V. Ransom**, for respondents:

This accounting trustee should have set apart out of the income a sufficient sum each year to form a sinking fund to keep the principal of the trust intact and unimpaired.

The intention of the testator is the controlling element in all these cases, and they must be decided upon the special facts presented in each case, and not determined by any arbitrary rule.

*McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548; *Re Hoyt*, 160 N. Y. 607, 48 L. R. A. 126, 55 N. E. 282; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493, 4 N. E. 69; *Balch v. Hallett*, 10 Gray, 402.

**Mr. Jesse Grant Roe**, for respondent Baker:

This respondent is entitled under this will to all this income.

*McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548; *Re Hoyt*, 160 N. Y. 607, 48 L. R. A. 126, 55 N. E. 282.

**Parker, Ch. J.**, delivered the opinion of the court:

The only question arising on this appeal to which reference will be made in this opinion is whether this accounting trustee should have set apart out of the income a sufficient sum each year with which to form a sinking fund of such extent that the principal of the trust would be kept intact and unimpaired. The referee before whom the case was tried decided that it was the duty of the trustee under the will to have so set apart out of the income a sufficient sum each year so that at all times the principal of the fund would be unimpaired, and that because of its failure to do so the trustee was properly chargeable for an amount equal to such a portion of the income as should have been so set aside while it was the trustee. Such portion was found to amount to the sum of \$5,260.75, and with that sum the trustee was charged. The appellate division affirmed the judgment entered upon the report of the referee, in an opinion that fully covers the question whether under this will it was the duty of the trustee to keep intact the principal of the trust fund by devoting yearly such portion of the income of the bonds as should be required to pay the amount of premiums that the trustee was obliged to pay in order to secure the bonds in which the trust estate was invested. We approve of what was said in that opinion, and should affirm on it without further comment, were it not that since it was written this court has decided the *Hoyt Case* (*Re Hoyt*, 160 N. Y. 607, 48 L. R. A. 126, 55 N. E. 282), which it is strenuously insisted is in conflict with the views expressed by the appellate division in the case under review. In support of that contention the provisions of the two wills creating the trusts and making disposition of the income are compared, and as a result of the comparison it is urged that on whichever side of the dividing line in such cases the one belongs the other should be held to belong also. But the difficulty with the argument is that the decision in the

*Hoyt Case* was not based solely upon the language of the will. It was not held by this court that the language creating the trust, standing alone, would permit of a construction authorizing the payment to the life tenant of all of the income arising from the bonds in which the capital had been invested by the payment of a large premium. What was held was that it was the duty of the court to ascertain the intention of the testator in that regard, and for that purpose the court, in construing the language employed in the will, should consider all the surrounding facts and circumstances attending the execution of the will, and if, as a result of such examination, the conclusion should be reached that it was the intention of the testator that his daughter should have all the income arising from the investment, without allowing any abatement therefrom for the purpose of keeping intact the capital of the trust estate, then such construction should be given to the will, notwithstanding its phraseology, in obedience to that rule of construction which, as has often been said by this court, makes the intention of the party the polar star of construction. Therefore at the very outset of the discussion the learned judge who wrote the opinion asserted the proposition that, in order to ascertain the intention of the testator in that particular case, it was necessary to go outside of the will and learn the situation of the parties, the facts and circumstances surrounding them, and the execution of the will by the testator, in order to determine his intention, and that proposition was stated in these words: "In order to determine the question presented by this appeal, it is necessary to consider the facts surrounding the execution of the will." Then follows a detailed account of such facts and circumstances, among which were that the testator was a man of large fortune, estimated at from six to eight million dollars, the bulk of which he bequeathed to his brothers and their children: that he had only one child, a daughter, and for her benefit he set apart \$1,250,000, to be held in trust for her benefit during life, and after her death the principal to go to the brothers and children to whom the bulk of the estate had been given. He appointed one of his brothers a trustee, who insisted upon investing the money in bonds bringing a large premium, and then keeping the capital of the estate intact out of the income derived therefrom. Aside from the fact that the will directed that the life tenant should receive "the interest, dividends, and income therefrom, and from each and every part thereof," the will also expressed the desire of the testator to provide for her in a "most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort and gratify her reasonable desires." After a careful analysis of the facts outside of the will that the court deemed it wise to consider in ascertaining the intention of the testator, together with expressions therein outside of the fourth clause, by which the trust for the benefit of the daughter was created, and an extract from the 53 L. R. A.

opinion in *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, asserting the principle that the intention of the testator is to control, and that such intention is "to be derived from the language employed in the creation of the trust, from the relations of the parties to each other, their condition, and all the surrounding facts and circumstances of the case," the judge proceeds: "In considering the surrounding facts and circumstances in the case at bar, to which we have already alluded, it is reasonable to infer that the testator intended in this sole provision for his daughter that she should receive, as he expresses it in the fourth subdivision of the will, 'the interest, dividends, and income therefrom, and from each and every part thereof;'" and, thus reasoning, the conclusion was reached that while the language employed in the creation of the trust and the paying over of the income, standing alone, would not admit of a construction that it was the intention of the testator to impose the loss of premium upon the remainderman, nevertheless, when construed in the light of the other provisions of the will, together with the condition of the parties, and the facts and circumstances surrounding them, it was necessary to hold that it was the intention of the testator to give to the life tenant all of the income of the trust fund, no matter in what securities it should be invested. In the surrounding facts and circumstances in this case, we find nothing that leads us to the conclusion that the testator intended any different treatment of the trust than that which the language of the clause creating it plainly indicates, viz., that the capital of the trust should be kept intact, and that to that end an adequate proportion of the annual income should be set apart to make good the amount paid in premiums in order to secure a proper investment.

The referee made a slight error in calculation, resulting in an overcharge of \$146, as the respondent concedes. *The judgment should therefore be modified by deducting therefrom the sum of \$146 as of the date of its entry, and as thus modified should be affirmed*, with costs to the guardian *ad litem* against the plaintiff, appellant.

**Gray, Haight, Landon, and Werner, JJ., concur.**

**O'Brien, J., dissenting:**

The judgment in this case has determined that the plaintiff, as trustee of a testamentary trust, has violated the provisions of the trust instrument, and thus is guilty of a breach of the trust committed to its charge by the testator and the court, in that it has suffered the capital of the trust fund to be impaired to the extent of nearly \$6,000. I think that this conclusion is unjust to the plaintiff, and that the principle decided must operate unjustly upon all trustees similarly situated; and, in the nature of things, there must be numerous trusts to which the rule applies. The reasons upon which this result is based are, as I think, strained; and the argument in support of it is based upon



theories and speculations that may be correct enough for an expert or trained financier, but are of very doubtful utility in the practical affairs of life. The only violation of the trust that the plaintiff has been charged with is that it paid over to the defendant William J. Baker annually the interest on the United States bonds constituting the capital of the trust. That is literally the full extent of its offending. If in so doing the trustee simply obeyed the will of the testator, it ought to be commended, and not punished, since that instrument was the charter that prescribed the powers and duties of the trustee and the rights of the beneficiaries. We must therefore examine that instrument, in order to see whether the claim that the plaintiff violated any of its terms or provisions has any support. By the will of James Baker, who died in 1876, a share of the estate was devised and bequeathed in trust for the use of his son, the defendant William J. Baker, during his life, with remainder to his children, who it seems are the infant defendants in this case. The trustee was given power to sell the property embraced in such share at public or private sale, and at such time and upon such terms as he might think best, and to invest the proceeds in certain securities named, among which were government bonds. The testator then directs the trustee "to collect and receive the income, dividends, and profits thereof, and apply the same to the use of my said son, William, during his natural life," with remainder to his children. It appears that the trustee named in the will refused to act, and that the person appointed in his place resigned, and that by an order of the court made on the 4th of August, 1882, the plaintiff was appointed the trustee of the trust, and there was passed over to it by the order the corpus of the fund, consisting, with a small item of cash, of \$50,000, par value, in United States registered 4 per cent bonds, and \$31,000, par value, registered 4½ per cent bonds. The latter were to become due in 1891, and the former in 1907. These bonds had been purchased at a premium, which amounted in all to about \$10,000. The plaintiff in the administration of the trust paid to the life beneficiary the interest collected on the bonds, and no more; and this is the only act claimed to be in violation of its duty as trustee, or of the terms of the will creating the trust. A government bond is a contract which imports a loan of money by an individual to the government at a stipulated rate of interest, payable at a designated time and place. The "income and dividends" of such a bond is generally supposed to be this interest. It is entirely safe to say that this was the sense in which the testator used these words. The words of the testator should be understood in their general and popular sense unless it appears that he used them in some special or restricted sense. When the testator directed the creation of a trust consisting of these bonds, he knew that they could not be purchased without payment of a premium, and yet he directed the trustee to pay the income and

dividends of the same to his son. It seems to me that no fair mind can entertain any doubt with respect to the intention of the testator when he made use of the words "income and dividends." He intended that the life beneficiary, his son, should be paid the interest on the bonds. But the decision in this case imputes to him quite another and different intention, which it is safe to say never entered into his mind at all, and that is that he intended to direct the trustee to pay to his son, not the 4 per cent or 4½ per cent interest collected on the bonds, but 3 per cent or such other reduced rate of interest as would enable him to provide a sinking fund to make good the premiums paid for the bonds when they matured. To say that this is what the testator intended when he gave the income of the bonds to his son for life, and what the trustee was bound to know from the use of these words in the will, is to ignore entirely the natural and general meaning of the testator's words, and to give to them a meaning altogether artificial. The plaintiff paid over the interest to the son just as did the prior trustee who formed the trust, and it seems that the latter was discharged, as a good and faithful servant of the court, by the same order that appointed the plaintiff. The latter might very well suppose that it could not be subjected to loss and censure by the court for following a line of conduct that had been approved in the case of its predecessor in the trust.

The plaintiff, in assuming the duties of trustee, had the right to rely, not only upon the order of the court conferring the appointment, which was in the nature of an adjudication of the question in the very case (*Re Talmage*, 160 N. Y. 512, 515, 55 N. E. 276), but upon the general rules of law as announced in the decisions of this court. It is no part of the functions of courts to make new laws, and theoretically, at least, they cannot and do not. They simply decide what the law is and always was, upon a given state of facts. Assuming that proposition to be correct, it is clear that the plaintiff, in paying the interest on the bonds to the life beneficiary, violated no provision of the trust instrument, but, on the contrary, executed the will and intention of the testator according to the law of the land, as expressed and defined in at least two recent decisions of this court: *McLouth v. Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548; *Re Hoyt*, 160 N. Y. 607, 48 L. R. A. 126, 55 N. E. 282. In the case last cited nearly \$245,000 of the trust fund had been paid in premiums upon bonds, and the life tenant was a daughter. In the case first cited the life tenants were grandchildren. In the case at bar the life tenant is a son, and the remaindermen his children. The direction in each of the three wills to the trustees is substantially the same. It was to pay to the life tenant the income of the bonds during the term of the trust, with remainder to others. But it was held in both cases cited that it was the duty of the trustee to pay the full interest collected upon the bonds to the life tenant; and that is precisely what

the trustee has done in the case at bar, and for which the decision imputes to it a breach of duty and a violation of the trust. The plaintiff followed the law as stated in these decisions. If it made a mistake in doing so, it must be because the law as there announced was wrong. An attempt has been made to draw some distinction between the cases cited and the one at bar, but the argument in that respect is so attenuated and fanciful that I will not undertake to state it. In my opinion, there is no distinction whatever, and no inquiring mind open to conviction will be able to perceive or state it in such a way as to command assent. The decisions of this court, which embody, not only a rule of property, but a rule of conduct for the guidance of trustees, should not be changed for light or transient causes. The notion that the premiums upon bonds should be borne by the life tenant, and not by the remainderman, is not in itself so clear, nor in its operation so equitable, as to justify a departure from precedents. The purchase of government bonds, bearing a low rate of interest, at a premium, was for the benefit of the remainderman, rather than the life tenant. The income of the latter was not enhanced, but the security of the former was made stable and certain. In such cases the life tenant should receive the interest without reduction, unless the testator has directed otherwise in his will.

But, quite independent of this question, there is another feature of the case which seems to me to be even more unjust to the trustee. The trust is still in operation, and the action was for an intermediate accounting. The parties are the trustee, the life tenant, and his two children, who are entitled to the remainder. The action was sent to a referee to hear and determine. In his report the findings of fact and conclusions of law are separately stated. On the trial the plaintiff's counsel requested the referee to rule and decide that the life tenant should be adjudged liable to refund any income which has been paid to him, and which should have been set apart by the trustee as a sinking fund, to be added to the principal, and that the trustee might deduct such income improperly paid to the life tenant from any payments of income thereafter payable to him. The referee refused to so find or decide, on the ground that it was not within the issues in the action, and the plaintiff excepted to this ruling. I think this ruling was error for which the judgment should be reversed. There were really no issues in the case. All the parties were before the court, and all prayed that an accounting be had. The life tenant did not allege in his answer that he had been paid too much, nor did the infant defendants allege that their father had been paid more than he was entitled to. The question of overpayments to the life tenant was not raised by any pleading, but by the court without pleading, as it doubtless might. But the whole case was before the court, and it was not embarrassed by any issues whatever. It had the power to do justice to the trustee as well as to the bene-

ficiaries. If the life tenant had been paid too much, the court had ample power to order him to restore the excess to the trust fund, or to permit the trustee to deduct such excess from any payments made to him thereafter. The court should not have permitted the life tenant and the remaindermen, his two children, to combine and take from the private property of the trustee nearly \$6,000 for no other reason than that the latter made a mistake in assuming that the direction in the will to pay income authorized it to pay the full interest. The ruling of the learned referee is not calculated, as it seems to me, to promote common honesty or commercial morality on the part of the beneficiaries of a trust when dealing with their trustee. The latter, beyond all question, acted in good faith, and the court had ample power to protect its own officer. If there was a mistake, clearly the life tenant was the beneficiary of it. He, as well as the trustee, was in the attitude of asking the court to do justice; and, unless I am greatly mistaken, the court had full power in that respect, and should have ruled as requested. The judgment should, for these reasons, be reversed.

Gallen, J., not sitting.

City of ROCHESTER, *Resp't.*,  
v.

Robert WEST, *Appt.*

(164 N. Y. 510.)

1. Charter authority to license bill-posters, and prescribe the terms and conditions upon which any such license shall be granted, includes power to regulate the height of boards erected for the purpose of bill-posting, so far, at least, as such regulation is necessary to the safety or welfare of the inhabitants of the city or persons passing along the street.
2. Liability for erecting a billboard in excess of the height authorized by ordinance is not controlled by the fact that no injury has occurred by reason thereof, or that it is improbable that any such injury will occur therefrom.
3. An ordinance limiting the height of billboards to 6 feet unless permission to exceed that height is expressly given by the common council is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon a lawful and beneficial use of private property.

(November 20, 1900.)

**A** PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Monroe County Court, which in turn affirmed a judgment of the Police Court of Rochester convicting defendant of violating an ordinance regulating the posting of bills. *Affirmed.*

NOTE.—For another case in this series as to constitutionality of ordinance regulating the erection of billboards, see *Crawford v. Topeka* (Kan.) 20 L. R. A. 692.

**Statement by Martin, J.:**

The defendant is the local manager of a corporation known as the "Rochester Billposting Company," and was arrested April 30, 1897, charged with the violation of §§ 8 and 9 of an ordinance of the city of Rochester entitled "An Ordinance Relating to Billposting and Billboards," adopted by the common council of the city December 22, 1896. Those sections are as follows:

"Sec. 8. No person shall hereafter erect any billboard more than 6 feet in height within the city of Rochester without permission of the common council. Every applicant for permission to erect a billboard more than 6 feet in height within said city is required to give one week's notice in writing, personally or by mail, of such application to the owners, occupants, or agents of all houses and lots within a distance of 200 feet from where such billboard is to be erected. No such application shall be considered by the common council without verified proof of the service of the notice herein described, or the written consent of such owners, occupants, or agents to the erection of said billboard.

"Sec. 9. No fence or other structure within said city shall be used as a billboard without the consent of the common council. The same notice and proof required by § 8 of this ordinance shall be necessary to obtain the consent of the common council to use such fence or structure as a billboard."

Section 10 provides for a fine in case of a violation of any of the provisions of the ordinance.

It is admitted that the defendant on April 26, 1897, erected a billboard more than 6 feet in height on premises fronting on Lake avenue, between White and Spencer streets, and back of the street line, without taking any of the steps provided for by the foregoing ordinance. It was also conceded that "such billboard was erected upon lands leased by the said Rochester Billposting Company, and that such billboard was well constructed, of new material," and "that, out of 6,000 posters put up each week for forty weeks of the year, not more than 400 would go upon a billboard 6 feet high." The case was submitted to the police justice upon these facts, no other testimony being taken, and on June 4th judgment was entered against the defendant for the sum of \$5. On appeal the county court affirmed the judgment. The appellate division affirmed the judgment of the county court, and allowed an appeal to this court, certifying the following questions: "First, whether or not the common council of the city of Rochester has authority, under subdivision 21 of § 40 of its charter, to pass the ordinance under consideration in this case; second, whether or not the ordinance in question is not an unreasonable and an undue restraint upon a lawful trade and business, and also a restraint upon the lawful and beneficial use of private property."

**Mr. John R. Fanning, for appellant:**

The legislature has not granted to the  
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plaintiff's common council the right or authority to pass an ordinance regulating billboards.

Penal statutes are to be construed strictly, and not extended by implication.

*Bell v. Dole*, 11 Johns. 173; *Myers v. Foster*, 6 Cow. 567; *Bridgewater & U. Pl. Road Co. v. Robbins*, 22 Barb. 662; *People v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285.

Statutes which prescribe the manner in which persons shall use their private property, or restrict and regulate the disposition thereof, are against common right, and must be strictly construed.

*Ramsey v. Gould*, 57 Barb. 398; *New York Port Wardens v. Cartwright*, 4 Sandf. 236.

A statute or municipal ordinance in derogation of the common law is not to be extended beyond the natural import of its language, by construction.

*Hardy v. Brooklyn*, 7 Abb. N. C. 403; *Dunham v. Rochester*, 5 Cow. 462; *People ex rel. Hoffman v. New York Bd. of Edu.* 143 N. Y. 62, 37 N. E. 637; *Hickok v. Plattsburgh*, 15 Barb. 435; *Halsted v. New York*, 3 N. Y. 430; *Greater New York Athletic Club v. Wurster*, 19 Misc. 445, 43 N. Y. Supp. 703.

The ordinance does not fix rules or undertake to regulate billboards, but commits to the arbitrary will of the plaintiff's common council the right to grant to or withhold from persons in every way equal and of equal right, a permit or consent to erect a billboard.

Municipal ordinances of such character are vicious in principle, and open the door to political vice and corruption, and have been repeatedly condemned by courts.

*Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 N. E. 312; *Barthet v. New Orleans*, 24 Fed. 563; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261, 20 N. E. 115; *Re Frazee*, 63 Mich. 396, 30 S. W. 72; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110, 10 Pac. 719; *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359.

**Mr. P. M. French, for respondent:**

The charter of Rochester gives its council the right to enact an ordinance on the subject of billposters and billboards.

The powers possessed by municipal corporations are "those granted in express words, those necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable."

*Dill. Mun. Corp.* 4th ed. § 89.

The ordinance in question is nothing more than prescribing "the terms and conditions upon which any such license shall be granted," and "regulating billposters and bill distributors" by fixing the method in which their posters and advertising matter shall be displayed. The ordinance first provides for granting a license for carrying on the busi-

ness, and then provides that no billboard more than 6 feet in height shall be erected without further permission.

*Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564.

Municipal ordinances passed in pursuance of authority from the legislature have the force of law, and are as obligatory as if enacted by the legislature itself.

*Buffalo v. New York, L. E. & W. R. Co.* 152 N. Y. 276, 46 N. E. 496.

The ordinance is valid because it is a proper exercise of the police power and is reasonable.

Dill. Mun. Corp. § 141; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *People ex rel. Schicab v. Grant*, 126 N. Y. 473, 27 N. E. 964; *People ex rel. Cumisky v. Wurster*, 14 App. Div. 556, 43 N. Y. Supp. 1088.

**Martin, J.**, delivered the opinion of the court:

Whether this appeal should be sustained depends wholly upon the validity or invalidity of an ordinance of the plaintiff which forbids the erection, within its limits, of billboards more than 6 feet in height without the consent of the common council. By its charter the plaintiff was authorized "to license and regulate billposters and bill distributors and sign advertising, and to prescribe the terms and conditions upon which any such license shall be granted, and to prohibit all unlicensed persons from acting in such capacity." Laws 1880, chap. 14, § 40, subd. 21, as amended by Laws 1894, chap. 28, § 9. We think this statute conferred upon the common council of the city authority to regulate boards erected for the purposes of billposting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city or persons passing along its streets. That is precisely what the ordinance in question was intended to accomplish. To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted. *Cronin v. People*, 82 N. Y. 318, 321, 37 Am. Rep. 564.

Nor do we think that the appellant's claim that this statute was unauthorized can be sustained. It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them. That the legislature had power to pass a statute authorizing the city to adopt an ordinance which, if enforced, would obviate that danger, we have no doubt. Nor was it in conflict with any provision of the state or Federal Constitution. The fact that no injury has occurred by reason of the erection of the bill-

board in question, or that it is improbable that any such injury will occur therefrom, is not controlling upon the question under consideration. The validity of a statute is not to be determined by what has been done in any particular instance, but by what may be done under it. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 200, 13 L. R. A. 304, 28 N. E. 1040.

It is equally true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained. *Carthage v. Frederick*, 122 N. Y. 268, 10 L. R. A. 178, 25 N. E. 480; *People ex rel. Oak Hill Cemetery Assn. v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *New York v. Dry Dock, E. B. & B. R. Co.* 133 N. Y. 104, 30 N. E. 563; *Rochester v. Simpson*, 134 N. Y. 414, 31 N. E. 871; *People v. Hamor*, 149 N. Y. 195, 204, 31 L. R. A. 689, 43 N. E. 541.

We are of the opinion that this ordinance is reasonable; that the legislature authorized its adoption; that the statute in pursuance of which it was passed was valid; and, consequently, that the defendant's appeal cannot be sustained.

It follows that *the judgment appealed from should be affirmed*. The questions certified to this court are answered as follows: (1) The common council of the city of Rochester had authority, under its charter, to pass the ordinance under consideration. (2) The ordinance in question is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property.

**O'Brien, Bartlett, Haight, Vann, and Landon, JJ.**, concur; **Parker, Ch. J.**, not sitting.

Mary T. UPPINGTON, Appt.,

v.

City of NEW YORK, Respnt.

(165 N. Y. 222.)

1. A municipality is not, in the construction of a sewer, obliged at its peril to select the best possible route, or to adopt the best possible plan, provided the route selected and the plan adopted are reasonably safe.
2. A plan for the construction of a sewer is not shown to be defective by the fact that the city engineers expect that there will be some injury to sidewalks and stoops from its erection.
3. When a city having power to contract for the construction of a sewer enters into a contract with competent

NOTE.—As to liability of city for negligent construction of sewer, see, in this series, *Nashville v. Comer* (Tenn.) 7 L. R. A. 465, and note; *Seymour v. Cummins* (Ind.) 5 L. R. A. 126, and

contractors doing an independent business, who agree to furnish the necessary materials and labor, and make the entire improvement, according to specifications prepared in advance, for a lump sum or its equivalent, they are independent contractors.

4. The reservation by a municipality, in letting a sewer contract, of the right to change, inspect, and supervise to the extent necessary to produce the result intended by the contract, will not render it liable for negligence of the independent contractor, which results in injury, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers.

(January 8, 1901.)

**A**PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Kings County in favor of defendant in an action brought to recover damages for injuries to plaintiff's property by the alleged negligent construction of a sewer by defendant. *Affirmed.*

Statement by Vann, J.:

This action was brought by an abutting owner upon Greene avenue, in the borough of Brooklyn, to recover damages alleged to have been sustained from injuries to her house through the construction of a sewer by means of an open trench in said street. The sewer is known as a "relief sewer," laid to carry off surface water which after heavy storms flooded a portion of the city quite remote from the plaintiff's property. Upon the trial there was evidence tending to show that the trench dug for the purpose of laying the sewer caused the ground to settle in front of the plaintiff's premises and injured her house to the extent of \$1,500, as claimed by her, although the jury upon the first trial assessed her damages at the sum of \$500. The verdict was set aside, however, upon appeal, and a new trial was granted, on the ground that she had not made out a cause of action. Upon the second trial, which is now under review, the same facts appeared, and at the close of all the evidence the trial judge directed a verdict for the defendant. Greene avenue is a public street 70 feet wide, and 35 feet from curb to curb. It is well built up with dwellings upon either side, ranging from 2½ to 3½ stories in height. The most of the buildings stand back ten feet from the line of the street, while some, including that of the plaintiff, stand upon the line. The soil under the street is compact gravel and sand, and contains bowlders, some of which are 4 or 5 feet in diameter. The depth of the excavation in front of the plaintiff's premises was about 35 feet, the width at the top 18

feet, and the sewer was 10 feet in diameter, when measured inside. The entire length of the sewer, including branches, was more than 3 miles, but for the most of that distance the diameter ranged from 5 feet to 12 inches, although for a part of the way it was from 12 to 15 feet. The work was let to the firm of James J. Moran & Co., who agreed to construct the sewer according to the specifications, and furnish all the materials and labor required, for a given sum per running foot, varying with the size. The method of construction provided by the specifications was through an open trench, to "be opened 1 foot wider on each side than the exterior diameter of the sewer," which was to be 12 feet. The sides of the excavation were to be "supported with suitable plank and shoring whenever necessary." The contractors were required at their own expense to "shore up, protect, restore, and make good, as may be necessary, all buildings, walls, fences, or other properties which may be disturbed or injured during the progress of the work;" "to do everything necessary to protect, support, and sustain the buildings on both sides of the street;" and were to "be held responsible for all damages which may happen to neighboring properties." A sufficient quantity of timber and plank was to be kept constantly upon the ground and used "as required for bracing and sheathing the sides of the excavation." Before breaking ground written notice of at least twenty-four hours was to be given to all persons whose interests might be affected by operations under the contract. The contractors were to promptly remove the surplus earth, relay cross walks, replace broken stones, regrade and repave the streets to the extent required by the work, and keep the materials excavated so trimmed as to be of as little inconvenience as possible to the public and the adjoining tenants. All damages resulting to buildings, etc., through the negligence of the contractors, were to be paid by them, and they were required to give a bond to indemnify the city against all suits brought on account of injuries sustained through the construction of the work, "or by or on account of any act or omission of" the contractors or their agents. In addition to this, the city was authorized to retain enough money otherwise going to the contractors to make good all losses to third persons. The city engineer was to "have the right to regulate the excavation," and not "more than 400 feet of trench" was to be opened at one time without his permission, while the commissioner of city works was authorized to "change at his discretion the amount of all the various kinds of work and materials and structures." The contractors were required to observe all the ordinances of the common council in relation to ob-

note; *Bulger v. Eden* (Me.) 9 L. R. A. 205, and *Hughes v. Auburn* (N. Y.) 46 L. R. A. 636.

For other cases in this series as to liability for acts of independent contractors generally, see *St. Louis, I. M. & S. R. Co. v. Yonly* (Ark.) 9 L. R. A. 604, and note; *Leavitt v. Bangor & A. R. Co.* (Me.) 36 L. R. A. 382; *Berg v. Parsons* (N. Y.) 41 L. R. A. 391; *Norfolk & W. R.* 53 L. R. A.

*Co. v. Stevens* (Va.) 46 L. R. A. 367; *Sanford v. Pawtucket Street R. Co.* (R. I.) 33 L. R. A. 564; *Smith v. Benick* (Md.) 42 L. R. A. 277; and *Boomer v. Wilbur* (Mass.) 58 L. R. A. 172. For exceptions to the rule that a master is not liable for the acts of an independent contractor, see *Peerless Mfg. Co. v. Bagley* (Mich.) ante, 285, and footnotes thereto.

structing the streets, and "in all cases of rock-blasting the blast" was "to be carefully covered with heavy timber, according to the ordinances of the common council" relating to the subject, "which ordinances shall be strictly observed." If any person employed by the contractor should "appear to the engineer to be incompetent or disorderly," he was to be discharged, and not employed again without permission. The engineer, with the consent of the commissioner, had power "to vary, extend, or diminish the quantity of work during its progress without vitiating the contract." It was also provided that "all explanations and directions necessary to the carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract will be given by said engineer." The city had the right to inspect the work and materials to see that they corresponded with the specifications. Any materials or implements brought upon the ground which the engineer "should deem to be of improper description or improper to be used in the work" were to be removed forthwith. The contractors were to have charge of and be responsible for the entire line of work until its completion and acceptance, and were not to be paid for any part thereof until the whole sewer was finished. The specifications contained many provisions relating to details of the work that are usually found in municipal contracts for the building of sewers. The plaintiff's lot, as described in her deed, begins at a fixed point "on the southerly side of Greene avenue," and the third course runs "to the southerly side of Greene avenue, and thence" by the fourth course "westerly along Greene avenue to the place of beginning." The house on said lot consisted of three stories and a basement, and cost \$9,300. Further facts are stated in the opinion.

**Messrs. James Troy and Thomas H. Troy**, for appellant:

In constructing a sewer on Greene avenue the contractors were the agents and servants of the city.

The contract reserves to the city the right of inspection to see that the work and materials correspond to the specifications. It also provides that all work shall be done in accordance with all the directions of the engineer, and the commissioner reserves to himself the right to change, at his discretion, the amount of all the various kinds of work and materials and structures.

If the city had the right to control the manner of doing any of the work, although contractors were otherwise independent, it is liable for negligence to that extent.

*Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Goldschmid v. New York*, 14 App. Div. 135, 43 N. Y. Supp. 447.

The tramway was a nuisance which caused or contributed to the injury, and was wrongfully permitted and maintained by the city to lessen the expense, regardless of the rights or convenience of the public and abutting owners.

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*People ex rel. Bentley v. New York*, 18 Abb. N. C. 123; *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; *Rehberg v. New York*, 91 N. Y. 137, 43 Am. Rep. 657; *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442; *Hume v. New York*, 74 N. Y. 264; *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641, 34 N. E. 727, 45 N. Y. S. R. 261, 18 N. Y. Supp. 170, 46 N. Y. S. R. 561, 19 N. Y. Supp. 665; *Milburn v. Fowler*, 27 Hun, 568.

The general rule exempting an employer from liability for the negligence of an independent contractor does not apply where the contract requires the performance of work intrinsically dangerous, however skilfully performed.

2 Dill. Mun. Corp. 4th ed. §§ 1029-1031; *White v. New York*, 15 App. Div. 443, 44 N. Y. Supp. 454; *Goldschmid v. New York*, 14 App. Div. 135, 43 N. Y. Supp. 447; *Weber v. Buffalo R. Co.* 20 App. Div. 292, 47 N. Y. Supp. 7.

The city is liable for negligence in mere supervision and inspection when reserved, and injury results.

*Conrad v. Ithaca*, 16 N. Y. 158; *Albrecht v. Queens County*, 84 Hun, 400, 32 N. Y. Supp. 473; *Hutson v. New York*, 9 N. Y. 163, 59 Am. Dec. 526; *Goldschmid v. New York*, 14 App. Div. 135, 43 N. Y. Supp. 447; *White v. New York*, 15 App. Div. 440, 44 N. Y. Supp. 454.

Injuries occasioned by negligence involve liability to the full extent thereof.

*Milburn v. Fowler*, 27 Hun, 568; *Finegan v. Eckerson*, 32 App. Div. 233, 52 N. Y. Supp. 993, 26 Misc. 574, 57 N. Y. Supp. 605.

The owners in fee of land abutting on a public street have a right to the lateral support afforded to their property by the highway as constructed according to law, and to the soil thereof, subject only to the right of the corporation to interfere with the same for the necessary purposes of the street, but not otherwise, and, so far as it may not be disturbed, the right exists.

*Milburn v. Fowler*, 27 Hun, 568; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528; *Deering v. Riley*, 38 App. Div. 164, 56 N. Y. Supp. 704; *Finegan v. Eckerson*, 32 App. Div. 233, 52 N. Y. Supp. 993, 26 Misc. 574, 57 N. Y. Supp. 605; *Reining v. New York, L. & W. R. Co.* 128 N. Y. 157, 14 L. R. A. 133, 23 N. E. 640.

**Mr. George Wingate** also for appellant.

**Messrs. William J. Carr and R. Percy Chittenden**, with **Mr. John Whalen**, for respondent:

Public officers lawfully employed in making public improvements, and corporations engaged in the performance of work of a public nature authorized by law, are not liable for consequential damages occasioned by it to others unless caused by misconduct, negligence, or unskilfulness.

*Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Bellinger v. New York*

*O. R. Co. 23 N. Y. 42; Moyer v. New York O. & H. R. R. Co. 88 N. Y. 351; Uline v. New York O. & H. R. R. Co. 101 N. Y. 98, 53 Am. Rep. 123, note, 4 N. E. 536; Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 270, 24 L. R. A. 105, 35 N. E. 592; Engel v. Eureka Club, 137 N. Y. 103, 32 N. E. 1052; Benner v. Atlantic Dredging Co. 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328; 2 Dill. Mun. Corp. § 991; Quinoy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Hall v. Bristol, L. R. 2 C. P. 322; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.*

There is no evidence of negligence in the adoption of plans for the sewer, and there is no evidence of negligence on the part of the contractor in the conduct of the work, for the jury.

*Fealey v. Bull*, 163 N. Y. 402, 57 N. E. 631.

The city was not liable for its contractor's negligence, because the work was not necessarily dangerous, and the contractor was independent.

*Engel v. Eureka Club*, 137 N. Y. 104, 32 N. E. 1052; *Goldschmid v. New York*, 14 App. Div. 133, 43 N. Y. Supp. 447.

It is seldom that an improvement, though executed in the most careful manner, does not cause injury to someone; and it is extremely difficult at times to separate injuries which are consequential from those for which an action will be permitted upon the ground of negligence.

*Tiedeman, Mun. Corp. § 329; Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336.

The construction of this sewer in the manner planned was a work lawful in itself, and not a case where defendant contracted for work to be done which would necessarily produce the injuries to the plaintiff's property complained of.

*McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *Hexamer v. Webb*, 101 N. Y. 384, 54 Am. Rep. 703, 4 N. E. 755; *Herrington v. Lansingburgh*, 110 N. Y. 148, 17 N. E. 728.

The right to vary the work, and an obligation on the part of the contractor to discharge any of his workmen who appear to the engineer "incompetent or disorderly," or the fact that the work must be done to the satisfaction or under the direction of a certain specified municipal officer, are not enough to create the relation of principal and agent between the city and the contractor.

*Kelly v. New York*, 11 N. Y. 432; *Pack v. New York*, 8 N. Y. 222; *Erie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 642; *Samuelson v. Cleveland Iron Min. Co.* 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499; *Blumb v. Kansas*, 84 Mo. 112, 54 Am. Rep. 87; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262.

**Vann, J.**, delivered the opinion of the court:

When a municipal corporation has general authority by statute to make a public im-

provement in a public street which does not involve direct encroachment upon private property, it is not liable for consequential damages unless they are caused by negligence, misconduct, or want of skill on the part of its servants or agents. *Attwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385; *Railcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; 2 Dill. Mun. Corp. § 1029; *Shearm. & Redf. Neg. § 272*. In such cases the corporation is the agent of the state, and acts done in the proper exercise of governmental powers do not make such agent liable at common law, even if they indirectly affect, but do not directly invade, private property. If the work is unlawful, the injury wilful, or the damages are owing to the failure of the proper authorities to exercise due care or skill, there is no exemption from liability, even when the undertaking is wholly for the benefit of the public. The relief sewer which is the subject of this controversy was lawful, because it was built wholly in a public street, without encroaching upon private property, and was duly authorized by statute. Such damages as were inflicted upon abutting property were an indirect result of the work, and were not caused by wilful misconduct. The controlling question is whether they were owing to the omission of some municipal duty, or, in other words, whether the city, through its representatives, was guilty of negligence, which includes want of skill whenever the exercise of skill is required by law. This question, for convenience, may be resolved into the following subordinate questions: (1) Whether the defendant was negligent in selecting an improper route or adopting an improper plan for the construction of the sewer; (2) whether James J. Moran & Co. were "independent contractors," as that phrase is known in law; (3) whether said contractors, if not independent, were negligent in executing the work.

The city was not obliged, at its peril, to select the best possible route or to adopt the best possible plan, provided the route selected and the plan adopted were reasonably safe. While the statute which conferred the power did not provide that this particular sewer should be built in any particular street, it was without limitation, and hence the city had control of the method of making the improvement. The route and plan adopted promoted the interest of the public, but two experts called by the plaintiff testified, in view of what had happened, and not in anticipation of what might happen, that construction by means of a tunnel would have caused less settling of the ground and less danger to abutting property than construction by an open trench. The city employed engineers conceded to be competent, who, after long and careful study of the subject, recommended the route and plan finally determined upon. That the route thus selected was a proper one, according to the evidence, does not admit of discussion. The city was bound to exercise due care to see that the plan decided upon was reason-

bly safe, but its "rights were superior to those of persons engaged in work private in character." *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385. The plan adopted had been in general use for years. It was carefully prepared to protect both public and private interests. The tunnel plan, while safer in most respects, is dangerous to some extent, as well as more expensive. It causes less settling of the ground and prevents interference with travel, but inspection is more difficult, and inferior work less apt to be discovered. It was not in general use, for almost all sewers in this country, at the time the plan was adopted, were laid in open cuts. "The tunnel is the exception, not the rule." There are three methods of tunneling, known as the timber, shield, and pilot systems. One of the plaintiff's experts condemned the timber method as dangerous at the place in question, and testified that the pilot system was the best, although he had never seen it in operation. The other expert sworn for the plaintiff also preferred the pilot system, but said that he had never used it, and that it was of recent origin. Even by the pilot system there are intervals of time when portions of the earth above are unsupported before the sustaining plates are put in, and, while the interval is short, subsidence of the soil may take place before the support is adjusted. Engineering conditions required the sewer to be placed about 35 feet beneath the surface of the street in front of the plaintiff's property, which left insufficient lateral pressure of the soil to prevent undue vertical pressure upon the work of excavating a tunnel. A sewer only 10 feet in diameter cannot be conveniently built by means of a tunnel, owing to the lack of room for workmen, and the city had never used that method under the circumstances named. The inconvenience of building a sewer but 10 feet wide by the tunnel method was illustrated by actual experience on the work in question, as it was necessary, for a part of the way, to tunnel under a hill 80 feet high; yet the contractor testified that he asked and obtained permission from the city authorities to make a sewer 12 feet in width, without additional charge, although the contract called for one only 10 feet wide. Even that tunnel, at that depth, caused some damage to abutting property, and it cost \$58 more per running foot than where a cut was made. Furthermore, there was a sewer in actual use 12 feet below the surface of the street, which, in case of leakage, might flood the tunnel and make it dangerous to adjacent property through settling of the moist soil. The city wished to remove that sewer from the street altogether, which would have been impossible except by the trench system. The presence of boulders in the soil made the tunnel plan less feasible than it otherwise would have been. The experience of the city was against it. No expert expressly condemned the plan adopted, and a large majority, including those of the highest standing and greatest experience, preferred it. The specifications made careful provision to protect the property of abutting owners by shoring,

sheathing, and otherwise, as well as to compel the contractors to make good any loss that might happen.

The fact that the engineers of the city expected there would be some damage to sidewalks and stoops before they adopted the plan does not show that it was defective, because some damage would have resulted from any plan. Consequential damages, more or less serious, naturally result from making extensive improvements in a public street occupied with dwellings standing upon either side. The city, however, is not liable therefor at common law, so long as they are confined to consequences that are the necessary and usual result of the proper exercise of the power to make the improvement. A change of grade may leave some houses too high and others too low, either to look well or to be conveniently used with reference to the street; yet, even if the change is such as to endanger their stability, the city is not responsible at common law, although the subject has been regulated by statute to some extent in certain cities. *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357. As was said in *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385, which is an instructive case: "Serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skilfully performed the consequences may be *damnum absque injuria* when the legislature has provided for no compensation. In such case the protection of the owner of property not taken or appropriated, which may be subjected to hazard or injury, is in the care and skill to be observed by those engaged in the execution of the work. If they fail to do that they are liable for the consequences of such failure." We think the evidence before us, even with every permissible inference drawn in favor of the plaintiff, would not permit a jury to find that the plan of construction was not reasonably safe. While some facts bearing on the principal question were in controversy, the uncontradicted evidence, when considered in connection with those facts, assuming them to be found according to the plaintiff's theory, left no question of fact as to the reasonable safety of the plan.

When a municipal corporation furnishes its own materials, and makes a public improvement through agents selected by itself, with power to discharge them at will, and to direct them as to details of the work, they are its servants, and the master who selects and controls them is liable for their negligence. They are, so to speak, the hands and arms of the city, to do its will, as the hands and arms of a man do his will. When, however, the city has power to let the work, and it enters into contract with competent contractors, doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement, according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents of the city, but are independent contractors; and the city is not liable for their negligence, even



when it reserves the right to change, inspect, and supervise to the extent necessary to produce the result intended by the contract provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers, which results in injury. *Borg v. Parsons*, 156 N. Y. 109, 41 L. R. A. 391, 50 N. E. 957; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052; *Builer v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Charlock v. Freel*, 125 N. Y. 367, 26 N. E. 262; *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Pierrepont v. Lovelless*, 72 N. Y. 211; *Kelly v. New York*, 11 N. Y. 432; *Pack v. New York*, 8 N. Y. 222; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Reedie v. London & N. W. R. Co.* 4 Exch. 244; *Overton v. Freeman*, 21 L. J. C. P. N. S. 52. Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not. *James J. Moran & Co.*, as competent contractors, undertook the independent business of building the sewer in question with their own materials and their own men; for, by specific agreement, they were to furnish both. They represented the will of the defendant as to the result of the work, but not as to the means of doing it. The men, the machinery, and the details were all under their control. The city could not employ workmen for them, nor direct the workmen employed by them. It could not select the tools and appliances to be used, nor require them to be used in any particular way or at any particular time. The will of the contractors, not of the city, controlled in these respects. While certain municipal officers could require the contractors to discharge incompetent workmen, that did not make the workmen not discharged the servants of the city, nor empower it to fill the places of those discharged with men of its own selection. Stipulations to secure faithful compliance with the specifications on the part of the contractors do not make them servants of the city, as was held in *Kelly v. New York*, 11 N. Y. 432, where the contract contained the following clause: "The whole work to be done under the direction and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work." The contractor in that case also "agreed to do the work, to take all necessary precautions for the prevention of accidents or injuries to persons or property, and to indemnify the corporation against all loss or damage by reason of any neglect or unskilfulness in its performance." The court said: "The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen will not be denied. This right of selection lies at the foundation of the responsibility of a master

or principal for the acts of his servant or agent. . . . As a general rule, certainly, no one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows. . . . The object of the clause relied upon was not to give to the commissioner of repairs and the other officer named the right to interfere with the workmen and direct them in detail how they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe what was to be done, but not how it was to be done, nor who should do it." So, in *Pack v. New York*, 8 N. Y. 222, the contract provided that the work was to be done according to certain specifications, and the contractor also agreed to "conform the work to such further directions as should be given by the street commissioner and one of the city surveyors;" yet it was held that this was "nothing more than a stipulation for a change of the specification of the work, as stated in the contract, at fixed prices provided therein. It does not, as the court below held, make Riley the immediate servant of the defendants, or give to them any control over him as to the manner or otherwise in which he should conduct the blasting." See also *Charlock v. Freel*, 125 N. Y. 367, 26 N. E. 262, where the city reserved the right to "vary, extend, or diminish the quantity of work during its progress," and authorized the engineer to fix the price of all work not included in the contract. As was said by the learned appellate division, the "supervisory powers related to the character of the work performed for the then city of Brooklyn, and not to the relations of the contractors with third persons." [41 App. Div. 376, 58 N. Y. Supp. 535.] Those relations were not interfered with by the city, which, however, made careful provision for the protection of abutting property by shoring it up, sheathing the trench, and the like, but leaving to the contractors full control of the means and method of doing it. While the contract provided that it should be done, it did not provide how it should be done. "To make the city liable, it must have the power to direct and control the manner of performing the very work in which the carelessness occurred." *Vogel v. New York*, 92 N. Y. 10, 18, 44 Am. Rep. 349. *James J. Moran & Co.* were not servants employed in the business of a master, and subject to his control as to all parts of the work, but were independent contractors, engaged in making an entire improvement, free from control as to the manner of performance, although subject to instructions as to results. The plan was reasonably safe, the work was lawful, was not interfered with by the city to the injury of the plaintiff, and was not a nuisance when performed. We think the city was liable neither for the negligence of the contractors nor that of their agents or servants. The contractors were, of course, liable for their own negligence, but the conclusion already reached makes it unnece-

sary to consider that subject upon this appeal.

*The judgment should be affirmed, with costs.*

**Parker, Ch. J., and O'Brien, Bartlett, Haight, Martin, and Landon, JJ., concur.**

Charles J. RUSSELL, *Resp't.*,

v.

James E. BRIGGS, *Impleaded, etc., Appt.*

(165 N. Y. 500.)

**Performance of services, such as superintending repairs on a building, procuring tenants, and collecting rents, is not sufficient to entitle one to specific performance of an oral promise, in consideration of such services, to convey an interest in the land for which the property shall be exchanged, the contract being void under the statute of frauds.**

(*Parker, Ch. J., and Haight and Landon, JJ., dissent.*)

(February 5, 1901.)

**A** PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, modifying and affirming a judgment of the Niagara County Equity Term in an action brought to compel specific performance of an agreement to convey real estate. *Reversed.*

The facts are stated in the opinion.

*Messrs. Hubbell & McGuire*, for appellant:

The contract was one which the court could not legally enforce by directing specific performance, because it was void.

The verbal contract upon which this action is based is in terms, plainly and unequivocally, both a contract "creating, granting, assigning, or declaring an estate or interest in lands," and also a "contract for the sale of lands, or an interest in lands."

The effect of the provision (statute of frauds), as expounded and applied, is to render unavailing to the parties, as the ground of a claim, any contract, in whatever shape it may be put, by which either of them is to part with any interest in real estate.

Browne, Stat. Fr. 3d ed. p. 268; *Burlingame v. Burlingame*, 7 Cow. 92; *King v. Brown*, 2 Hill, 485.

Such contracts as the one found to have been made in this case have uniformly been held to be void under the statute in question.

*Lisk v. Sherman*, 25 Barb. 433; *Henning v. Miller*, 83 Hun, 403, 31 N. Y. Supp. 878;

**NOTE.**—For other cases in this series as to specific performance of oral contract to convey land, see *Graves v. Goldthwait* (Mass.) 10 L. R. A. 783; *Boggs v. Bodkin* (W. Va.) 5 L. R. A. 245, and note; *Frame v. Frame* (W. Va.) 5 L. R. A. 823; *Bryson v. McShane* (W. Va.) 49 L. R. A. 527; and *Clancy v. Flusky* (Ill.) 52 L. R. A. 277.

53 L. R. A.

*Van Valkenburg v. Croffut*, 15 Hun, 147; *Devinney v. Corey*, 1 Silv. Sup. Ct. 148, 5 N. Y. Supp. 289, Affirmed in 127 N. Y. 655, 28 N. E. 254; *Gooding v. Brown*, 35 Hun, 148; *Slevin v. Wallace*, 64 Hun, 288, 19 N. Y. Supp. 87, Affirmed in 144 N. Y. 635, 39 N. E. 494.

The only performance on plaintiff's part was the payment of the alleged consideration. Payment of the consideration is not such performance as will take the case out of the operation of the statute.

*Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783; *Devinney v. Corey*, 1 Silv. Sup. Ct. 148, 5 N. Y. Supp. 289, Affirmed in 127 N. Y. 655, 28 N. E. 254; *Miller v. Ball*, 64 N. Y. 291; *Ladd v. Stevenson*, 43 Hun, 541, Affirmed in 112 N. Y. 333, 19 N. E. 842.

**Mr. Judson A. Gibson**, for respondent: The contract or agreement made between Briggs and Russell, as found by the trial court, is not within the statute of frauds.

*Sandford v. Norris*, 4 Abb. App. Dec. 144; *Dodge v. Wellman*, 1 Abb. App. Dec. 512; *Babcock v. Read*, 99 N. Y. 609, 1 N. E. 141; *Traphagen v. Burt*, 67 N. Y. 30; *Ostrander v. Snyder*, 73 Hun, 378, 26 N. Y. Supp. 263, Affirmed in 148 N. Y. 757, 43 N. E. 988; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Getty v. Devlin*, 54 N. Y. 403; *Bissell v. Harrington*, 18 Hun, 81; *Johannes v. Martian*, 22 App. Div. 561, 48 N. Y. Supp. 102; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712; *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000.

There was such a performance of the contract or agreement made between Russell and Briggs on the part of Mr. Russell, the promisee, that, even if the contract, not being in writing, was originally within the statute, it was taken out of its effect, and is enforceable by a court of equity in the nature of specific performance.

Equity will not permit the statute of frauds to be made an instrument of fraud.

*Canda v. Totten*, 157 N. Y. 231, 51 N. E. 989; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Lovry v. Tew*, 3 Barb. Ch. 407; 1 Beach, Modern Eq. Jur. § 84.

The plaintiff left his real-estate business, and moved his office upon the property of the defendant, and gave his time and experience in refitting and remodeling the property and assisting in its sale, fully performing, on his part, the contract.

Pom. Spec. Perf. § 30; Story, Eq. Jur. § 759; *Kincaid v. Kincaid*, 85 Hun, 141, 32 N. Y. Supp. 476, Affirmed in 157 N. Y. 715, 53 N. E. 1126; *Pauling v. Pauling*, 86 Hun, 502, 33 N. Y. Supp. 780, Affirmed in 150 N. Y. 574, 44 N. E. 1127; *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Cooper v. Monroe*, 77 Hun, 1, 28 N. Y. Supp. 222; 8 Am. & Eng. Enc. Law, p. 737; *Wetmore v. White*, 2 Cai. Cas. 109, 2 Am. Dec. 323; *Malins v. Brown*, 4 N. Y. 403; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Lobdell v. Lobdell*, 36 N. Y. 327; *Parsell v. Stryker*, 41 N. Y. 480; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Miller v. Ball*, 64 N.

Y. 286; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712; *Smith v. Smith*, 51 Hun, 164, 4 N. Y. Supp. 669; *Kenyon v. Youlen*, 53 Hun, 591, 6 N. Y. Supp. 784; *Godine v. Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335; *Brennan v. Brennan*, 50 N. Y. S. R. 260, 21 N. Y. Supp. 195; *Dunkel v. Dunkel*, 141 N. Y. 427, 36 N. E. 405; *Styles v. Blume*, 61 N. Y. S. R. 131, 30 N. Y. Supp. 409; *Lowry v. Tew*, 3 Barb. Ch. 407.

A suit in equity may be maintained to compel a specific performance of a contract to convey or enforce a claim against real property, although the plaintiff has another and adequate remedy at law upon the agreement.

*Baumann v. Pinckney*, 118 N. Y. 612, 23 N. E. 916; *Beach, Modern Eq. Jur.* § 597; *Brown v. Haff*, 5 Paige, 235, 28 Am. Dec. 425; *Crary v. Smith*, 2 N. Y. 60.

A defendant can only raise the objection of an adequate remedy at law by setting forth the same in his answer.

*Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *Ostrander v. Weber*, 114 N. Y. 95, 21 N. E. 112; *Baumann v. Pinckney*, 118 N. Y. 604, 23 N. E. 916; *Beach, Modern Eq. Jur.* § 13.

The granting of relief by way of specific performance of a verbal contract for an interest in real property is in the discretion of the equity trial court, and where it is granted without violating any fixed rule of equity the discretion is not reviewable in the court of appeals.

*Dunkel v. Dunkel*, 141 N. Y. 427, 36 N. E. 405; *Dyker Meadow Land & Improv. Co. v. Cook*, 159 N. Y. 6, 53 N. E. 690; *Miles v. Dover Furnace Iron Co.* 125 N. Y. 294, 26 N. E. 261.

Cullen, J., delivered the opinion of the court:

This action was brought to compel the defendant to convey to the plaintiff a certain interest in real estate in Niagara county, or, in default thereof, to pay the plaintiff the sum of \$5,000 in money in specific performance of an oral contract, by which the defendant agreed to compensate the plaintiff for certain services rendered by the latter. The answer of the defendant put in issue the alleged contract and pleaded the statute of frauds. The court at special term found that the plaintiff rendered services to the defendant, who was the owner of the Brackett House, in the city of Rochester, as a real-estate agent in superintending extensive alterations and repairs in the building on said premises, and procuring tenants therefor, and collecting the rents of the same; and that, in consideration of said services already rendered, and the agreement of the plaintiff to continue the same, and to assist in endeavoring to find a purchaser for said property, the defendant agreed orally that "whenever the said Brackett House property should be sold or disposed of, whether through the instrumentality of said Russell or otherwise, he would pay to the said plaintiff, Charles J. Russell, the sum of five thousand dollars (\$5,000) in full payment for the services which had theretofore and which should thereafter be rendered by the said Russell in and concerning the said Brackett House property; and it was further agreed by the said Briggs that, in case the consideration for the said Brackett House building above the mortgage encumbrance should be cash, then the said sum of five thousand dollars (\$5,000) should be paid to the said Russell by the said Briggs in cash, but, if the consideration therefor should be land, then the said Russell should be entitled therein at the same time to such a portion thereof as five thousand dollars (\$5,000) should bear to its value." It was further found that the plaintiff performed the terms of the agreement on his part; that the defendant exchanged the Brackett House property for certain real estate in Niagara county; that the plaintiff demanded of defendant the payment of the sum of \$5,000, or that he convey to him (plaintiff) an interest in the land for which the Brackett House was exchanged equal in value to the sum of \$5,000; and that the defendant refused to comply with said demand. The court thereupon decreed that the defendant convey to the plaintiff one hundred and twenty-three undivided one-thousandth parts of the real estate obtained by the former in exchange for the Brackett House, the court having found that such interest was worth the sum of \$5,000. The appellate division, for reasons to which it is unnecessary to refer, reduced the plaintiff's interest to  $\frac{1000}{1000}$  parts, and affirmed the decree below as modified.

The only question presented on this appeal is the objection of the appellant that the contract, so far as it provided for a transfer of land in payment of the plaintiff's services, was void under the statute of frauds, and that the performance by the plaintiff was insufficient to authorize the court to decree specific performance by the defendant under the exception of the statute that "nothing in this title contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements." 2 Rev. Stat. 1st ed. p. 135, § 10. It is true that this is a contract for the rendition of services, but it is clear that, so far as it has been enforced by the courts below, it is equally a contract for the sale of lands, or an interest in lands. Every executory contract must have a consideration, and, unless it is given in advance, the consideration of such contracts is the reciprocal covenants of the parties. It makes no difference which covenant is first specified in the contract. An agreement to render services, and in consideration therefor to convey lands, is exactly the same agreement as one to sell lands and to pay therefor in services. No partnership between the parties was created, for the plaintiff was not to share in any profit or loss that might be incurred on the sale of the Brackett House property; nor can the sale of that property be considered

as creating a fund in which the plaintiff was entitled to share. He was not to receive any aliquot proportion of or interest in that which the defendant might realize on the disposition of the property, but the specific sum of \$5,000 in money, if the property was sold for money, or in land, if the property was exchanged; which the complaint and findings allege that the defendant agreed to pay him. We are therefore relegated to the question as to the sufficiency of the plaintiff's performance to bring the case within the exception of the statute quoted. Though this exception is broad in its terms, the class of cases in which a court of equity will decree the specific performance of a contract void by the statute of frauds, and the class in which it will refuse such relief, have long been settled by authority in this state and by the decisions in our sister states and in England. The general rule is that "the payment of the consideration alone in a case where its recovery in an action at law would fully indemnify the party paying would not be a sufficient part performance" within the statute. *Miller v. Ball*, 64 N. Y. 286. See *Odell v. Montross*, 68 N. Y. 499; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *Dunkel v. Dunkel*, 141 N. Y. 427, 36 N. E. 403; *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783. In some of these cases it was held that specific performance might be decreed, so it may be said that the assertion in those cases of this rule was merely *dictum*. Not so, however, of the cases from 68 N. Y. and 153 N. Y., 47 N. E., respectively. In these cases the determination of the question discussed was necessary to the decisions rendered in the cases, and those decisions proceeded on the rule declared. In the latter case Judge Vann wrote: "The payment of the consideration alone is not enough, although learned judges differ as to the reason for the rule. . . . The more generally accepted, and, on the whole, more satisfactory, reason, however, is that, as the purchase money can be recovered back in an action at law, and the parties thus restored to their original position, the party paying is not injured, no fraud is perpetrated upon him by refusal to convey, and there is no occasion for a resort to equity. But, whatever may be the reason for the rule, as said by a recent author, 'by an unbroken current of authorities running through many years it is settled too firmly for question that payment, even to the whole amount of the purchase money, is not to be deemed such part performance as to justify a court of equity in enforcing the contract.' Browne, Stat. Fr. § 461." "A verbal agreement for an exchange of lands, we have seen in a former chapter, was not binding; and the same is undoubtedly true when the price of the proposed conveyance is to consist of labor or services of any kind, or, generally, of whatever the law would regard as a good consideration." *Id.*, § 271. In *Devinney v. Corey*, 1 Silv. Sup. Ct. 148, 5 N. Y. Supp. 289, which was an action for specific performance of an oral agreement to convey land, the consid-

eration of which was services rendered, a specific performance was denied. Judge Dwight, writing for the general term of the fifth department, said: "Indeed, we think there has been no case in this state in which specific performance of such a contract has been decreed on the ground of part performance when entry into possession has not constituted a leading feature of the part performance relied upon." This case was affirmed by the second division of this court without opinion in *De Vinney v. Corey*, 127 N. Y. 656, 28 N. E. 254. The result of our own research among the decided cases is the same as that reached by Judge Dwight. While there might arise a case in which the services were of so singular character, and the relation of the parties so peculiar, that an action at law for the value of the services would not compensate the party, no such case is now before us. There would seem no difficulty in the plaintiff's establishing the value of the services, and under the complaint herein recovering it in this action. In *Canda v. Totten*, 157 N. Y. 281, 51 N. E. 989, this court made no innovation upon the law as it had previously obtained in this state. The decision was well within the adjudicated cases. It was not a case resting on payment of the consideration alone, but the plaintiff had paid taxes, insurance, and interest on mortgages, and had received the rents collected from the property. She was practically in possession through her tenants, and this performance of the agreement and acceptance thereof by the defendant was held to take the case out of the statute.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the final award of costs.

Gray, O'Brien, and Werner, JJ., concur.

Parker, Ch. J., dissenting:

The counsel for the respondent urges that the agreement underlying this controversy is not in contravention of the statute of frauds, and cites a number of authorities that he insists fully support his position. As I am of opinion, however, that the plaintiff's judgment should in any event be sustained, I shall assume in the discussion of the first proposition (but for the purpose of argument only) that the agreement is repugnant to the statute of frauds. But it by no means follows that because of such fact this judgment is not abundantly supported; for it has long been a favorite head of equity jurisprudence to grant relief by way of specific performance to parties to an agreement who have performed in part, the reason being that otherwise one party might be enabled to practise a fraud upon the other, and thus it would sometimes happen that a statute intended to prevent fraud would operate to secure to the dishonorable party to an oral contract the fruits of fraud. In *Story, Eq. Jur.*, at § 759, it is said: "In the next place, courts of equity will enforce a specific performance of a contract within the statute where the parol agreement has

been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is that otherwise one party would be able to practise a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice." While in *Pom. Spec. Perf.*, at § 30, it is stated that "by far the most numerous and important species of contract contained in this class are those which, being void at law, under the statute of frauds, have been part performed by the plaintiff, and will therefore be wholly executed *in specie* at his suit, and for his benefit, by courts of equity. The theory upon which equity proceeds in administering its specific remedy in such cases is that, the defendant having permitted the plaintiff to treat the agreement as binding and to do positive acts based upon such assumption, it would be a fraud in him to repudiate his undertaking, and to set up the statute as an obstacle in the way of its completion. The doctrine is most frequently applied to contracts for the sale of land which have been part performed by the purchaser. . . . " Browne, in his work on the Statute of Frauds, preliminarily to a discussion of the cases with a view of ascertaining when courts of equity will enforce the performance of contracts that are in terms repugnant to the statute, says: "The correct view appears to be that equity will at all times lend its aid to defeat a fraud notwithstanding the statute of frauds; and upon this simple ground it is believed that the many decisions in equity, which it is now our duty to examine, will be found substantially to rest." Section 438.

Viner claims that the first case in which any equitable exception to the statute of frauds appears occurred in Lord Nottingham's time, and arose out of a verbal agreement for an absolute conveyance of land and for a defeasance to be executed by the grantee, who, having obtained the conveyance, refused to execute the defeasance, and invoked to his aid the statute of frauds; but his plea was overruled, and he required to execute a defeasance according to his agreement. 5 Viner, Abr. 523. From that day to this, courts of equity have wisely, because in the interest of justice, exercised this power, until at last a great variety of oral contracts that have been so far performed as to make their successful repudiation work wrong to one set of the parties, have been adjudged to be within the protecting arm of equity. Occasionally the strictly legal, as distinguished from the broader equitable, view has been taken of cases so near to the

border line separating contracts that will be enforced by equity from those to which it refuses its aid, as to make it doubtful whether their proper place was not on the other side of the line; and in all pioneer cases the party perpetrating a fraud in reliance upon the protection of the statute has tried to persuade the court that, as no case precisely like it can be found in which equity has granted relief, the letter of the statute, rather than the principles of equity, should prevail in its disposition. Despite, however, this ever-recurring contention, the number of cases of specific performance has multiplied in every jurisdiction where the principles of our equity jurisprudence have sway. That it has frequently occurred that the exercise of this jurisdiction by courts of equity has proved of great value in the administration of justice is not only known of all men, but it has been expressly recognized by legislative enactment. The language of the title of the Revised Statutes relating to fraudulent conveyances and contracts relating to lands is, "Nothing in this title contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements." 2 Rev. Stat. 1st ed. p. 135, § 10. In declaring its intention not to interfere with this well-recognized head of equity, the legislature most strongly manifested its approbation of those decrees of equity requiring performance notwithstanding the statute, where the situation of the parties had been so far changed by the action of one or both under an agreement as to result in injury to the one and an unmerited benefit to the other, unless relieved from the statute. The doctrine has been invoked and applied in many interesting cases in our jurisdiction, from among which the following are taken: *Malins v. Brown*, 4 N. Y. 403; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Loddell v. Loddell*, 36 N. Y. 327; *Parsell v. Stryker*, 41 N. Y. 480; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Miller v. Ball*, 64 N. Y. 286; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *Dunkel v. Dunkel*, 141 N. Y. 427, 36 N. E. 405; *Young v. Overbaugh*, 145 N. Y. 158, 39 N. E. 712; *Canda v. Totten*, 157 N. Y. 281, 51 N. E. 989. But in other jurisdictions, and in at least one case in this state (*Odell v. Montross*, 68 N. Y. 499), it has been held that even full payment of the consideration for the purchase of land, in pursuance of an agreement repugnant to the statute of frauds, may not entitle the party making such payment to specific performance. And the doctrine has been asserted in at least four other cases where the disposition of the case did not turn upon that point. *Miller v. Ball*, 64 N. Y. 286; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *Dunkel v. Dunkel*, 141 N. Y. 427, 36 N. E. 405; *Cooley v. Loddell*, 153 N. Y. 596, 47 N. E. 783. In two of those cases specific performance was granted, while in the last the action was not for specific performance at all, but was brought on the common-law side of the

court, where the power does not exist to relieve a party from the operation of the statute. That there may be no doubt whatever as to the absolute accuracy of this statement, attention is called to the fact that the record discloses that in the complaint the plaintiff alleged that his ancestor was the equitable owner, and entitled to a conveyance of certain real property reasonably worth the sum of \$4,500; that the defendant sold the property, and received that amount therefor in money or securities, "which money and securities he received to the use of this plaintiff, the successor in interest of said Olive Y. Lobbell, as hereinbefore set forth." The thirteenth paragraph of the complaint alleged the receipt of the avails by Gideon Lobbell, and that he "was at the time of his decease indebted to this plaintiff, as the successor in interest of the said Olive Y. Lobbell, in the sum of \$4,500 and interest. . . ." The complaint contains no prayer for relief, but instead a demand in this language: "Wherefore the plaintiff demands judgment against the defendant for the sum of \$4,500 and interest thereon from January 31, 1892." The case came on for trial before a court and a jury without a suggestion from the beginning to the end of the trial that the case was on the equity side of the court. When the plaintiff rested, defendant moved for a dismissal of the complaint on six different grounds, but there is not a hint in any one of them that the defendant in making the motion had discovered that the plaintiff supposed he was asking the aid of a court of equity; nor is there anything in the record to suggest that the plaintiff's counsel entertained any such idea. The motion to dismiss was granted, and it was that record which was brought to this court. It must follow that, whatever may have been said in the opinion, the court did not decide that, had the plaintiff brought his action in time, he would not have been entitled to equitable relief, for no such question was before the court. The court decided that the defense of the statute of limitations was made out, and it also discussed that question. It also decided that the defense of the statute of frauds was established, as it properly should have done, and discussed that question; but it could not decide whether equity might have relieved the plaintiff from the operation of the statute had timely suit been brought for that purpose, as no suit was brought on the equity side of the court for such or any other purpose.

The reason assigned for refusing specific performance in such a case is that the purchaser may have his money back, and that hence there is no room for the application of the principle upon which courts of equity decree specific performance to prevent fraud. In other words, as equity only compels the performance of contracts void under the statute of frauds, for the purpose of preventing that statute from being made an instrument by which one party to such a contract may defraud the other party to it, it follows that it will not aid a party who

can get back all that he has paid, for he is in no wise defrauded. But it does not necessarily follow that in all cases the mere right to recover back a part or the whole of the purchase money paid under an oral contract for the purchase of lands will save harmless the party making the payment, for the party contracting to sell may be insolvent, and both able and willing to put his property beyond the reach of execution by the time the oral purchaser shall have obtained judgment. In such a case it is obvious that the effect of compelling an oral purchaser of lands to resort to an action at law would be to deprive him of the money that he had paid in the purchase of the property, and thus the statute of frauds would enable the other party to the oral agreement to perpetrate a fraud upon such purchaser; and it is to prevent such an outcome, as we have seen, that equity lends its aid. Indeed, it is only for such purpose that equity has enforced the specific performance of contracts contravening the statute of frauds.

It would seem to follow that in enforcing specific performance in a case where an action at law to recover back the moneys paid would not in fact save harmless the purchaser, the court would be fully supported by the principle which lies at the foundation of the remedy afforded by equity. It may be said that no case can be found in this jurisdiction in which equity has decreed specific performance where the only act upon the part of the plaintiff was to pay the purchase money; but, while this is true, it may also be said that we have not been able to find any reported case in which it has been made to appear to a court of equity that the failure or refusal of specific performance would operate to deprive the purchaser from securing a return of the money that he had paid over on the promise of the other party to convey lands. We have, then, a case where a court of equity, unchained by precedent, is called upon to determine whether, within the principles upon which it has exercised jurisdiction in actions for specific performance of contracts void under the statute of frauds, it will create an exception to the general rule that such contracts will not be enforced where the party may be fully protected by a return of the money that he has paid; and it cannot be doubted that those principles, to which we have already referred in this opinion, call for a determination that specific performance in such a case should be had. It is not an argument against the assertion of a duty to decree specific performance in a given case to say that there is no precedent for it, for we have already seen that many contracts have been enforced by equity that could not have been conceived of when, in Lord Nottingham's time, the court first decreed specific performance of a verbal agreement by a grantee to execute a defeasance of lands conveyed to him by the grantor; and still other cases will arise in the course of time, not covered by the facts of a preceding case, in which the application of the

principles upon which equity has so far decreed specific performance, will require it to make still further decrees of that character. While this court has never been called upon, so far as I am able to discover, to pass upon the precise question that we are considering, it has received the attention of the court in at least three cases. In *Malins v. Brown*, 4 N. Y. 403, Gardiner, J., said: "It is said that the payment of money will not take the contract out of the statute. This may be considered as an unsettled question where the contract is for the sale of lands. It has been decided both ways in England. (13 Ves. Jr. Sumn. ed. 461, note 1; 3 Atk. 1; *Clinan v. Cooke*, 1 Sch. & Lef. 40.) In *Wetmore v. White*, 2 Cal. Cas. 109, 2 Am. Dec. 323, it was assumed that payment of the consideration entitled the party to a specific performance. The reason assigned by those who deny that payment of the consideration is in equity a part performance is that the money may be recovered back, and the party reinstated in his former condition. This reason, which has been deemed unsatisfactory, has no application to this case." This case was brought to the attention of the court in *Dybert v. Remerschnider*, 32 N. Y. 629, and at page 643, Potter, J., after referring to the expression of Judge Gardner which we have quoted, said, among other things: "Payment alone, where such payment is obtained by representations or acts which amounted to a fraud upon the party from which payment is obtained, and where the party cannot be restored to his or her former condition, is a sufficient ground in a court of equity to authorize the court to interfere, and decree specific performance." In *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405, Judge Earl (at page 435, 141 N. Y., and page 407, 36 N. E.) said: "We think it is a general rule to be gathered from the authorities that mere payment of the purchase price of land is not sufficient to authorize the specific performance of a contract of sale, unless the peculiar circumstances of the case be such that an action at law to recover back the money paid would not give the purchaser an adequate remedy."

Now, while it is true that in none of the cases to which I have referred was the question that we have been considering presented for decision, it is quite apparent that the learned judges writing the opinions had in mind the possibility that such a question might be presented in time, and, therefore, were careful to safeguard the question by expressions indicating the intention of the court to avoid the appearance of committing itself to the doctrine that the mere right to maintain an action at law for the recovery back of the purchase money paid on an oral contract should in all cases be the only remedy of a party to whom conveyance was refused after full payment,—a right which might have no pecuniary value whatever, owing to the irresponsibility of the seller.

If the views so far expressed be sound, it would seem to follow that, while it is the

general rule that courts of equity will not decree specific performance where the purchaser may get back the money that he has paid, and thus suffer no injury, an exception to that rule exists where the facts proved justify the trial court in determining that a judgment for the recovery of money would not operate to return to him the money that he has in good faith paid upon the oral agreement to purchase, and that in such case, to prevent him from being made a victim of fraud, a court of equity may enforce specific performance. In this case the plaintiff brought his action on the equity side of the court, alleging that by virtue of an oral agreement between him and the defendant, in pursuance of which he had made full performance, he was entitled to a conveyance from the defendant of an undivided interest in certain lands, and praying that the defendant be compelled to specifically perform his part of the agreement. The answer of the defendant denied the agreement alleged in the complaint, and set up the statute of frauds, but did not allege that the plaintiff had an adequate remedy at law. The case coming on for trial before the court on the equity side thereof, the making of the contract as alleged in the complaint was found, and also full performance thereof on the part of the plaintiff (which consisted in the rendition of services), together with a failure of performance on the part of the defendant; and it was decreed that the defendant should convey a certain undivided interest in the lands to the plaintiff. This decree was unanimously affirmed at the appellate division, and it follows that, if it be true, as claimed by the appellant, that the payment of \$5,000 to the plaintiff would save him from all loss by reason of the contract with the defendant, the supreme court, in both branches thereof, must be deemed to have reached the conclusion that only through the medium of specific performance could the plaintiff be saved from loss by reason of the services rendered under the oral contract.

The discussion so far has proceeded upon the assumption that the contention of the appellant that the plaintiff could have recovered \$5,000 in an action at law is well founded. As I read the contract, however, it admits of no such construction. The agreement provided that the plaintiff should render certain services in putting the Brackett House building, owned by the defendant, into a tenantable condition, and to assist the defendant in endeavoring to find a purchaser; and it further provided that, in consideration of the rendition of certain specified services by the plaintiff, the defendant agreed to pay him \$5,000 in cash, if the premises should be sold for cash, but, if the consideration should be land, "then the said Russell should be entitled therein at the same time to such portion thereof as \$5,000 should bear to its value." Now, the Brackett House building was not sold for cash, but was exchanged for certain real estate. Under the terms of the contract, therefore, the plaintiff is not entitled to \$5,000 in

cash, but is "entitled therein"—that is, in the land—to such a portion thereof as \$5,000 shall bear to its value. Unless, then, this contract be specifically performed, it is not at all certain that the plaintiff can even recover judgment in the sum that it was agreed he should receive for his services, to say nothing of the difficulties that might attend the collection of the judgment; for in an action at law he could not recover upon the contract, but could recover the value of his services upon a *quantum meruit* only, which might be found to be a much smaller sum than that which the parties agreed the plaintiff should receive for the services that he agreed to and did render. The supreme court was therefore justified in reaching the conclusion that only through specific performance could the plaintiff be saved from possible injury by the other party to the oral agreement.

There is still another view upon which this judgment can be affirmed. In consideration of the full performance by the plaintiff, the defendant agreed to pay to him \$5,000 in cash if the premises should be sold for cash, but, if the consideration should be land, "then the said Russell should be entitled therein at the same time to such a portion thereof as \$5,000 should bear to its value." Now, this means that the defendant either would convey to the plaintiff such agreed portion of the land accepted as the consideration for the Brackett House building, or would take title to the plaintiff for such agreed portion. And it means the latter as clearly as the former, and much more so if the former method would be void under the statute of frauds, since the parties cannot be presumed to have intended to make a void contract when they used terms which could import a valid contract. Of the two possible constructions we must adopt the valid one, which is that the defendant agreed to take title to the plaintiff for an interest in the lands accepted as the consideration for the sale of the Brackett House property equal to the agreed portion therein, and, not having done so, is constructively guilty of a fraud, and holds the title to such agreed portion as trustee *ex maleficio*. He, therefore, was properly decreed to convey it to the plaintiff. *Canda v. Totten*, 157 N. Y. 281, 51 N. E. 989. The judgment should be affirmed, with costs.

**Haight and Landon, JJ.,** concur with **Parker, Ch. J.**

**Augustus Van Horne STUYVESANT,**  
*Resp't.,*  
*v.*

**Ralph WEIL, Appt.**

(167 N. Y. 421.)

**A mistake in the Christian name of a**

**NOTE.**—For cases in this series as to effect on records of mistake in name, see *Flincher v. Hane-gan* (Ark.) 24 L. R. A. 543, and *note*; *Davis v. Steeps* (W'ia.) 23 L. R. A. 818; and *Crouse v. Murphy* (Pa.) 12 L. R. A. 58.  
53 L. R. A.

**defendant who is duly served with process** will not prevent the court from acquiring jurisdiction of him, if at the time the summons is served on him he is duly apprised that he is the person intended to be named therein and affected thereby, where the statutes provide for correcting mistakes in the names of parties as they appear in the summons.

(June 11, 1901.)

**A PPEAL** by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County dismissing the complaint in an action to compel specific performance of a contract to convey real estate, or to recover damages in case a good title could not be conveyed. *Reversed.*

**Statement by Parker, Ch. J.:**

The defendant, by an agreement in writing, promised to convey to plaintiff certain real estate known as Nos. 741 and 743 Amsterdam avenue and No. 151 West Ninety-Sixth street, in the city of New York. The plaintiff, claiming that the defendant's title was defective, brought this action to compel specific performance, or, if it should be decided that the defendant could not give good title, that he should be decreed to refund to plaintiff a partial payment, together with the costs and expenses of the search. The alleged defects were: (1) That the defendant acquired his title through a certain mortgage foreclosure wherein the owner of the equity of redemption was not named as a party defendant in either the summons or the complaint, and did not appear in the action prior to the entry of judgment; (2) that notice of the pendency of said foreclosure was not filed, as required by statute, against such owner; and (3) that the judgment was not entered in the foreclosure action in accordance with statute. June 5, 1896, foreclosure proceedings for nonpayment of interest—the right to demand the principal not being insisted upon—were brought under a first mortgage by Simon Pretsteld, and the summons and complaint therein named Emma J. Stockton as a defendant, and, as so written, they were personally served on Mary J. Stockton, who was at that time the owner of the fee of the premises. More than twenty days thereafter an affidavit was presented to the court entitled in the foreclosure action, in which it was stated that "the summons and complaint herein were duly served on the defendant Stockton; . . . that, through inadvertence, defendant Stockton was made party defendant by the name of Emma J., whereas her name is in fact Mary J. Stockton." Upon this affidavit an *ex parte* order was entered amending "the summons and complaint and all other papers herein . . . by

As to effect of errors in name in index of judgment, see *note* to *Dewey v. Sugg* (N. C.) 14 L. R. A. 393.



striking out the name of Emma J. Stockton where the same appears, and inserting in lieu thereof the name of Mary J. Stockton as one of the defendants in this action." The name Mary J. Stockton was used in all subsequent steps in the action, and all proceedings therein were as usual in actions of foreclosure. The premises were sold July 30, 1896. A surplus of \$928.75 resulted, and in the proceedings subsequently taken for the distribution thereof Mary J. Stockton was served, and she appeared, and consented to the payment of the surplus to the mortgagees of the second mortgage.

**Mr. Edward W. S. Johnston, with Mr. Isaac Fromme, for appellant:**

In view of the recital of the judgment that the notice of pendency of action was duly filed, the court must presume that it was duly filed against Mary J. Stockton, and in view of the recital that Mary J. Stockton was duly served with the summons and complaint in the action, or had appeared but had not filed an answer, the court must presume that she had been personally served with a summons and complaint against her; and the mere facts that there was an original summons issued as against Emma J. Stockton, and that an order was entered which amended the name and changed it from Emma J. Stockton to Mary J. Stockton, and that no amended or supplemental summons was issued, do not overcome the presumption that the said Mary J. Stockton was duly and personally served with a summons in the action directed against her.

*Smith v. Central Trust Co.* 154 N. Y. 340, 48 N. E. 553; *Steinhardt v. Baker*, 20 Misc. 474, 46 N. Y. Supp. 707, 25 App. Div. 197, 49 N. Y. Supp. 357, Affirmed in 163 N. Y. 410, 57 N. E. 629; *O'Connor v. Felia*, 87 Hun, 179, 33 N. Y. Supp. 1074; *Murphy v. Shea*, 143 N. Y. 78, 37 N. E. 675; *McGaughy v. Woods*, 106 Ind. 380, 7 N. E. 7; *Grant v. Birdsall*, 2 N. Y. Civ. Proc. Rep. 422; *Rosworth v. Vandewalker*, 53 N. Y. 597; *Steinam v. Strauss*, 44 N. Y. S. R. 380, 18 N. Y. Supp. 48, Affirmed in 137 N. Y. 561, 33 N. E. 338; *Gridley v. St. Francis Xavier College*, 137 N. Y. 331, 33 N. E. 321; *Stiefel v. Berlin*, 28 App. Div. 106, 51 N. Y. Supp. 147; *Jackson v. State use of Dyer*, 104 Ind. 516, 3 N. E. 863; *Hupfeld v. Automaton Piano Co.* 66 Fed. 788; *First Nat. Bank v. Jagers*, 31 Md. 47, 100 Am. Dec. 53; *Guroute v. Haley*, 104 Cal. 497, 38 Pac. 194; *Pope v. Terre Haute Car & Mfg. Co.* 87 N. Y. 140; *Maples v. Mackey*, 89 N. Y. 146, Affirming 22 Hun, 228; *Berkovitz v. Brown*, 3 Misc. 6, 23 N. Y. Supp. 792; *Freeman v. Karr*, 34 Ill. App. 640; *Fuchs v. Devlin*, 35 N. Y. S. R. 807, 12 N. Y. Supp. 574; *Thurber-Whyland Co. v. Klittner*, 42 N. Y. S. R. 157, 16 N. Y. Supp. 828; *Mack v. American Exp. Co.* 20 Misc. 217, 45 N. Y. Supp. 362; *Sloane v. Martin*, 77 Hun, 249, 28 N. Y. Supp. 332; *Palmer v. Colville*, 63 Hun, 536, 18 N. Y. Supp. 509; *Kennedy v. Bambrick*, 20 Mo. App. 630; *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216, 24 N. E. 272; *Mutual L. Ins. Co. v. Corey*, 135 N. Y. 326, 31 N. E. 53 L. R. A.

1095; *Pindar v. Black*, 4 How. Pr. 95; *Cazet v. Hubbell*, 36 N. Y. 681; *Farmers Nat. Bank v. Williams*, 9 N. Y. Civ. Proc. Rep. 212; *Miller v. Stettiner*, 22 How. Pr. 518, 7 Bosw. 692; *Von Hatten v. Scholl*, 1 App. Div. 33, 36 N. Y. Supp. 771; *Mann v. Carley*, 4 Cow. 148; *Bohn v. Wilson*, N. Y. Daily Reg. Feb. 17, 1887; *Stuber v. Schwartz*, 1 N. Y. City Ct. Rep. 110; *Newton v. Milleville Mfg. Co.* 17 Abb. Pr. 318, note; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *Wiggins v. Richmond*, 58 How. Pr. 377; *Bank of Colfax v. Richardson*, 34 Or. 518, 54 Pac. 359; *Veasey v. Brigham*, 93 Ala. 548, 13 L. R. A. 541, 9 So. 728; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833; *McCaskey v. Pollock*, 82 Ala. 174, 2 So. 674; *Terry v. French*, 5 Tex. Civ. App. 120, 23 S. W. 911; *Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714; *Robinson v. Fair*, 128 U. S. 53, 32 L. ed. 415, 9 Sup. Ct. Rep. 30; *Toliver v. Morgan*, 75 Iowa, 619, 34 N. W. 858; *McDonald v. Swett*, 76 Cal. 257, 18 Pac. 324; *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117; *Davis v. Robinson*, 70 Tex. 394, 7 S. W. 740; *Heck v. Martin*, 75 Tex. 460, 13 S. W. 52; *Allured v. Voller*, 112 Mich. 357, 70 N. W. 1038; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *L'Engle v. Florida C. & W. R. Co.* 21 Fla. 357; *Nye v. Swan*, 42 Minn. 243, 44 N. W. 9; *Petersen v. Little*, 74 Iowa, 223, 37 N. W. 169; *Hull v. Webb*, 78 Ill. App. 622; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 24 So. 516; *Breen v. Kuhn*, 91 Iowa, 325, 59 N. W. 344; *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51.

In any event, the court had the power to grant the order of June 27, 1896, amending the summons and complaint and all other papers herein by striking out the name "Emma J. Stockton" where the same appears, and inserting in lieu thereof the name "Mary J. Stockton" as one of the defendants in the action.

*Reilly v. World Pub. Co.* 14 N. Y. S. R. 390; *Van Wyck v. Hardy*, 4 Abb. App. Dec. 496, Affirming 11 Abb. Pr. 473, 20 How. Pr. 222; *Tasker v. Wallace*, 6 Daly, 365; *Harrison v. Union Trust Co.* 80 Hun, 463, 30 N. Y. Supp. 443; *Vanderheyden v. Gary*, 38 How. Pr. 367; *Hutton v. Murphy*, 9 Misc. 151, 29 N. Y. Supp. 70; *Weil v. Martin*, 1 N. Y. Civ. Proc. Rep. 138, 12 N. Y. Week. Dig. 366, 24 Hun, 645; *Carr v. Sterling*, 114 N. Y. 558, 22 N. E. 37; *Farmers' Nat. Bank v. Williams*, 9 N. Y. Civ. Proc. Rep. 212; *Hilton v. Sinsheimer*, 5 N. Y. Civ. Proc. Rep. 355; *Dean v. Gilbert*, 92 Hun, 427, 36 N. Y. Supp. 1004; *Evoy v. Expressmen's Aid Soc.* 51 N. Y. S. R. 38, 21 N. Y. Supp. 641; *Hulbert Bros. v. Hohman*, 22 Misc. 248, 49 N. Y. Supp. 633; *Carey v. Cranston*, 99 Ga. 77, 24 S. E. 869; *Christal v. Kelly*, 88 N. Y. 285; *Munzinger v. Courier Co.* 82 Hun, 575, 31 N. Y. Supp. 737; *Palmer v. Colville*, 63 Hun, 538, 18 N. Y. Supp. 509; *Bank of Havana v. Magee*, 20 N. Y. 355; *Merriam v. Wolcott*, 61 How. Pr. 394; *Mack v. American Exp. Co.* 20 Misc. 215, 45 N. Y. Supp. 362; *Bannerman v. Quackenbush*, 11 Daly, 529; *Miller v. Stettiner*, 22 How. Pr. 518,

7 Bosw. 692; *Skoog v. New York Novelty Co.*, 45 N. Y. Civ. Proc. Rep. 145; *Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43; *McGhee v. Romaika*, 92 Tex. 38, 45 S. W. 552; *Heckemann v. Young*, 18 Abb. N. C. 196; *McKane v. Democratic General Committee*, 21 Abb. N. C. 89, 1 N. Y. Supp. 580; *Grant v. Birdsall*, 2 N. Y. Civ. Proc. Rep. 422.

Instructive opinions in other jurisdictions upon this question, under statutory provisions similar to § 723 of our Code, are to be found in—

*Cain v. Rockwell*, 132 Mass. 193; *McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7; *Jones v. Martin*, 5 Blackf. 351; *Thatcher v. Coleman*, 5 Blackf. 76; *Bridges v. Layman*, 31 Ind. 384; *Hopper v. Lucas*, 86 Ind. 43; *Ridgway's Appeal*, 15 Pa. 177; *York Bank's Appeal*, 36 Pa. 458; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 24 So. 516; *Georgia P. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764; *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272, 14 So. 109; *Ueland v. Lynch* (Minn.) 80 N. W. 700; *Gorman's Case*, 124 Mass. 190; *McDonald v. Sweet*, 76 Cal. 257, 18 Pac. 324; *Brock v. Martinovich*, 55 Cal. 516; *Heck v. Martin*, 75 Tex. 469, 13 S. W. 51; *Freeman v. Hawkins*, 75 Tex. 498, 14 S. W. 364; *Goodgion v. Gilreath*, 32 S. C. 388, 11 S. E. 207; *Patterson v. Walton*, 119 N. C. 500, 26 S. E. 43; *Davenport v. Kirkland*, 156 Ill. 174, 40 N. E. 304; *Jones v. San Francisco Sulphur Co.* 14 Nev. 172; *McLaughlin v. Wilks*, 42 Mich. 553, 4 N. W. 268; *Final v. Backus*, 18 Mich. 218; *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992; *Niehoff v. People* *use of Degan*, 171 Ill. 243, 49 N. E. 214, Affirming 66 Ill. App. 669; *Gulf, C. & S. F. R. Co. v. James*, 1 C. C. A. 53, 4 U. S. App. 19, 48 Fed. 148; *Harvey Lumber Co. v. Herri-man & C. Lumber Co.* 39 Mo. App. 214.

*Mr. Lucius H. Beers*, with *Messrs. Lord, Day, & Lord*, for respondent:

When the judgment of foreclosure was entered in *Pretzfeld v. Lawrence* the court did not have jurisdiction of Mary J. Stockton, the owner of the equity. That judgment as to her is therefore absolutely void.

A judgment against a person who was duly served, but who was sued by the wrong name and did not appear, is absolutely void.

*Farnham v. Hildreth*, 32 Barb. 277; *Schoellkopf v. Ohmeis*, 11 Misc. 253, 32 N. Y. Supp. 736; *McGill v. Weill*, 19 N. Y. Civ. Proc. Rep. 43, 10 N. Y. Supp. 246; *Gardner v. Kraft*, 52 How. Pr. 499; *Miller v. Foley*, 28 Barb. 630; *Muldoon v. Pierz*, 1 Abb. N. C. 309; *Wichle v. Schwarz*, 22 Jones & S. 169.

The judgment in *Pretzfeld v. Lawrence* was not merely irregular or voidable, but was absolutely void and a nullity so far as Mary J. Stockton was concerned.

*Winslow v. Clark*, 47 N. Y. 261; *Miner v. Beekman*, 50 N. Y. 337; *Landon v. Towns-hend*, 112 N. Y. 93, 19 N. E. 424.

The fact that the court did not have jurisdiction appears on the face of the judgment roll, and the defect of jurisdiction can therefore be shown in a collateral proceeding where that judgment is relied upon to make title.

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*Smith v. Central Trust Co.* 154 N. Y. 333, 48 N. E. 553; *Ferguson v. Crawford*, 70 N. Y. 256, 26 Am. Rep. 589; *Freeman*, Judgm. 3d ed. § 125; *Berkowitz v. Brown*, 3 Misc. 1, 23 N. Y. Supp. 792; *Pringle v. Woolworth*, 90 N. Y. 502.

Mary J. Stockton will not be bound by any decision in this action, and may at any time within the next fifteen years bring an action to recover the property.

*Fry*, Spec. Perf. 3d ed. § 862; *Irving v. Campbell*, 121 N. Y. 353, 8 L. R. A. 620, 24 N. E. 821; *Dingley v. Bon*, 130 N. Y. 607, 29 N. E. 1023; *McPherson v. Schade*, 149 N. Y. 16, 43 N. E. 527; *Greenblatt v. Hermann*, 144 N. Y. 13, 38 N. E. 966; *Kilpatrick v. Barron*, 125 N. Y. 751, 26 N. E. 925; *Abbott v. James*, 111 N. Y. 673, 19 N. E. 434.

*Parker, Ch. J.*, delivered the opinion of the court:

This action is brought on the equity side of the court to compel the defendant to convey the title of certain premises to the plaintiff in pursuance of the terms of a written contract, or, if unable to convey a marketable title, that he be decreed to return a partial payment made by the plaintiff. The trial court held that the title was marketable, and decreed specific performance. The appellate division reached a contrary conclusion, and so reversed the judgment. The defendant's title comes through a foreclosure of a mortgage while Mary J. Stockton was the owner of the fee, but in the summons and complaint, both of which were duly served upon her, she was called Emma J. Stockton. Later the attorney for the plaintiff, without notice to Mary J. Stockton, obtained an order amending the summons and complaint so as to correctly state her given name, in pursuance of the authority conferred by § 723 of the Code of Civil Procedure, which provides that the court may, "before or after judgment, in furtherance of justice, . . . amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party." The contention that the court had no power to amend the summons and complaint, as provided by the order, is founded upon the claim that the court had not acquired jurisdiction of defendant Stockton by the personal service of the summons and complaint upon her because of the error therein in respect to her given name. But we cannot concur with a view that insists upon it that any error appearing in a summons in the name of a defendant prevents the court from acquiring jurisdiction of such defendant, notwithstanding he was fully apprised, when service of the summons was made upon him, that he was the party intended to be named therein and affected thereby,—a view directly antagonistic to both the letter and the spirit of §§ 721 and 723 of the Code, the first of which declares that a judgment of a court of record shall not "be impaired or affected, by reason of either of the following imperfections, omis-

sions, defects, matters, or things in the process, pleadings, or other proceedings:

(9) For a mistake in the name of a party or other person . . . where the correct name . . . has been once rightly stated, in any of the pleadings or other proceedings," while the latter section provides for correcting a mistake in the name of a party as it appears in the summons, which, of course, presupposes, in case of prior service, that jurisdiction has already been acquired. The object of the summons is to apprise the party defendant that the plaintiff therein seeks a judgment against him, so that he may take such steps as may seem advisable to protect his interests; and, in order to assure its coming to his attention, the statute requires personal service of the summons to be made when it is possible to do so. It may happen, as in this case, that the defendant's name is not correctly stated in the summons, and in such case it is the duty of the court, when properly moved, to determine whether, notwithstanding the error, the defendant was fairly apprised whether he was the party the action was intended to affect; and, if the answer of the court be in the affirmative, its determination must be that the court acquired jurisdiction. In our judgment, the facts disclosed by this record permit only one answer to the question, Was Mary J. Stockton fairly apprised by the summons and complaint served upon her that the object of the action was to foreclose a mortgage upon the premises owned by her? *viz.*, that she was. That being so, it follows that it was the duty of the court, when applied to, to hold that jurisdiction had been acquired, and thereupon to grant such amendments in furtherance of justice as the statute authorized. That is precisely the course of procedure taken in the foreclosure action. After the summons had been personally served upon Mrs. Stockton more than twenty days, the fact that there was an error in her given name, as it appeared in the summons, and of what that error consisted, was brought to the attention of the court, which thereupon decided to amend the summons and complaint so that the defendant's name should correctly appear in every paper entitled in the action. The decision expressed necessarily involved a decision not expressed, but nevertheless made, that the court had acquired jurisdiction of the defendant in the action; and hence it follows that the court could and should have made the order amending the summons and complaint so as to state defendant's given name properly. The decision was correctly made, and it follows necessarily that the purchaser at the foreclosure sale acquired a marketable title.

We have not alluded to the decisions of the several special and general terms which the appellate division felt called upon to follow. Their foundations were laid long before §§ 721 and 723 of the Code came into existence as marking features of a distinct legislative policy to stop the sacrifice of things of real substance upon the altar of

mere technicality, and hence a discussion of them can serve no useful purpose.

*The order of the Appellate Division should be reversed*, and the judgment of the trial term affirmed, with costs to the appellant in all courts.

**Gray, O'Brien, Martin, Landon, and Cullen, JJ., concur. Werner, J., not sitting.**

Joseph F. SINNOTT, Individually and as Surviving Partner of Andrew F. Moore, Deceased, *Appt.*,

*v.*

Bernard FEIOCK, Impleaded, etc., *Respnt.*

(165 N. Y. 444.)

**Replevin will not lie to recover goods obtained by fraud** where, before the commencement of the action, they have been taken from defendant's possession on an execution in favor of a third person, and sold, without any collusion on his part, so that they are no longer in his possession, custody, or control.

(February 1, 1901.)

**A PPEAL** by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in favor of defendant in an action of replevin to recover possession of certain chattels alleged to have been procured by defendant Feiock through fraud. *Affirmed.*

The facts are stated in the opinion.

**Mr. Frank J. Hone**, for appellant:

An action can be brought in replevin against one who has had, but has parted with, possession of chattels, even though the chattels have passed into the hands of a bona fide purchaser for value.

*Barnett v. Selling*, 70 N. Y. 492; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 250; *Knapp v. Smith*, 27 N. Y. 277; *Ellis v. Lerner*, 48 Barb. 539; *Dunham v. Troy Union R. Co.* 3 Keyes, 543; *Brockway v. Burnap*, 16 Barb. 309; *Ward v. Woodburn*, 27 Barb. 346; *Tasker v. Ryan*, 75 N. Y. S. R. 341, 40 N. Y. Supp. 942; *National S. S. Co. v. Sheahan*, 122 N. Y. 461, 10 L. R. A. 782, 25 N. E. 858.

**Mr. Charles E. Bostwick**, for respondent:

Replevin cannot be maintained against a person who has no possession or control of the goods to be replevined, and such a person cannot rightfully be made a defendant, sole or jointly, in an action of replevin.

*Hall v. White*, 106 Mass. 599; *Roberts v. Randel*, 3 Sandf. 707.

**Cullen, J.**, delivered the opinion of the court:

The action is in replevin to recover certain

**NOTE.**—For cases in this series as to replevin to recover goods obtained by fraud, after they have been transferred to a third party, see *Schloss v. Feltus* (Mich.) 36 L. R. A. 161; and *Merrell v. Springer* (Ind.) 8 L. R. A. 61.

chattels which it was alleged the plaintiff was induced to sell to the respondent by fraud on the part of the latter. The complaint was in the ordinary form, and averred property in the plaintiff, and that the defendant wrongfully took and detained the chattels. The complaint was dismissed on the opening of the plaintiff's counsel, and his concession (apparently made for the purpose of obtaining a ruling on the question) that prior to a demand for the return of the goods, and before the commencement of the action, the chattels had been taken from the defendant on an execution against him and sold, so that at the time of such demand and commencement of the action they were not in the defendant's possession, custody, or control. On this concession the trial court dismissed the complaint, and the judgment entered on such dismissal has been affirmed by the appellate division.

There was no suggestion made that the defendant obtained the property with the intention that it should be seized on execution, or in pursuance of any conspiracy or collusion with the execution creditor. The sale was not void, but voidable at the election of the plaintiff. At the time the chattels were seized on execution the plaintiff had not rescinded the sale, and, whatever were the plaintiff's rights, the seizure of the goods as to the defendant was lawful, and he could not resist or avoid it. The question presented, therefore, is whether the defendant is liable in an action of replevin for the recovery of the chattels after they have been taken from him by process legal as to him, and not by any voluntary act on his part. The determination of this question requires an examination and consideration of this particular form of action as it now exists under our Code and statutes.

Originally, at common law, the action of replevin lay to recover the possession of goods illegally distrained by a landlord. The primary object of the action was to recover possession of the specific chattels. The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels, where it was sought to recover the chattels *in specie*. In many cases where the plaintiff was unable to obtain the return of the chattels he could recover in the action their value. Still the action remained essentially one to recover the possession of chattels, as distinguished from actions in trespass or trover to recover damages for the seizure or for the value of the property. There were many technical rules in force relating to this form of action, which at times made proceedings under it difficult, and in 1788 a statute was passed in this state (1 Rev. Laws 1813, p. 31) to simplify the procedure. It directed the form of plaint before the sheriff, in which the plea was "of taking and unjustly detaining" beasts, goods, or chattels. Afterwards the Revised Statutes prescribed the rules governing actions of replevin, and the procedure therein. Title 12, chap. 8, pt. 3. In the original note of the revisers is stated their intention to so extend the action of

replevin "as to make it a substitute for detinue, and a concurrent remedy in all cases of the unlawful caption or detention of personal property, with trespass and trover." We do not think the revisers used the term "concurrent" as meaning "coextensive," for by § 6, title 12, it is provided that the action shall in all cases be commenced by writ, the form of which is prescribed as follows: "Whereas A. B. complains that C. D. has taken, and does unjustly detain (or 'does unjustly detain,' as the case may be)." The execution in the action required the sheriff to replevin the goods if they could be found, and deliver them to the plaintiff, and, in case they could not be obtained, to collect their value, with the damages and costs, from the property of the defendant. The provisions of chapter 2 of title 7 of the Code of Procedure of 1848, entitled "Claim and Delivery of Personal Property," operated as a substitute for those of the Revised Statutes. They direct that at the commencement of the action the plaintiff may replevy the chattels, but in the affidavit to obtain the writ there is required the statement that the defendant "unjustly detains" them. The provisions of the present Code of Civil Procedure, in the article entitled "Action to Recover a Chattel" (§§ 1689-1730), are substantially the same as those of the old Code.

The question several times arose under the Code of Procedure whether replevin could be maintained against a party who was not in possession, either actual or constructive, of the chattels, and was the subject of conflicting decisions in the supreme court and in the superior court of New York. It finally came to this court, in *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259. This was also a case of fraudulent purchase of goods, in which the defendant, before the action was brought, had voluntarily transferred the goods to his assignee. It was held that the action could be maintained. This decision was based on the authority of two English cases: *Garth v. Howard*, 5 Car. & P. 346, and *Jones v. Doyle*, 9 Mees. & W. 19. In the case in this court Judge Selden wrote: "The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both, because the acts of both unite in producing the detention." This doctrine has been steadily adhered to by this court. *Barnett v. Selling*, 70 N. Y. 492; *Dunham v. Troy Union R. Co.* 3 Keyes, 543. These decisions, however, do not control the present case. They are authorities to the effect that where the defendant has wrongfully parted with possession the action will lie. As already stated, the defendant did not part with possession by any act on his

part, but the property was taken from him by process of law valid as to him, and which he could not resist. To uphold a recovery in replevin under such circumstances we must go further, and decide that whenever property has been taken or obtained wrongfully an action of replevin may be maintained against the taker, regardless of whether the property is in his possession or whether he has been lawfully deprived of it, and as a logical sequence, as we think, also regardless of the fact that the property sought to be replevined may have ceased to exist without fault on the defendant's part; in other words, that the action can be maintained under all circumstances to the same extent as an action for conversion. Such a doctrine would substantially destroy the characteristics of an action of replevin, which distinguish it as an action to recover possession of specific property, and we find no authority for it in the decisions of this or of our sister states. In Massachusetts the rule seems absolute that the defendant must be in possession when the action of replevin is brought. *Richardson v. Reed*, 4 Gray, 441, 64 Am. Dec. 77; *Hall v. White*, 106 Mass. 599. In the earlier case it is said: "By the common law replevin cannot be maintained where trespass cannot, for by that law an unlawful taking of goods is a prerequisite to the maintenance of replevin.

But trespass will lie in cases where replevin will not. Replevin, being an action in which the process is partly *in rem*, will not lie where it is impracticable or unlawful to execute that part of the process according to the precept." In the later case it was held that the action would not lie against a sheriff who had seized goods, but parted with possession before the date of the plaintiff's writ. The same rule obtains in New Hampshire (*Mitchell v. Roberts*, 50 N. H. 486), Iowa (*Coffin v. Gephart*, 18 Iowa, 256), Missouri (*Feder v. Abrahams*, 28 Mo. App. 454; *Davis v. Randolph*, 3 Mo. App. 454), Maine (*Howe v. Shaw*, 56 Me. 291), Minnesota (*Ames v. Mississippi Boom Co.*, 6 Minn. 467, Gil. 417), and in North Carolina (*Haughton v. Newberry*, 69 N. C. 456). In Michigan the statute as to procedure in replevin is similar to our own; and in *McBrian v. Morrison*, 55 Mich. 351, 21 N. W. 368, the supreme court of that state, following the rule in *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259, held that the action lay, despite a wrongful transfer by the defendant prior to its institution. In the subsequent case of *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153, it is said: "The nature of the remedy, the detention being the gist of the action, and the delivery of the goods its object, forbids this action against one not in possession, and who cannot deliver the property, unless he has concealed, removed, or disposed of the same with the intent of avoiding the writ." Accordingly it was held that replevin would not lie against a pledgee who had improperly sold the pledge and parted with possession. With us it is sufficient that the defendant has voluntarily disposed of the property, though

without intent to avoid the writ. *Barnett v. Selling*, 70 N. Y. 492. In Wisconsin, though a decision on the exact point seems wanting, the *dicta* of the opinions indicate the rule to be the same as that in this state. In Virginia there is a very early case on the subject (*Burnley v. Lambert*, 1 Wash. [Va.] 308), argued by Mr. (afterwards Justice) Washington and Mr. (afterwards Chief Justice) Marshall. It was there held that the defendant could not, by transferring the property before the commencement of the action, defeat the writ. In the opinion it is said that possession of the defendant prior to the suit was sufficient to charge him unless he was legally evicted. In *Poole v. Adkisson*, 1 Dana, 110, the court of appeals of Kentucky, following the decision in *Burnley v. Lambert*, held that the voluntary transfer of the defendant before suit did not defeat an action in replevin. It is there said: "According to the case of *Burnley v. Lambert*, the fact that the plaintiff was not possessed of the slaves when this suit was brought cannot change or affect the remedy, unless he had been legally evicted." This doctrine, if interpreted literally, may be too restrictive. But it seems to be free from just exception, if understood, as we suppose it ought to be, to mean that the plaintiff had been divested of the possession in a manner authorized by law, and which would therefore exonerate him from the charge of tortious conduct." It was held by the same court in *Caldwell v. Fenwick*, 2 Dana, 333, that detainee could not be maintained for a slave dead before the commencement of the action, though otherwise if he had died subsequent to the commencement of the action, or the defendant had improperly parted with his possession. The court said: "Detinue is a mode of action given for the recovery of a specific thing, and damages for its detention. Though judgment is also rendered in favor of the plaintiff for the alternate value, provided the thing cannot be had; yet the recovery of the thing itself is the main object and inducement to the allowance of the action. . . . The action is not adapted to the recovery alone of the value of a thing detained, nor can it be maintained therefor."

We have thus reviewed the leading cases in this country in reference to the circumstances under which an action of replevin can be maintained. None of them authorize the maintenance of the action under the circumstances of the present case. In all of them replevin is held to be essentially a possessory action. In many of the states it is unqualifiedly requisite for the maintenance of the action that the defendant should be in possession of the chattels sued for at the time the action was commenced. In others, as in our own state, an exception is made to the general rule where the defendant has voluntarily parted with the property. Still the exception goes only to the extent stated. The law in Virginia and Kentucky is substantially the same as our own, and the cases cited from those states are well reasoned on principle. The case at bar falls

within the rule stated in those cases,—that, where the defendant is evicted by legal process before suit brought, the action will not lie,—and we are therefore of opinion the disposition of the case by the courts below was correct. We have not overlooked the decision in *Devoe v. Brandt*, 53 N. Y. 462. In that case Samuels, the vendee, from whom the goods had been taken on execution, did not defend the action, and the question we have discussed did not arise. The action was unquestionably well brought against the other defendant, as he was in possession of the chattels at the time of the commencement of the suit.

It is urged that, whatever may have been originally the nature and character of an action of replevin, there is now no longer reason for maintaining a distinction between it and an action for conversion, and that it would conduce greatly to the speedy administration of justice to permit the use of the first form of action as a substitute for the second. A good deal may be said in favor of this claim, great as would be the innova-

tion resulting in its acceptance. There is, however, a serious objection to adopting this view of an action of replevin. If a defendant is arrested in an action to recover a chattel, he can be discharged only upon giving a bond for the return of the chattel, or the full payment of any judgment that may be recovered against him, while in an action for conversion the bond is conditioned only for his personal surrender to any mandate or final judgment against him. Code Civ. Proc. § 575. The form of the action, therefore, seriously affects the rights of the defendant against whom it is brought. While this consideration should not induce us to limit the scope of an action of replevin except within the bounds prescribed by statute and the authorities, it may well restrain us from taking any radical departure in the law.

*The judgment appealed from should be affirmed, with costs.*

**Parker, Ch. J., and Gray, Bartlett, Martin, Vann, and Werner, JJ., concur.**

## UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

**William S. JEWETT, Plff. in Err.,**  
v.

**UNITED STATES OF AMERICA.**

(41 C. C. A. 88, 100 Fed. 832.)

1. **Discrepancies between an order remitting a cause from a United States district court to a circuit court and the docket entry in the district court will not affect the validity of the remission.**
2. **Absence of a record of an indictment in a United States district court will not affect the jurisdiction of a circuit court to which the cause has been remitted.**
3. **The sending of the original indictment forward to the circuit court upon remission of a cause into it from the district**

court under the provisions of U. S. Rev. Stat. § 1037, is not such an irregularity as will defeat the jurisdiction of the former court.

4. **The insertion in a count of an indictment for misapplication of its funds by the agent of an insolvent bank, of the allegation that the conversion was done by some means and in some manner to the jurors unknown, will not render the count demurrable if it alleges that accused did unlawfully, fraudulently, and wilfully misapply and convert to his own use the assets of the bank, with intent then and thereby to injure and defraud the association.**
5. **One indicted for misapplying the assets of an insolvent bank under U. S. Rev. Stat. § 5209, may be declared against as president, director, and agent.**
6. **An agent appointed to wind up the**

**NOTE.**—*Removal of criminal causes into Federal courts from other Federal, or from state, courts.*

I. *From other Federal courts.*

II. *From state courts.*

a. *Power of Congress to authorize removals.*

b. *Removals under U. S. Rev. Stat. § 641, to protect Federal rights.*

1. *Terms of statute generally.*

2. *Local prejudices.*

3. *Discrimination as to jurors.*

4. *Effect of removal.*

c. *Removals under U. S. Rev. Stat. § 643, of causes against Federal officers.*

1. *Terms of statute generally.*

2. *Commencement of prosecution.*

3. *Who entitled to removal.*

4. *Effect of removal.*

d. *Removals under act of Congress of March 3, 1863.*

III. *From territorial courts.*

I. *From other Federal courts.*

The jurisdiction of the inferior Federal courts  
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is derived from, and is subject to, the absolute control of Congress, and may be changed or taken away at its pleasure. Existing courts may be abolished, and their jurisdiction, and all cases pending in them, whatever their condition, transferred to other existing courts or to new courts. And the constitutionality of an act of Congress authorizing the transfer of causes in such case is expressly upheld in *Stuart v. Laird*, 1 Cranch, 209, 2 L. ed. 115, where the court said: "Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper, and to transfer a cause from one such tribunal to another. In this last particular there are no words in the Constitution to prohibit or restrain the exercise of legislative power." This was a civil case, but, inasmuch as the source of jurisdiction of those courts is the same, whether the cause be of a civil or of a criminal nature, the argument would seem to be equally applicable. At any rate, the removal of criminal causes, as authorized by U. S. Rev. Stat. §§ 1037, 1038, from district to circuit courts, and *vice versa*, as set out in this section, seems never to have been resisted upon the ground that Congress had no power to authorize such removals.

affairs of an insolvent bank is subject to indictment under U. S. Rev. Stat. § 5209, in case he wilfully misapplies its funds, although such office was not created by statute, since it has long been recognized as permitted by law, and the word "agent" is used in the statute as descriptive of those subject to its provisions.

7. That an agent to wind up the affairs of an insolvent bank was appointed by vote of the stockholders does not make him their individual agent rather than the agent of the corporation, so as to take him out of the provisions of U. S. Rev. Stat. § 5209, which provides for the punishment of agents of banks who misapply the bank funds.
8. An indictment under U. S. Rev. Stat. § 5209, for wilfully misapplying bank funds, is not unsupported by the evidence because the funds were shown to be in defendant's possession, which makes the offense embezzlement, and the statute provides for the punishment of embezzlement or wilful misap-

plication of funds, since the term "wilful misapplication" covers embezzlement, and it is not necessary to construe the generic term so peculiarly as to exclude the narrower word preceding it.

9. The appellate court will not review a discrepancy between an indictment charging misapplication of funds on September 1, 1893, and proof showing the transaction to have been on November 1, 1894, where no exception was taken with reference to it, and there is nothing to show that any practical injustice was done by it in the trial of the cause.
10. The appellate court will not review a finding of the trial court that an agent for liquidating the affairs of an insolvent bank misapplied its funds by declaring and paying a dividend on stock belonging to himself, while he claims that it belonged to a third person, where there was persuasive evidence to go to the jury in favor of the finding,—among which was the nonproduction of

the inquiry in every case being whether the case was a proper one for the application of the statute.

U. S. Rev. Stat. § 1037, provides that whenever the district attorney deems it necessary any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged is cognizable by the district court. And, in like manner, any district court may remit to the next session of the circuit court of the same district any indictment pending in the district court. And such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all other proceedings in the same, had originated in that court.

And § 1038 provides that any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein.

The object of this legislation is twofold: First, speedy trials for persons charged with crime, and dispatch of the public business; and, second, to furnish a method by which questions of law arising in criminal causes in the district court can be taken to the higher courts. *United States v. Haynes*, 29 Fed. 691.

These sections apply exclusively to indictments, and to cases of which the circuit and district courts have concurrent jurisdiction; they have no application to a case in which the circuit court has no original jurisdiction; such, for instance, as a prosecution under the fugitive slave act of 1850. *Campbell v. Kirkpatrick*, 5 McLean, 175, Fed. Cas. No. 2,363.

And § 1037 does not authorize the district court to remit to the circuit court a criminal prosecution under an information filed in the district court. *United States v. Tiernay*, 16 Fed. 513.

The offense of selling spirituous liquors to an Indian in violation of an act of Congress, declared by act of Congress to be cognizable in the district courts, is, by virtue of the judiciary act of 1789, cognizable in the circuit court also, and may, under the above statute, be remitted by the district court to the circuit court. 53 L. R. A.

*United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182. The indictment in this case originated in the district court, and was remitted to the circuit court, from which it was certified to the Supreme Court on the question whether the offense charged was one of which the circuit court could have original jurisdiction; for, of course, under the statute, if that court did not have such jurisdiction the removal was improper; but the question was answered in favor of the circuit court's jurisdiction.

And the circuit court has jurisdiction of an indictment for assaulting and obstructing an enrolling officer, which, after remission to the district court on motion of the district attorney, has subsequently upon his motion been remitted back by the district court into the circuit court. *United States v. Murphy*, 3 Wall. 649, 18 L. ed. 217. The court said that they saw no reason, either in the nature of the transaction or in the language of the statute, why a cause so brought into the district court should not be sent back under the proper circumstances; that, as the order could only be made on motion of the district attorney, or whenever, in the opinion of the district court, difficult and important questions of law were involved, there was no danger of collision between the courts on account of such orders, and that, as they tended to the dispatch of business, and to sound decisions on legal propositions, there was no reason for limiting the rule further than the language of the statute required.

But the fact that there are questions of law involved which are new and have not yet been passed upon in the Federal courts does not necessarily clothe them with the qualities of "difficult" and "important." *United States v. O'Sullivan*, 9 N. Y. Legal Obs. 193, Fed. Cas. No. 15,973. In this case it was held also that this statute does not contemplate, nor would a district judge be justified in, remitting a cause to the circuit court because in his charge to the grand jury he had given a particular exposition to the crimes act, when it is not made to appear that his exposition is in conflict with that of any other court.

But under neither of these sections, nor under any provision of law, can the circuit court, of its own motion or on the application of the defendant, remit an indictment to the district court for trial. *United States v. Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571.

The power of the district court to remit an indictment into the circuit court "when in the opinion of the court difficult and important questions of law are involved in the case" may be exercised whenever the court shall have arrived

the check by which the money was paid, and the existence of uncollected indebtedness of the third person to the bank of more than the amount of the dividend.

(March 29, 1900.)

**E**RROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment convicting defendant of wilfully misappropriating funds of an insolvent bank to liquidate the affairs of which he had been appointed the agent. *Affirmed.*

The facts are stated in the opinion.

Argued before *Colt* and *Putnam*, Circuit Judges, and *Webb*, District Judge.

*Messrs. W. S. B. Hopkins and Hollis R. Bailey*, for plaintiff in error:

A certified copy of the indictment should have been sent, and not the original.

at the opinion that such questions are so involved, and there is no limitation of time when that authority may or may not be exercised; and the order of remission need not necessarily be made before any proceedings have been taken under the indictment. *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815. In this case the order was made at a term subsequent to that at which the indictment was returned, and after the defendant had pleaded and the jury was partially impaneled; and Judge Curtis said that in his opinion the power to remit might be exercised "after any proceedings have been had which do not amount to a bar to a future trial."

But the district court has no power, under § 1037, to remit an indictment to the circuit court after verdict. *United States v. Haynes*, 26 Fed. 857; *Re Haynes*, 30 Fed. 767. The history of this case, as shown by the opinions of the circuit court in the two citations just given, and by the opinion of the district court in 29 Fed. 691, shows that the circuit court had held in 26 Fed. as above stated, and had also arrested the judgment of conviction of the district court, holding the order of remission to be a violation of the 7th Amendment to the Federal Constitution, providing that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." Subsequently the district court vacated the order of remission to the circuit court, and the latter court directed the papers to be returned into the district court. The district court afterwards ordered warrant to issue, and passed sentence on the defendant. This is set forth in 29 Fed., where District Judge Nelson disagreed with the circuit court in holding the order to be a violation of the 7th Amendment, and insisted that an indictment was pending for purposes of remission, even after verdict of conviction, although not after verdict of acquittal, and quoted in support of his contention the language of Judge Curtis in *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815, *supra*, but said that the ruling of the circuit court, denying the power of the district court to remit after verdict, was the law of the case, and that the order of the circuit court arresting the judgment was in effect an arrest for want of jurisdiction in that court, and the district court still had jurisdiction of the case. In 30 Fed., on petition for habeas corpus, the circuit court reiterated their holding of 26 Fed., stating that they took no jurisdiction by reason of the remission, that their order arresting the judgment was a nullity for lack of jurisdiction, and that it was proper for them to return the indictment to 53 L. R. A.

*United States v. McKee*, 4 Dill. 1, Fed. Cas. No. 15,687; *State v. Gibbons*, 4 N. J. L. 40.

An agent in liquidation is not an agent of the bank within the meaning of § 5209, U. S. Rev. Stat.

*United States v. Britton*, 107 U. S. 662, 27 L. ed. 523, 2 Sup. Ct. Rep. 512; *Richmond v. Irons*, 121 U. S. 28, 30 L. ed. 866, 7 Sup. Ct. Rep. 788; *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 1 L. R. A. 781, 19 N. E. 353; *First Nat. Bank v. Marshall*, 26 Ill. App. 440; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

A statutory agent in liquidation, appointed under the act of June 30, 1876, as amended by the act of August 3, 1892, is an "officer of the United States" in the technical sense, and a suit brought by him is,

the district court for final disposition. In this instance Judge Nelson concurred in the result, but insisted that the orders of remission were nullities, and that the district court had never lost its jurisdiction.

And in *United States v. Cummins*, 3 Pittsb. L. J. 405, Fed. Cas. No. 14,901, appears a statement by one of the counsel that the judge of the circuit court had decided that after conviction a case could not properly be certified from one court to the other.

It is not necessary, under § 1037, that the original indictment be transmitted into the circuit court, but it is sufficient if a certified copy thereof be sent up with the record and order of remission. *United States v. McKee*, 4 Dill. 1, Fed. Cas. No. 15,687. In this case the court said: "When our statute provides for the remission of the indictment, it may well be construed to mean an exemplified copy or record of the indictment, to be sent with the other records pertaining to the case. It is just as important, or as little important, that the original bill of indictment found at the sessions should be in the King's bench for the trial of the defendant thereon by a jury, as that it be in the Federal court to which a criminal case has been sent by the court to which the indictment was originally presented. It is essential to the jurisdiction of the district court that the indictment should have been presented to it by a grand jury impaneled in that court, and these facts ought to appear of record therein. If that court acquired no jurisdiction before the order remitting the indictment, the circuit court could acquire none in consequence of the filing of the order of remission."

But, as held by *Jewett v. United States*, the fact that no record of the indictment was made in the district court does not affect the jurisdiction of the circuit court. Nor was it held error that the district court sent into the circuit court the original indictment as part of the record.

The practice under both sections is for the court to which the indictment has been remitted to proceed with the case from the point it had reached in the other court. *United States v. Haynes*, 29 Fed. 691.

And where an indictment is transmitted from the district court to the circuit court, under § 1038, although after the defendant has pleaded, the circuit court has jurisdiction of the case and of the questions arising upon the pleas. *United States v. Richardson*, 28 Fed. 61. In this case the pleas all related to the method of drawing and summoning two of the grand jurors who returned the indictment.

So, where a prosecution has been certified



in the technical sense, a suit "arising under the laws of the United States," and may for that reason be brought in the Federal court.

*McConville v. Gilmour*, 1 L. R. A. 498, 36 Fed. 277; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

If this is true of a shareholder's agent in liquidation appointed under the act of June 30, 1876, why is it not equally true of a shareholder's agent in liquidation appointed under U. S. Rev. Stat. § 5220?

If an agent in liquidation is an officer of the United States, he is certainly a very different functionary from any of the officials mentioned in U. S. Rev. Stat. § 5209.

When a receiver is appointed by the controller the appointment supersedes the power of the directors to exercise the incidental powers necessary to carry on the business

of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and the association is forbidden to prosecute the business of banking.

*First Nat. Bank v. National Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840.

The same is equally true in the case of the appointment of an agent in voluntary liquidation.

Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute.

*United States v. Brewer*, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; *United States v. Lacher*, 134 U. S. 624, 33 L. ed.

from the circuit to the district court, under § 1037, the circuit court may order the clerk thereof to correct the record so as to conform to the facts. *Kelly v. United States*, 27 Fed. 618.

## II. From state courts.

### a. Power of Congress to authorize removals.

The constitutional power of Congress to authorize the removal before trial of civil causes arising under the laws of the United States has long since passed beyond doubt. The judiciary act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution. And, though some doubts were soon after suggested whether causes could be removed from state courts before trial, the Supreme Court of the United States, in *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97, and *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 267, clearly recognized the power of Congress to authorize removals either before or after trial. And Congress, by additional grants from time to time, has authorized more and more fully, as occasion has required, the removal before trial of civil causes from state into Federal courts.

It is true the act of 1789 authorized the removal of civil cases only. But the statutes have not been confined to civil causes. In 1815 an act of Congress (3 Stat. at L. 195) made provision for removing suits or prosecutions against persons therein enumerated. This act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by a subsequent act (3 Stat. at L. 233, § 6), and re-enacted in 1817 for a period of four years.

And in 1833 President Jackson recommended that Congress should re-enact the act of 1815, with some amendments, and accordingly the act of March 3, 1833, was passed (4 Stat. at L. 432), § 3 of which received its final shape from an amendment proposed in the senate by Thomas Ewing, of Ohio, and is repeated in U. S. Rev. Stat. § 643 (set out *infra*, II. c.). That statute undoubtedly embraced both civil and criminal causes. It was so understood and intended when it was passed, although *Ex parte Carson*, 4 Hughes, 215, Fed. Cas. No. 2,459, held that § 3 of that act applied only to civil cases. The chairman of the judiciary committee, who introduced the bill, said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the state tribunals. Whether in criminal or civil cases, it gives the

right of removal." President Jackson approved this statute, his legal adviser at the time being Roger B. Taney. It remained in force until 1874.

Again, the provisions of the act of July 13, 1866 (14 Stat. at L. 171, § 67), relative to the removal of suits or prosecutions in state courts against internal revenue officers,—provisions re-enacted in U. S. Rev. Stat. § 643 (*infra*, II. c).—are almost identical with those of the act of 1833, the only noticeable difference being that in the later act the adjective "criminal" is inserted before the word "prosecution." This made no change in the meaning. The well-understood legal signification of the word "prosecution" is a criminal proceeding at the suit of the government. 2 Bouvier, Law Dict. 784; Century Dict. title *Prosecution*.

It would thus appear that all along our history the legislative understanding of the Constitution has been that it authorizes removing from state courts into the circuit courts of the United States alike civil and criminal causes arising under the laws, the Constitution, or the treaties. This is pointed out in *Findley v. Satterfield*, 3 Woods, 504, Fed. Cas. No. 4,792, where Judge Woods says: "We should not feel at liberty to pronounce unconstitutional a course of legislation so long continued, so deliberately maintained, sanctioned by so many venerated names and by the general approbation of the country, unless its unconstitutionality was made very clear to our minds." This is also referred to as of weight in *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648.

But, aside from this long-continued course of action by Congress, the fact that these statutes are fully warranted by the fundamental law has been decided in cases directly involving their constitutionality.

As stated, the first criminal case, removal of which was resisted on the ground that Congress has no constitutional power to authorize it, was *Findley v. Satterfield*, 3 Woods, 504, Fed. Cas. No. 4,792, where the prisoner sought to have an indictment against him removed under the provisions of § 643 (*infra*, II. c). In disposing of the question, Judge Woods says: "The judicial power extends to all cases arising under the laws of the United States. It is argued that no criminal case can arise under those laws, except when a person is accused of violating them. But we think that, when an officer executing in a lawful manner a law of the United States meets with resistance, and, to overcome that resistance, uses necessary force, and, for such use of force, is charged with crime against the state, the case arises under the law of the United States. To hold that a case arises

1080, 10 Sup. Ct. Rep. 625; Black, Interpretation of Laws, ed. 1896, p. 286.

An accusation of crime should not be in doubtful terms, or in outline indistinct, but it should be certain.

1 Bishop, New Crim. Proc. § 323.

An indictment is bad if its meaning is equivocal,—as, if the allegation is that the defendant did one or the other of two criminal things,—or the language may be equally as well construed to charge a civil wrong as a criminal one.

*Batchelor v. United States*, 156 U. S. 429, 39 L. ed. 479, 15 Sup. Ct. Rep. 446; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *United States v. Eno*, 56 Fed. 218; *United States v. Warner*, 26 Fed. 616.

What is required of the government is clear and precise averments, and their ab-

sence will not be supplied by vituperative generalities.

*United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. Rep. 294; *United States v. Greve*, 65 Fed. 488.

Something essentially different from embezzling or abstracting is meant by "wilfully misapplying."

*United States v. Cadwallader*, 59 Fed. 677; *United States v. Fish*, 24 Fed. 591; *United States v. Harper*, 33 Fed. 472; *United States v. Youtsey*, 91 Fed. 864; *United States v. Britton*, 107 U. S. 666, 27 L. ed. 524, 2 Sup. Ct. Rep. 512.

In count 84 the averment is that the said Jewett acted as president, director, and agent. The evidence was that he acted only

under that law when it forbids the act under investigation, but does not arise under that law when it produces and justifies the act under investigation, is to take the words of the Constitution in a sense too partial and limited. Congress can give criminal jurisdiction to the courts of the United States when the law of the United States is the ground of defense, as well as when it is the ground of accusation. Congress has power to levy and collect taxes and excises, and to make all laws necessary and proper to carry that power into execution. This includes the power to employ suitable officers and agents, and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty. We cannot say that this protection is not necessary and proper for the prompt and effective collection of the revenue. It is obvious that, where a local sentiment adverse to a particular revenue law could exert itself in irremovable prosecutions in the local courts against persons executing that law, the collection of the revenue might be seriously impeded. Congress has thought proper to guard against such impediments by the law that we are now considering, and we are satisfied that it is a constitutional means to a constitutional end."

The next case to uphold the constitutionality of this statute is *State v. Hoskins*, 77 N. C. 530. There the question was considered first as one of comity, the court arguing thus: "The state, a sovereign, claims that the defendant has trespassed upon its rights; the United States, a sovereign, claims that the defendant was its officer and acting under its orders, and for the purposes of the demand assumes the responsibility of the act complained of, and demands its officer in order that it may investigate his conduct, and punish or protect him as he may deserve. Now, what ought the state to do? Ought it to hold the officer and punish him, although he was acting under orders and is justified by his government? That would be pusillanimous. Sovereigns do not quarrel with servants, but with sovereigns, when they are angry. And when they are friendly they defer to each other the control of their own servants." It was also argued that the statute did not contemplate criminal causes, because it did not provide how they should be removed; but the court pointed out that this was a mistaken conception of counsel, and that, on the contrary, the statute very clearly provided the manner of removal. Finally, it was urged that the statute is a violation of the rights of the state; but the court in a very able and extended discussion refused their sanction to that view, saying that

where a Federal officer is charged with a duty, and does acts under color of his duty which but for his office would be a crime against the state, the power to then assert its jurisdiction and remove the cause into its own tribunals for trial is indispensable to the United States, and is in no way derogatory to the state. In this case *Rodman, J.*, dissented.

And in *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648, it was held that, not only is such removal no invasion of the state domain, but that, on the contrary, a denial of the right of the general government to remove such causes, to take charge of and try any cause arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it; the court arguing further that, as said in *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97, *supra*, "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." In this case *Clifford and Field, JJ.*, dissented.

And in *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 684, the question considered was whether the power of Congress to enforce the provisions of the 14th Amendment, relative to the protection of Federal rights, by appropriate legislation, was sufficient to justify the enactment of § 641 (*infra*, II. b. 1); and it was held that a very efficient and appropriate mode of extending such protection and securing to the party the enjoyment of such rights or immunities is a law providing for the removal of the case from the state court in which the right is denied by the state law, into a Federal court, where it will be upheld; and that § 641 is such a provision.

And in *Ex parte Reynolds*, 3 Hughes. 559, Fed. Cas. No. 11,720, this statute is held constitutional.

Having thus far considered the power of Congress to authorize removal of criminal causes, it now remains to be seen what particular causes are so removable under such statutes.

#### b. Removals under U. S. Rev. Stat. § 641, to protect Federal rights.

##### 1. Terms of statute generally.

A Federal statute (U. S. Rev. Stat. § 641) provides that "when any . . . criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending,

as agent in liquidation. This was a variance; having alleged three capacities, the government was bound to prove them all.

*Ewing v. Orane*, Circuit Court; *Hawes, Parties to Actions*, § 4; *Cassels v. Vernon*, 5 Mason, 333, Fed. Cas. No. 2,503; *Lawson v. Kolbensohn*, 61 Ill. 417; *Com. v. Grey*, 2 Gray, 501, 61 Am. Rep. 476.

*Messrs. Boyd B. Jones and John H. Casey*, for defendant in error:

The natural import of the language of § 1037, U. S. Rev. Stat., is that the indictment itself shall be transmitted.

The practice in this circuit has been to transmit the original.

*United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; *United States v. Haynes*, 29 Fed. 691, 30 Fed. 767; *United States v. Richardson*, 28 Fed. 61.

An indictment may be remitted under the

section in question by one court to the other, and then remitted back into the court in which it was found.

*United States v. Murphy*, 3 Wall. 649, 18 L. ed. 217.

The right to go into voluntary liquidation necessarily implies the right to have the process carried on by its officers or agents.

Officers of a corporation, whose powers are conferred by statute, cannot lawfully exceed their statutory authority.

*Com. v. Ruggles*, 6 Allen, 588.

Boards of directors are agents of the corporation only so far as authorized, directly or impliedly, by the charter.

*Angell & A. Priv. Corp.* § 280; *Morawetz, Priv. Corp.* § 512; *Chicago City R. Co. v. Allerton*, 18 Wall. 233, 21 L. ed. 902.

Voluntary liquidation is effected by an agent of the association. The statutes do

any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the causes, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending."

The remainder of this section makes provision for the removal of the papers and the effect on the proceedings in the state court (see *infra*, II. b, 4), and § 642 provides for the issuance of a writ of habeas corpus cum causa for the delivery of an imprisoned defendant into the custody of the United States court.

And the act of Congress of August 13, 1888, chap. 866, § 5, further regulating the removal of causes from state to Federal courts, expressly exempts from the repealing clause in that chapter, and continues in force, this § 641.

A petition for the removal of a criminal cause under this statute must be filed before the trial or final hearing thereof. *Ex parte Reynolds*, 3 Hughes, 559, Fed. Cas. No. 11,720.

And a petition filed after verdict and sentence comes too late. *Bush v. Com.* 80 Ky. 244. This case also holds that an inspection of the petition by the appellate court is essential to determine whether or not it contained allegations sufficient to authorize the removal, and that in its absence the appellate court will presume that it was defective in the allegation of jurisdictional facts, and therefore that the court below did right to disregard it.

An indictment for fornication, of a white man and a negro woman who, pending the indictment, are married in a state not prohibiting marriages between white and colored persons, and who immediately return to the state where they are indicted, is not removable into the Federal circuit court under § 641. *Georgia v. Tutty*, 7 L. B. A. 50, 41 Fed. 753.

So, criminal proceedings for maintaining a liquor nuisance as described in Iowa Code, § 1543, are not removable under § 641, upon the ground that the liquors kept and sold were manufactured in other states and purchased there by the accused in the usual course of trade, and that the Federal taxes had been paid thereon by the manufacturer and also by the accused as a 53 L. R. A.

retail dealer. *Stommel v. Timbrel*, 84 Iowa, 336, 51 N. W. 159.

And in *Schmidt v. Cobb*, 119 U. S. 286, 30 L. ed. 321, 7 Sup. Ct. Rep. 1373, and *O'Malley v. Farley*, 119 U. S. 296, 30 L. ed. 323, 7 Sup. Ct. Rep. 1373, also, criminal proceedings for maintaining liquor nuisances as described in Iowa Code, § 1543, the defendants petitioned for removal of the causes into the Federal court under § 641, but the Federal court remanded the causes upon the ground that no Federal question was involved; and upon appeal from such order of remandment to the Supreme Court that court affirmed it by a divided court.

## 2. Local prejudice.

The existence of a general prejudice against a person indicted in the state court, on the part of the court, the jurors, the officials, and the people, is not ground for removing the cause to the Federal court under § 641. *Ex parte Wells*, 3 Woods, 128, Fed. Cas. No. 17,886.

And a prosecution against a Chinaman for having in his possession a lottery ticket in violation of a law which applies to all persons is not removable from a state to the Federal court under § 641, on the ground of local prejudice or maladministration of the law. *California v. Chue Fan*, 14 Sawy. 577, 42 Fed. 865.

Nor is the existence in the locality in which an indictment for crime may be found against a negro, of a sentiment and prejudice hostile to him because of his race and color, cause for removing the indictment for trial from the state to the Federal court, where the laws of the state otherwise secure to him full protection of all his rights, and the state, through none of its agencies, otherwise denies to him equal protection under the laws. The Federal statute (§ 641) was intended only to afford protection against an infringement of the equal rights of citizens of the United States by state action, and by that action alone. It does not refer to other obstructions of right, such as personal or class prejudice, or political feeling and the like. *Ex parte State*, 71 Ala. 363.

So held, also, in *State v. Smalls*, 11 S. C. 262, on the petition of a negro who was formerly a slave and afterwards a captain and pilot in the service of the United States, and who alleged that for that reason great prejudice existed against him in the county where the indictment was found.

And this was also held in *Thomas v. State ex rel. Stepney*, 58 Ala. 365,—a proceeding to disbar a negro attorney at law for misconduct, where the defendant asserted that because of his race and color, and because of his republican

not give to the directors power to appoint the agent.

*Angell & A. Priv. Corp.* § 277.

The funds of a bank remain its property until they have been distributed and liquidation has been accomplished.

*Id.* §§ 100, 190, 557; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449.

Even when an agency is unauthorized by law, or is for an unlawful purpose, the agent may be guilty of embezzling funds received by virtue of his illegal employment.

*Com. v. Smith*, 129 Mass. 104; *Com. v. Cooper*, 130 Mass. 285.

A misapplication of the funds of an association is not an offense if the funds are not converted to the use of some person other than the association.

The indictment should charge a criminal misapplication, *viz.*, a misapplication of the

funds of the association to the use of some person other than the corporation, with intent to defraud the association or some other corporation or person.

*United States v. Eno*, 56 Fed. 218; *United States v. Britton*, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. Rep. 512; *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580; *Claassen v. United States*, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 831, 14 Sup. Ct. Rep. 934, 939; *Batchelor v. United States*, 156 U. S. 426, 39 L. ed. 478, 15 Sup. Ct. Rep. 446; *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.

**Putnam**, Circuit Judge, delivered the opinion of the court:

Jewett, the plaintiff in error, was the

politics, he could not have as full and equal protection under, and benefits of, the state laws as could a white man, and that the public prejudice against him for said causes was so great that it would be impossible for him to obtain a fair and impartial trial in the state court.

And to the same effect under the act of Congress of 1866, see *Texas v. Gaines*, 2 Woods, 342, Fed. Cas. No. 13,847 (indictment of negro for bigamy). "It is clear," said the court in this case, "that, in order to entitle to a removal of the cause, the case must show the deprivation of a right guaranteed by the 1st section of the act. The defendant says that he is deprived of such a right, and that the right of which he is thus deprived is 'full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens.' But how does he say he is deprived of that right? Not by the laws themselves, but by the prejudice and enmity of the people. Is that sufficient? What says the 3d section? How does it describe and define those who are within the meaning of the act? It defines them as 'persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the 1st section of this act.' Here are two classes: (1) Persons who are denied any of the rights secured to them by the 1st section of the act; (2) persons who cannot enforce in the courts any of said rights. Does the denial of rights or the inability to enforce them in the courts refer to a denial by the laws, usages, and customs of the state, and to an inability to enforce rights in the courts in consequence of inadequate remedies to that end; or does it refer as well to other obstructions of right, such as personal or class prejudice, or political feeling and the like? It must be remembered that the privilege of removal is thus guaranteed to every citizen of the United States, as well white as black. And if every citizen who is prosecuted in a state court can, on his own allegation, remove his case to the United States courts, it will present a powerful temptation to litigants, especially of the criminal class, and the United States courts will be flooded with cases in which one of the parties imagines, or says, that he cannot have a fair trial in the state courts. We cannot think that this is the true construction of the statute."

The only opinion to the contrary seems to have been expressed in *State v. Dunlap*, 65 N. C. 491, 6 Am. Rep. 746, arising under the act of 1866, in which the court considered that the operation of the act extended, not merely to discrimination by laws, but to discrimination arising from prejudice in the community; in this 53 L. R. A.

instance race and political prejudice. But in this case the order of the lower court for a removal was modified so as to provide that the state court "will proceed no further in the prosecution until certified of the action of the circuit court of the United States, according to the provisions of the act of Congress of March 3, 1863." The opinion adds, "This opinion will be certified to the end that such proceedings may be had as are agreeable to law." This doubtless means that the opinion was to be certified to the Federal court. If this is to be regarded as an express decision that the discrimination by local prejudice was a ground for removal, it is contrary to the decisions of the Federal courts above referred to.

### 3. Discrimination as to jurors.

The denial or inability to enforce in the judicial tribunals of the state the right secured to a defendant by any law providing for the equal civil rights of all persons, citizens of the United States, of which § 641 speaks, is primarily, if not exclusively, a denial or an inability resulting from the Constitution or laws of the state, rather than a denial first made manifest at the trial. In other words, that statute has reference to a constitutional or legislative denial, or an inability resulting from it. By express requirement of the statute the applicant must set forth, under oath, the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. In the absence of constitutional or legislative impediments he cannot swear before trial that his enjoyment of his civil rights is denied to him. *Virginia v. Rives*, 100 U. S. 313, *sub nom. Ex parte Virginia*, 25 L. ed. 667, where it is held that the Constitution and laws of Virginia do not exclude colored citizens from service on juries, and that the petition for removal in that case did not present a case for removal under § 641.

And in *Stommel v. Timbrel*, 84 Iowa, 336, 51 N. W. 159, it was said that cases are not transferable in anticipation that the state court may on the trial deny such rights; that for such denials the remedy is by appeal.

And a criminal prosecution of a colored person cannot be removed from a state into a Federal court under § 641 because jury commissioners or their subordinate officers have, without authority derived from the Constitution and laws of the state, excluded colored citizens from juries because of their race. *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Smith v. Mississippi*, 162 U. S. 592.

president of the Lake National Bank of Wolfeborough, and, without formally resigning that office, he was constituted the agent of the association to close its affairs in liquidation, as provided by § 5220 of the Revised Statutes. The offenses with which he is charged occurred while he was acting as such agent. At a term of the district court for the district of Massachusetts, Jewett was indicted for violation of § 5209 of the Revised Statutes. The indictment was remitted to the circuit court, accompanied with the following order:

May 14, 1897.

District Court of the United States, }  
District of Massachusetts } ss.

And now, it appearing to the court that the district attorney deems it necessary, it is ordered that this indictment be remitted

to the next term and session of the circuit court of the United States for this district.

Attest: Frank H. Mason, Clerk.

The indictment included 96 counts. The bill of exceptions says that 13 offenses were charged in the first 78 counts. We are not informed how many offenses were charged in the remaining 18 counts. During the trial the United States, with the consent of the accused, nol pros'd all but 7 counts. At what stage of the trial this took place the record does not show. The jury found a verdict of guilty on counts 84 and 95, and disagreed as to the other counts submitted to them. Count 84, the only one with which we will deal, laid a date of the 1st day of September, 1893, and charged that on that date Jewett had constant and free access to all the assets of the association, consisting

40 L. ed. 1082, 16 Sup. Ct. Rep. 900; Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; Dixon v. State, 74 Miss. 271, 20 So. 339.

These cases in effect overrule *Ex parte Reynolds*, 3 Hughes, 559, Fed. Cas. No. 11,720.

Such exclusion, however, if made by the jury commissioners without authority derived from the Constitution and laws of the state, was a violation of the prisoner's rights under the Constitution and laws of the United States, which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in the Federal Supreme Court upon writ of error to the state court. Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

When actual exclusion by the officer of the state is relied upon it must be availed of in the state court itself, whose ruling may be reviewed by appellate courts of the state and then by the Supreme Court of the United States. Cooper v. State, 64 Md. 40, 20 Atl. 986.

So, the organization of a grand jury under a state statute which is not applicable to the case furnishes no ground for removing the cause into the Federal court under § 641, unless the statute whose provisions were followed, either expressly or by necessary operation, denied the accused some Federal right. Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904. "It is not every denial by a state enactment," said the court in this case, "of rights secured by the Constitution or laws of the United States, that is embraced by § 641 of the Revised Statutes. The right of removal given by that section exists only in the special cases mentioned in it. Whether a particular statute which does not discriminate against a class of citizens in respect of their civil rights is applicable to a pending criminal prosecution in a state court is a question, in the first instance, for the determination of that court, and its right and duty to finally determine such a question cannot be interfered with by removing the prosecution from the state court, except in those cases which, by express enactment of Congress, may be removed for trial into the courts of the United States. If that question involves rights secured by the Constitution and laws of the United States, the power of ultimate review is in this court whenever such rights are denied by the judgment of the highest court of the state in which the decision could be had. As the judges of the state courts take an oath to support the Constitution of the United States as well as the laws enacted in pursuance thereof, and as that Constitution and those laws are of supreme authority, anything in the Constitution or laws of any state to the contrary notwithstanding, 53 L. R. A.

standing, 'upon the state courts equally with the courts of the Union rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination.'"

And the fact that a state statute prescribing the mode of selecting and drawing jurors is so framed that the officers intrusted thereunder with the duty of drawing jurors may manipulate it in such manner as to secure a jury inimical to the accused is not ground for removing a criminal cause from the state to the Federal court under this statute. *Ex parte Wells*, 3 Woods, 128, Fed. Cas. No. 17,386. In this case Mr. Justice Bradley said: "The 14th Amendment to the Constitution, which guarantees the equal benefit of the laws, on which the present application is based, only prohibits state legislation violative of said right. It is not directed against individual infringements thereof. The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression, but still only when committed under color of some 'law, statute, ordinance, regulation, or custom.' And when that provision in this law, which is transferred to § 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court against a person who is denied or cannot enforce any of the rights secured by the act, it had reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation, or custom. It is only when some such hostile state legislation can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the Federal court."

But a statute which in effect singles out and denies to colored citizens the right and privilege of participating in the administration of the law as jurors because of their color, though qualified in all other respects, is a discrimination against the colored race, forbidden by the 14th Amendment, and amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the state, and entitles him to have the prosecution removed into the Federal

of certain credits, certain money, divers promissory notes, divers certificates of deposit, divers gold coins, and divers silver coins, of all of which a more particular description was alleged to be to the jurors unknown. It, however, alleged for each class of assets values of \$10,000, \$3,000, or \$1,000. The count charged that on the day named Jewett misapplied all of the assets described. In support of this count the United States at the trial relied on alleged dealings of Jewett on or about November 1, 1894, to the amount of \$4,000, which Jewett claimed to have paid to one A. E. Butler. In what way it could be maintained that the grand jury in this count, laying a transaction under date of September 1, 1893, with no other particular description whatever, unless the sums to which we have referred, of \$10,000, \$3,000, and \$1,000, and without

any mention of A. E. Butler, could be supposed to have had reference to a transaction of November 1, 1894, to the amount of \$4,000, claimed to have been paid to Butler, it is difficult to understand. We will show, however, at the proper place, that this does not raise any question over which we have jurisdiction.

The first matter brought to our consideration is the alleged invalidity of the remission of the indictment to the circuit court. This was made under § 1037 of the Revised Statutes. The order of the district court which we have recited conforms to that section. The plaintiff in error calls our attention to some discrepancies between this order and the docket entry in the district court appertaining to the same matter; but it is settled law that, while a docket entry may temporarily be accepted as the record,

court under § 641. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664.

The Constitution of Delaware, adopted in 1831, the wording of which has never been changed, gave the right of suffrage, with a few special exceptions, to free white male citizens. And the jury statute of that state, adopted in 1848 and never repealed, restricts the selection of jurors to those qualified to vote at a general state election. But in *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567, it was held that the legal effect of the adoption of the amendments to the Federal Constitution, and the laws passed for their enforcement, was to annul so much of the state Constitution as was inconsistent therewith, including the provision confining suffrage to the white race; and thenceforward the jury statute was enlarged in its operation so as to render colored citizens, otherwise qualified, competent to serve on juries in state courts. The court said that the presumption should be indulged in the first instance that the state recognizes, as its plain duty, an amendment to the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced within its limits without reference to any inconsistent provisions in its own Constitution or statutes; and that in that case the presumption was strengthened and became conclusive, not only by reason of the direct adjudication of the state court recognizing the modification of the state Constitution because of the Federal amendments, but by the entire absence of any statutes, since the adoption of the amendments, indicating that the state, by its constituted authorities, did not recognize in the fullest legal sense their legal effect upon the state Constitution and statute.

But this presumption, that a state has recognized the 14th Amendment as binding on its citizens and its government, is overthrown by the fact that twice after the ratification of that amendment the state enacted laws which in terms excluded citizens of African descent, because of their race, from service on grand and petit juries. *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625.

#### 4. Effect of removal.

This statute also provides that upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as therein provided.

But the mere presentation of a petition for the removal of a criminal cause from the state court to the Federal court is not sufficient to arrest the jurisdiction of the state court, and 53 L. R. A.

that court still has the right to examine into the sufficiency of the petition; and the Federal court has the right to re-examine the petition, and, if found sufficient, to issue a writ of certiorari or other writ for the removal from the state court. *Es parte Wells*, 3 Woods, 128, Fed. Cas. No. 17,386.

The jurisdiction of the state court is not ousted by the mere application for removal to the Federal court. It is only when the application is in proper form, conforms to the Federal statute authorizing the removal, and states facts bringing the case within the provisions of that statute, that it becomes the duty of the state court to yield obedience to the paramount law and to cease the exercise of its original jurisdiction. It may err in determining that the application presents a case in which it either ought or ought not to cease its original jurisdiction; that determination is subject to the jurisdiction and sentence of the Federal court when the case finds its way into that court. The Federal court must determine its own jurisdiction, and whatever it may determine is the law of the court of the state. A state court from which an indictment is sought to be removed to a Federal court has unquestioned jurisdiction to determine upon the petition whether a case is presented which requires that it shall cease jurisdiction and transmit the cause for trial to the Federal court. *Es parte State*, 71 Ala. 363.

In *Virginia v. Rives*, 100 U. S. 313, *sub nom. Es parte Virginia*, 25 L. ed. 667, however, it is held that the petition for removal is required to be filed in the state court, and is of itself notice to that court, and therefore upon the filing of such petition all further proceedings in the state court cease, and if the petition shows sufficient ground for removal the case is in legal effect removed. But, while the court so holds, the decision is not clear upon the question of the power of the state court to determine, in the first instance, whether the petition presented made a case for removal and arrested the jurisdiction of that court, but the court would seem to incline to the view that such power did exist, inasmuch as it expressly says that that is a material inquiry.

Under a similar provision for removal, in the act of April 9, 1866, preceding the Revision further proceedings in the state court were ordered suspended until that court was certified of the action of the circuit court of the United States, according to the provisions of the earlier act of March 3, 1863, to which the act of 1866 refers for procedure. *State v. Dunlap*, 65 N. C. 491, 6 Am. Rep. 746.

But the filing of a petition for removal un-

yet it is of no consequence, and cannot be read, after the record is properly extended. The plaintiff in error also says that no record of this indictment was made in the district court, but we are not concerned with this, because errors of this nature could not affect the jurisdiction of the circuit court.

The only serious question raised in this connection grows out of the fact that the original indictment was sent to the circuit court. It is claimed that it should have been retained in the district court, and only a transcript sent up. The practice in the several states in this particular is so variant that nothing can be deduced from it which will enable us to declare that bringing up either the original indictment or the tenor of it would be irregular. The cases are cited in a note to 1 Bishop New Crim. Proc. § 73. This varying practice may well

be thought to grow out of the rule by which, on writs of error, the tenor of the record is often regarded as the record proper, and out of the further fact that whether the record itself should be removed, or only a transcript sent up, was at times, at the common law, a mere question of convenience or safety. Yet, wherever the court into which the record was to be removed on error had jurisdiction to proceed to execution, the original record was usually brought up. 3 Bacon, Abr. *Error*, D. 2; Tidd, Pr. 1st Am. ed. 1135, 1136. Indeed, so strictly was this observed, that in the House of Lords, which did not proceed to execution, though it could, the chief justice attended with both the original record and a transcript of it, afterwards returning the original to the King's bench. As the exchequer chamber could not proceed to execution, there was never a semblance

der § 641, which falls to show upon its face that the petitioners are denied by some constitutional or legislative provision any Federal right or immunities, does not deprive the state court of jurisdiction. And where a cause removed to the Federal court has by the latter court been remanded to the state court, an appeal from the order of remandment will not deprive the state court of jurisdiction to proceed with the trial, where no supersedeas order is made or bond filed. *Stommel v. Timbrel*, 84 Iowa, 336, 51 N. W. 159.

But where an indictment has been, by an order of removal, transmitted from the state to the Federal court, upon the latter court devolves the duty of determining its own jurisdiction; and it is not concluded or affected by the sentence of the court having original jurisdiction. And if the Federal court determines that it has not jurisdiction, and remands the cause to the state court, the indictment is in the same plight and condition in which it was when the erroneous order of removal was entered. And the failure of the state court to proceed in the prosecution while it was awaiting disposition in the Federal court, and until that court made the order of remandment, does not work a discontinuance. *Ex parte State*, 71 Ala. 363.

And the removal, under § 641, of an indictment from the state into a Federal court where it is quashed, does not divest the state court of jurisdiction thereafter to find a new indictment and to try the prisoner for the crime charged; and an order directing the prisoner to be returned to the county in which he was originally indicted, that the state authorities may take such further action as they deem expedient, is proper. *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625.

This case further holds that after the decision of the court of last resort of the state, that a state statute excluding citizens of African descent from a grand or petit jury because of their race or color was unconstitutional, a second indictment for an offense, the first indictment for which was removed into the Federal court and there quashed because of such state statute, is not removable into the Federal court for trial under § 641. If any right of the accused under the Constitution or laws of the United States is denied by the state court on the trial, his remedy is through the revisory power of the highest court of the state, and ultimately through that of the United States Supreme Court. Compare same case, 80 Ky. 244, *supra*. 53 L. R. A.

c. *Removal, under U. S. Rev. Stat. § 643, of causes against Federal officers.*

#### 1. *Terms of statute generally.*

The Federal statute (U. S. Rev. Stat. § 643) regulating the removal of suits and prosecutions against revenue officers and officers acting under registration law provides that "when any . . . criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against . . . any officer of the United States, or other person, on account of any act done under the provisions of title XXVI., *The elective franchise*, or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions,—the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or another process except capias, the clerk of the circuit court shall issue a writ of certiorari to the state court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is or

of remitting to it more than a transcript of the record. Tidd, Pr. 1st Am. ed. 1135. The same methods of procedure existed at common law on certiorari to remove an indictment for trial to the King's bench from an inferior court. 2 Bacon, Abr. *Certiorari*, H. Usually the original indictment was returned, unless the court which issued the certiorari had no jurisdiction to proceed on the record. It is an expressive fact that it is stated as exceptional that the return of the tenor of an indictment from London was sufficient. The forms of writs of certiorari, and of the returns thereto, in Lilly's Modern Entries, correspond to the practice thus stated.

The provisions of law under which this indictment was removed are stated somewhat more fully in the original act of August 8, 1846 (9 Stat. at L. 72), than in the

corresponding § 1037 to 1039 of the Revised Statutes; yet there is no essential difference, and the substance of the original statute is found in its revision. It is to be noticed as a fact of some consequence that in all the provisions of statute with reference to the removals of suits from the state courts to the circuit courts, including criminal prosecutions, and in the like provisions for writs of error and appeals, there is found, either expressly or by implication, a direction for sending up the transcript of the record. In view, nevertheless, of the practice to which we have referred, by virtue of which the tenor of the record is often regarded as the record itself, and of the facilities which the law gives for bringing forward original papers from time to time as needed, we are not required to pass on the question whether or not the sending up of

dered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court, or left at his office by the marshal of the district, or his deputy, or by some person duly authorized thereto. . . . And if the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the state court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosecutur* may be rendered against him, with costs for the defendant."

In *Illinois v. Fletcher*, 22 Fed. 776, the extent and application of the statute are discussed generally.

In 1894 Congress passed an act (28 Stat. at L. p. 37) repealing that clause relating to prosecutions against Federal officers on account of acts done under the provisions of U. S. Rev. Stat. title XXVI, *The elective franchise*.

But the act of Congress of March 3, 1875, relating to the removal of civil cases, did not repeal § 643. *Venable v. Richards*, 105 U. S. 636, 26 L. ed. 1196.

A writ of certiorari issued by the clerk of the United States circuit court upon the removal of a prosecution against a United States officer, under this statute, not being from a superior to an inferior court, need not in all respects conform to the common-law writ of certiorari, but is sufficient if it informs the state court of the sufficient grounds upon which the circuit court assumes jurisdiction, and notifies the state court to make return of the record; nor need it show that the clerk had adjudged the petition sufficient, nor state the ground of the authority of the circuit court, nor the purpose of the writ. *North Carolina v. Sullivan*, 50 Fed. 593.

The issuance of such writ of certiorari is a ministerial duty which may be performed by a deputy clerk. *Ibid.* The supreme court of North Carolina held to the contrary in this same case, in 110 N. C. 513, 14 S. E. 796, on an appeal by the defendant from a judgment of 53 L. R. A.

conviction rendered in the court to which the indictment was originally returned.

And the issuance of a writ of habeas corpus cum causa is not necessary or proper upon the removal to a Federal court of a prosecution against a United States officer who is under bail and does not apply therefor, under § 643. *Ibid.*

But the Federal district court has no authority to order the prosecution to be removed into the circuit court. *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536. In this case it was held that the state was entitled to have the prosecution remanded to its courts by writ of mandamus issued to the district judge who so unlawfully assumed jurisdiction, and that no previous notice to him to remand the case was necessary.

In *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648, the question was raised whether, if the cause be removable from the state court under § 643, there is any mode and manner of procedure in the trial prescribed by the act of Congress. The court said that whether there was or not was immaterial to the inquiry whether the cause was removable. "The circuit courts," said the court, "have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the state in civil cases, and there is no more difficulty in administering the state's criminal law. They are not foreign courts. The Constitution has made them courts within the states to administer the laws of the states in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a state, in tribunals of a general government, grows entirely out of the division of powers between that government and the government of a state; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be) it will not appear strange that, even in cases of criminal prosecutions for alleged offenses against a state, in which arises a defense under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding."

In *North Carolina v. Gosnell*, 74 Fed. 734, an indictment found by a grand jury in a state court and removed under § 643, it was held that the Federal court was controlled by the interpretation of a statute defining the crime charged, made by the supreme court of the state, and must not confine or restrict that construction by implication.



a transcript of the indictment in lieu of the original would be an irregularity which would defeat jurisdiction. Indeed, at the common law, whether the record itself came up, or only a transcript, was, as we have already said, at times a mere question of safety or convenience, as shown on error to the common pleas or to the King's bench in Ireland. 3 Bacon, Abr. *Error*, D, 2; *Vicars v. Haydon*, 2 Cowp. 841.

The plaintiff in error suggests that some minor difficulties might arise from the particular proceedings on removal in the case at bar; but, clearly, by the provisions of § 1037 of the Revised Statutes, nothing was required in the circuit court primarily, except the indictment itself and the order of remission. No difficulties are shown to have arisen in the case at bar; but, if any had been shown, they could easily

have been met by a suggestion to the circuit court, with a proper writ of certiorari to the court below, or, in the case of removal from the circuit court to the district court, with a like suggestion, and the appropriate proceedings which might follow it. Therefore, looking at the letter of the statute on which the remission was based, and at the practices of the common law to which we have referred, and regarding, also, the interest which a person accused has in a right to inspect at any stage of the proceedings the original indictment, we are satisfied that the custom of sending forward the original, which has prevailed in this circuit from the origin of § 1037, cannot be disturbed. Of course, so far as the statute refers to "proceedings" and the "order of remission," it must be accepted that all purposes are accomplished, and that, therefore, the stat-

Where a criminal prosecution against Federal officers is removed into the Federal court under § 643, the prosecuting officers of the state should prosecute the action in the Federal court. The United States attorneys have no right or power to prosecute the action; and not only this, but they are to act as counsel for the defendants. *Delaware v. Emerson*, 8 Fed. 411.

## 2. Commencement of prosecution.

Proceedings before a magistrate to commit a person to jail or to hold him to bail to answer for a crime are not a commencement of the prosecution under § 643; before an indictment is found there is no cause pending in the state court that can be removed. *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536. To the same effect: *Georgia v. O'Grady*, 3 Woods, 496, Fed. Cas. No. 5,352. The court in the Paul Case expressly overruled *Georgia v. Port*, 4 Woods, 514, 3 Fed. 117; *Georgia v. Bolton*, 11 Fed. 217; *North Carolina v. Kirkpatrick*, 42 Fed. 689, on this point.

But that there was no indictment found is no objection to the removal of a cause under § 643, where the offense is a nonindictable one under the state law. *Virginia v. Bingham*, 88 Fed. 561, holding also, in this connection, that a justice of the peace before whom such a criminal prosecution is instituted is a court within the meaning of § 643.

## 3. Who entitled to removal.

To be entitled to a removal under § 643, the petition must show that the case is one within the category of removable causes. *Ex parte Anderson*, 3 Woods, 124, Fed. Cas. No. 349.

Thus, the petition of a United States marshal indicted by a state court for murder, to have the indictment removed into the Federal court under § 643, which distinctly asserts that the defendant neither did the killing, nor in any way contributed to the deceased's death, although it does aver that the indictment was found against the petitioner for acts done by him, if done at all, as deputy marshal of the United States while in the performance of his duties as such, is insufficient. Nothing short of a positive affirmation that he did the act for which he stands indicted, and did it in the line of his duty as such officer or under color of his authority as such officer, will entitle him to have the indictment removed into the Federal court. *Illinois v. Fletcher*, 22 Fed. 776.

In *State v. Hoskins*, 77 N. C. 530, the petitioner made affidavit that he was a Federal revenue officer, and that the alleged offense was

committed under color of his office; and it was held that the state court committed no error in staying the proceedings in that court.

In *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648, it appeared that a deputy collector of internal revenue, while attempting to enforce the revenue laws of the United States by the seizure of an illicit distillery and the apparatus used in connection therewith, was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire resulting in the killing for which he was indicted in the state court; and it was held that the petition set forth a case for the application of the statute.

So, a person acting as one of a posse under the control of a deputy internal revenue collector while the latter was in the actual discharge of his official duties is a revenue officer within the meaning of § 643. *Virginia v. Bingham*, 88 Fed. 561.

In *Findley v. Satterfield*, 3 Woods, 504, Fed. Cas. No. 4,792, the facts were that, while a deputy revenue collector and his assistants were attempting to seize an illicit still, one of the persons in charge of the still seemed about to shoot at the officers, when one of the latter shot and wounded such person, and on this shooting the indictment was founded, and it was held that the case was one for the application of the provisions of § 643.

And the statute was held in *Davis v. South Carolina*, 107 U. S. 597, 27 L. ed. 574, 2 Sup. Ct. Rep. 636, to embrace the case of a prosecution for murder against a noncommissioned army officer detailed as a guard to aid a United States marshal, and acting as one of his *posse comitatus* while engaged in the service of process issued for the arrest of parties accused of violation of the Federal revenue laws.

In *State v. Deaver*, 77 N. C. 555, the defendants, one of whom was a deputy collector and the other a United States commissioner, were indicted by the state court, charged with conspiring to extort money from a person who had been arrested at their instance and brought before the commissioner to answer an alleged charge of violating the Federal revenue laws; and the case was removed, and held to have been properly removed.

But the mere holding of a commission as a deputy marshal of the United States at the time a party is indicted for murder, or for any other offense against the laws of the state, is not of itself sufficient ground for depriving the state court of jurisdiction of the case. *Illinois v. Fletcher*, 22 Fed. 776.

So held, also under the act of Congress of 1833, chap. 57, § 3, in *Com. v. Casey*, 12 Allen,

ute is satisfied by compliance with the common practice to which we have already referred, which permits a transcript in lieu of the original when a mere question of convenience is involved.

The counts on which Jewett was convicted were demurred to, and the overruling of the demurrer affords the basis of the second group of objections to the proceedings. As the sentence imposed by the court was less than the maximum which might be inflicted under either count, it is a well-settled rule of the Federal courts that the conviction must stand if either is found sufficient. *Evans v. United States*, 153 U. S. 584, 595, 38 L. ed. 830, 834, 14 Sup. Ct. Rep. 934, 939. The objection to count 84 is want of certainty, in that there is no distinct allegation of any unlawful act, because the grand jury reports that it was ignorant how Jewett misapplied the funds described. It is well settled, not only as a general rule of the common law, but in the supreme court, that the grand jury is entitled to set out in its indictment that certain facts, ordinarily necessary to be alleged, are to it unknown. This rule was applied to the description of persons whom there was an intent to defraud, under the section on which this indictment was framed, in *United States v. Britton*, 107 U. S. 655, 665, 27 L. ed. 520, 524, 2 Sup. Ct. Rep. 512. The same result was reached in *Coffin v. United States*, 156 U. S. 432, 451, 39 L. ed. 481, 490, 15 Sup. Ct. Rep. 394, with the additional state-

ment that, where nothing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed. In *Frisbie v. United States*, 151 U. S. 160, 167, 39 L. ed. 657, 659, 15 Sup. Ct. Rep. 586, the rule was applied to the description of the excess amount received by an agent engaged in prosecuting a claim for a pension over that permitted by statute. In *Durland v. United States*, 161 U. S. 306, 314, 40 L. ed. 709, 712, 16 Sup. Ct. Rep. 508, it was applied with reference to the names of persons defrauded, or intended to be defrauded, contrary to § 5480 of the Revised Statutes. There is therefore ground for maintaining, if necessary to do so, that the well-known practice of the common law and the decisions of the supreme court go far enough to cover the particular allegation objected to by the accused; but it is not necessary to determine this proposition. Count 84 is based on that provision of § 5209 of the Revised Statutes which reaches an officer or agent of an association who wilfully misapplies assets. *Batchelor v. United States*, 156 U. S. 426, 429, 39 L. ed. 478, 479, 15 Sup. Ct. Rep. 446, repeats emphatically the rule that these words have no settled technical meaning, like "embezzle," also found in the same section, so that they must be supplemented by further averments showing wherein the misapplication was unlawful. But the count in question alleges that the accused did unlawfully, fraudulently, and wilfully misapply and convert

214, of an indictment under the Massachusetts statute for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors.

And indictments charging the defendant with being a common seller of intoxicating liquors are not within the purview of this act of 1833. The defendant in such case is not indicted for any act done "under the laws for the collection of internal duties, stamp duties, licenses, or taxes, which have been or may hereafter be enacted;" nor "for or on account of any right, authority, or title set up or claimed by him under any such law," but for a violation of a state law for which his license affords no justification. *State v. Elder*, 54 Me. 381.

Persons acting as members of a returning board appointed under a state law and acting under state authority in reference to the election returns of presidential electors, are not Federal officers under § 643, so as to be entitled to have an indictment charging them with feloniously publishing a false election return removed from the state into the Federal court. *Ex parte Anderson*, 3 Woods, 124, Fed. Cas. No. 349.

#### 4. Effect of removal.

The removal of the case out of the jurisdiction of the state court and into the exclusive jurisdiction of the Federal court takes place, without any order of the Federal court, as soon as the state court, by the service upon it, or upon its clerk, of the appropriate process, whether certiorari or habeas corpus cum causa, has notice of the filing of the petition in the Federal court. But it is only after such formal notice has been given that the jurisdiction is transferred from the state to the Federal court. Vir- 53 L. R. A.

ginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

And upon the filing of the petition the state court must stay all further proceedings in the cause; and the prosecution, upon delivery of the necessary writ, or leaving it as provided, is to be deemed removed to the circuit court; and any further proceedings, trial, or judgment therein in the state court shall be void. *North Carolina v. Kirkpatrick*, 42 Fed. 689.

And for instances where the state court did so stay further proceedings therein, see *State v. Hoskins*, 77 N. C. 530; *State v. Deaver*, 77 N. C. 555.

In *North Carolina v. Sullivan*, 50 Fed. 593, it was held that the removal of a suit or prosecution against an officer of the United States under this statute is complete upon the filing of the petition therein prescribed, with the requisite verification, notwithstanding the provisions for the issuance of a writ of certiorari, and, where the defendant is in custody, of a writ of habeas corpus cum causa, and that upon the delivery of such process the suit shall be held to be removed to the circuit court, and any further proceedings in the state court shall be void.

The jurisdiction of the Federal court completely vests and that of the state court ceases altogether, and there can consequently be no breach of the bail bond in not appearing in the state court; and proceedings to forfeit it and render judgment upon it against the sureties by that court are *coram non iudice* and void. *Davis v. South Carolina*, 107 U. S. 597, 27 L. ed. 574, 2 Sup. Ct. Rep. 636.

And a United States officer does not, by defending in the state court after filing a petition for the removal of a prosecution against him to the United States circuit court in the manner provided by law, lose or impair his right of trial

to his own use the assets of the bank, with intent then and thereby to injure and defraud the association. Then follows the allegation that this conversion was done by some means and in some manner to the jurors unknown. But, having alleged that the accused had unlawfully, fraudulently, and wilfully misapplied and converted to his own use the assets of the bank, with intent to injure and defraud the association, no further allegation as to the means or manner was required. What was alleged would clearly have amounted to a charge of embezzlement at common law if the assets had been in Jewett's personal possession, and the allegation that Jewett did convert to his own use shows how the misapplication was made, and that it was an unlawful one, within the requirements of *Batchelor v. United States*. Certainly it cannot be held that an allegation of all the elements which would constitute embezzlement, in the technical sense of the word, if charged against a person who had possession, is not a sufficient allegation of an unlawful misapplication, and of the means of misapplication. We may therefore reject as surplusage the additional allegation to which the accused objects.

The next point made by Jewett is that § 5209 of the Revised Statutes has no application to a bank in liquidation, or to an agent appointed to close its affairs. Clearly, both are within the letter of the statute, and within the mischief it was intended to remedy. Indeed, there would seem to be

more ground for holding the terrors of the law over an agent who is in uncontrolled possession of the assets of an association, than over an officer who is at all times subject to the scrutiny of those who are about him or over him. That an association in process of liquidation is still an existing corporation was determined in *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 72, 73, 26 L. ed. 693, 701. That case was strikingly close to the present one, because there, as here, the directors had authorized the president and acting cashier to do whatever was necessary in the liquidation of the business of the association. The essential principle of *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* was applied in *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439, in which latter case the association had passed into the hands of a receiver appointed by the Comptroller of the Currency under the provisions of the Revised Statutes. *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* was cited at page 8, 161 U. S., and page 598, 40 L. ed., page 442, 16 Sup. Ct. Rep., as an authority for the conclusion reached in the later case,—that even the insolvency of a national banking association, and the consequent appointment of a receiver, did not terminate its existence as a corporation.

It must be observed that no such office as an agent in liquidation is known to the statute, and also that the count declared against Jewett alike as president, director, and

in the Federal court. *North Carolina v. Sullivan*, 50 Fed. 593:

In *Findley v. Satterfield*, 3 Woods, 504, Fed. Cas. No. 4,792, it was urged that § 643 applies only to cases of attempts by state legislatures to nullify a law of the United States; but the court held that the statute was not so limited in its terms.

#### d. Removals under act of Congress of March 3, 1863.

An act of Congress of March 3, 1863, provided that any criminal prosecution which had been or should be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the late civil war, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, could, upon application of the defendant, and his taking the steps required by the act, be removed into the circuit court of the United States to be held in the district where the prosecution was pending; and the cause was to proceed therein in the same manner as if it had been brought in that court by original process.

But an indictment in a state court for an offense against the penal laws of the state was held, in *People v. Murray*, 5 Park. Crim. Rep. 577, not to be removable by the defendants, on petition before plea, into the circuit court of the United States, under the provisions of this act.

And in *Pennsylvania v. Artman*, 3 Grant Cas. 436, Fed. Cas. No. 10,952, it was held that a prosecution was not commenced in the state court, within the contemplation of this act, where there was merely a warrant issued and

the defendant arrested; and that a removal before indictment was premature.

#### III. From territorial courts.

On the erection of the territory of Florida into a state, in March, 1845, Congress passed an act providing for the transfer of the records of the proceedings of all causes not appropriately belonging to state jurisdiction, pending in the territorial courts at the date of her admission into the Union, into the district court of the United States for the state of Florida; and in *Forsyth v. United States*, 9 How. 571, 13 L. ed. 282, and *Simpson v. United States*, 9 How. 578, 13 L. ed. 265, it was held that the jurisdiction of the territorial courts ceased on the erection of the territory into a state, and that an indictment found in the territorial court after the erection of the territory into a state, and after the territorial government had ceased, was void; that the transfer of such an indictment from the territorial into the Federal district court under the above statute was improper, and that a conviction in the latter court should be reversed and annulled for want of jurisdiction. The court did not doubt the power of Congress to provide for the transfer of pending causes at the termination of the territorial government into the Federal courts, with authority to proceed therein to final judgment the same as if the causes had there originated, but said that the case at bar was different, that the statute cited related to cases pending in courts that had taken cognizance of them, and had proceeded therein, after it was alleged their jurisdiction had ceased, but that it found no provision for taking up the unfinished cases after the transfer, and proceeding to judgment.

agent. It is well settled that this form of allegation does not involve either inconsistency or duplicity. The case cited by the plaintiff in error referred to a plaintiff in a civil suit, and the court properly required him to elect in what capacity he would proceed; but as the same person may be both president, director, and agent of a banking association, the form of allegation in respect thereto found in this count is common in this class of indictments, and has been explicitly recognized by the Supreme Court as valid. *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580. The extent to which this form of pleading is permitted, even in capital cases, is pointed out in an interesting way in *Andersen v. United States*, 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. Rep. 689.

Although the agency which Jewett exercised was not in terms created by the statute, yet it has been so long recognized as permitted by the law, going back at least as far as *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, already cited, decided in 1881, that it cannot now be questioned; and in fact it is not questioned in the case at bar. We must assume, therefore, that there is no doubt in reference to the fact of agency, nor can there be any as to its nature. The plaintiff in error is described in count 84 "as an agent to assist said association in such liquidation." It then alleges that Jewett, as such agent, had authority from the association to collect all its credits. These allegations show that the authority given Jewett with reference to certain very important matters connected with closing the affairs of the association, if not to all of them, was as extensive as that which would have vested in its president and directors if no agent had been appointed.

Therefore, as we have already said, the spirit of the statute reaches the case. Consequently we are not justified by any rule of construction in so far clipping the letter of the statute, which expressly uses the word "agent," as to exclude this case from its purview. Of course, the rule *noscitur a sociis* applies here as everywhere; and when the statute groups representatives of the corporation in the following language, "president, director, cashier, teller, clerk, or agent," we are not permitted to hold that one occupying the position of the plaintiff in error is excluded from the classes of persons within its purview, however it might be with someone exercising temporary or special authority, who would not, in the mind of the legislature, be commonly associated with the recognized officers of the bank.

The plaintiff in error refers us to an expression found in *United States v. Britton*, 107 U. S. 655, 662, 27 L. ed. 520, 523, 2 Sup. Ct. Rep. 512, already cited, to the effect that certain counts under § 5209 of the Revised Statutes, there under consideration, require an averment that the association is carrying on a banking business. First of all, this was not necessary for the decision of that case, which also related only to alleged false entries; but, more especially, the effect 53 L. R. A.

which the plaintiff in error gives to the opinion is so broad as to defeat itself, because the opinion refers, not to an agent in liquidation, but to a "president or other officer" of a national banking association. If applied broadly to embezzlements and misapplications, the result would be that the president and directors of an insolvent institution might, so far as the criminal law is concerned, carry off its assets with impunity the day after it closed its doors. The probability is that the court had in mind only the necessity of its appearing that the association was something more than a mere paper organization; in other words, that it was what is represented in the count in issue here by the words "duly organized and existing," and "having its usual place of business."

The plaintiff in error also refers to certain expressions in *Richmond v. Irons*, 121 U. S. 27, 60, 30 L. ed. 864, 875, 7 Sup. Ct. Rep. 788, to the effect that the officers of a national banking association which has gone into liquidation occupy the relation of trustees for the creditors. This may be true, to a certain extent, even though the corporation be supposed to be solvent, if it be also in liquidation. *McDonald v. Williams*, 174 U. S. 397, 403, 43 L. ed. 1022, 1024, 19 Sup. Ct. Rep. 743. This applies, however, as well to the directors of an association as to its agent in liquidation. In neither the one case nor the other do the directors cease to be directors, or the agent to be agent. *Richmond v. Irons*, if applied as the plaintiff in error maintains, would again be too broad, because, on his proposition, not only would he, as agent in liquidation, go free from the statute, but the president and directors of the association, if no agent had been appointed, would also go free from it.

This count does not show the fact in the better way, but we assume that Jewett was appointed agent by a vote of the shareholders; and he claimed at the trial, therefore, that he was merely the representative of the shareholders, and not of the association. The vote of the shareholders, however, must have been taken in their corporate capacity; and so the fine distinction which the plaintiff in error seeks to make on this point has no foundation of law. Whether or not the statutory agent who may be appointed by the shareholders of an association under § 3 of the act of June 30, 1876 (19 Stat. at L. 63), is subject to the penalties of § 5209 of the Revised Statutes, we need not consider. He is not the same "agent" as the plaintiff in error. The position was created after § 5209 was enacted, and so it is impossible to reason by analogy from one to the other. The suggestion that some parts of § 5209 evidently relate to a going institution in no way assists Jewett, because the section groups together many offenses of an entirely different character. As justly said by the plaintiff in error, there is nothing in the history of the statute which throws any particular light on the question raised by him. Neither do the special rules of construction of penal statutes invoked by him

assist him, because the language of the section is explicit on the point under consideration. It needs no construction, except so far as it may exclude those who are impliedly excluded by the way in which the word "agent" is grouped, as we have already pointed out.

The plaintiff in error was allowed three peremptory challenges, but he claimed ten. Since the statute expressly declares his offense a misdemeanor, this proposition is so clearly wrong as to need no discussion. We think this disposes of all questions submitted to us, except that the verdict was against the evidence. The plaintiff in error maintains that, on all the evidence, the United States failed to make out a case against him, either on count 84 or count 95. For reasons already stated, we need consider only count 84. The plaintiff in error divides this proposition into one of law and one of fact. He maintains that, as the count charges him with "wilfully misapplying," he could not be convicted under it, because the assets which he is accused of misapplying were in his actual possession. He maintains, therefore, that the proper offense chargeable against him was that of embezzlement, and that embezzlement and misapplication are not the same things, within the purview of the statute. It is true that it is quite probable that he might properly have been charged with embezzlement. Nevertheless, while "embezzlement" and "misapplication" are not convertible terms, "misapplication" is the broader, and covers "embezzlement." The statute, in this particular, is one of those frequently found in criminal legislation, as well as in other legislation and in private instruments, where there is first used a word of narrow application, and afterwards a broader one, and so continued until there is a certainty that the entire purpose sought to be accomplished is accomplished. It is not necessary, under such circumstances, to apply the rule that every word in a statute must have its effect, to such an extent as to hold that the generic term is to be so peculiarly construed, contrary to its settled meaning, as to exclude from its scope the narrower word which precedes it.

As we have already said, the record shows that the United States rested this count on an item, appearing in Jewett's statement of the alleged payments made by him as agent in liquidation, as follows: "1894, Nov. 1. Paid A. E. Butler fifty shares stock, Cert. No. 478, \$4,000.00." This was intended to represent a dividend of 80 per cent in liquidation. As we have also said, it is difficult to understand, so far as anything appears in the record, by virtue of what the United States assumed, that the grand jury had in view this particular item in finding count 84. This we note only that it may not be understood that we are bound by what appears, or does not appear, in the record with reference to this precise matter. The num-

ber of counts relied on by the United States before discontinuance, and the transactions of the accused which were laid before the jury, were numerous. For aught that appears, the accused was fully prepared to meet at the trial all the several offenses with which he was charged, and, so far as the record shows, he was indifferent which alleged offense should be assigned to any particular count. No exceptions were taken with reference to this topic, and we are led to presume that no practical injustice was done on this account in the trial of the cause. Certainly we have no jurisdiction with reference to any such difficulty as we have suggested.

The pith of the instruction given to the jury by the court below in reference to this item was as follows: "It is contended by the United States that Butler had no shares; that those shares were the shares of William S. Jewett; and they show to you a certificate of stock, and they show to you a power of attorney in blank for the transfer of the stock. Well, if that stock were in fact Mr. Jewett's, or if the stock were in fact Mr. Butler's, the question seems to me, gentlemen, to be the same. It is the same old question, whether there was an honest belief at that time that there were assets of that bank sufficient to pay everybody *pro rata*, or whether that was a mere cover to appropriate the property of the bank."

No question is made by the plaintiff in error as to the propriety of this instruction. Therefore the substantial issue framed for the jury was whether or not this money was in fact paid to Mr. Butler, or was appropriated by the plaintiff in error under cover of this entry. There was some very persuasive evidence to go to the jury on this issue, among which was that, while for the larger portion of the transactions of the plaintiff in error as agent in liquidation checks were produced, none was produced for this transaction; and his explanation, as witness in his own behalf, as to the manner in which he paid over this money, was indefinite. Another fact which the jury was entitled to weigh was that Butler was indebted on notes to the association of more than \$4,000, which were never paid, and which the plaintiff in error, acting as agent in liquidation, would ordinarily have realized and collected, at least in part, by offset, if a dividend had become payable to Butler as a stockholder for the large amount claimed to have been paid him. Under the circumstances, the question whether or not the evidence sustained the verdict was, on this record, for the court below, so that its determination cannot be revised by us.

*The judgment of the Circuit Court is affirmed.*

Petitions for rehearing and for writ of certiorari to remove case to Supreme Court of the United States denied.

## WASHINGTON SUPREME COURT.

STATE of Washington, *Respt.*,  
v.

Charles W. NORDSTROM, *Appt.*

(21 Wash. 403.)

1. The trial of the question of the sanity or insanity of a person who has been sentenced to death, on a claim that he has become insane since the sentence, is not a matter of absolute right, if the court is satisfied of his sanity; but the investigation of the matter is in the discretion of the court.
2. The discretion of the trial judge in denying a motion to set aside the report of physicians to the effect that the condition of a person sentenced to death was the same as at the time of the trial, and refusing to submit the question of his sanity or insanity for determination by a tribunal before which the convict might be represented by counsel and produce witnesses, is not subject to review by appeal.

(July 24, 1899.)

**A** PPEAL by defendant from an order of the Superior Court for King County refusing to permit examination into the question of the insanity of defendant, who had been convicted of murder and sentenced to suffer the death penalty. *Dismissed.*

The facts are stated in the opinion.

*Mr. James Hamilton Lewis* for appellant.

*Messrs. James F. McElroy and John B. Hart* for respondent.

**Anders, J.**, delivered the opinion of the court:

The appellant, Charles W. Nordstrom, was tried in the superior court of King county on a charge of murder in the first degree, and on January 13, 1892, the jury returned a verdict of "guilty as charged." On April 2, 1892, he was adjudged guilty, and sentenced to be hanged on a day to be fixed by the court. He thereafter appealed from the judgment of conviction to this court, and this court, after argument and due consideration, affirmed the judgment. 7 Wash. 506, 35 Pac. 382. He thereupon removed the cause to the Supreme Court of the United States, where the judgment of this court was affirmed. 164 U. S. 705, 41 L. ed. 1183, 17 Sup. Ct. Rep. 997. He thereafter applied to the circuit court of the United States for the district of Washington, northern division, for a writ of habeas corpus. His application was denied by said court, and the proceeding dismissed, whereupon he appealed to the Supreme Court of the United States, which court affirmed the decision of the said circuit court. The mandate of the Supreme Court of the United States in the habeas corpus proceeding was filed in said circuit court on March 8, 1899,

and on March 11, 1899, a regularly certified copy thereof was filed in the superior court of King county. Soon thereafter the prosecuting attorney in and for said county moved the superior court for an order fixing the day for carrying into effect the judgment and sentence theretofore passed on the defendant. This application on the part of the state was continued from time to time, at the request of counsel for the defendant (appellant here), until the 15th day of May, 1899, at which time the superior court entered its order, and signed a death warrant, directing that the said Nordstrom be executed in the manner provided by law on Friday, the 11th day of August, 1899. During the pendency of the motion for fixing the day of execution, the appellant, through his counsel, suggested to the court, and supported the suggestion by an affidavit, that the defendant had become insane since the judgment and sentence of the court, and therefore requested a stay of the order and warrant of execution. The court, in order to satisfy its mind and conscience as to the sanity or insanity of the defendant, appointed a commission consisting of five expert physicians and alienists to examine the defendant, and to report to the court his present mental condition. According to the record, this commission was appointed with the concurrence of counsel for defendant and for the state. The commission reported to the court, in substance, that they had carefully examined the said Nordstrom, and had taken the testimony of the officials who had had him in charge since his conviction, and that they found him capable of distinguishing between right and wrong, and that, so far as they were able to ascertain, his mental condition was the same as it was at the time of the trial. Upon hearing and considering this report, the court became satisfied that the defendant was of sane mind, and therefore proceeded, over the objection and protest of counsel for defendant, to fix a day for carrying the judgment and sentence into effect in accordance with the provisions of the statute. The learned counsel for the defendant moved the court to set aside the report of the physicians, and asked to have the question of the sanity or insanity of the defendant determined by some tribunal or body in which or before whom the defendant might be represented by counsel, and produce such witnesses as he desired. The court denied the motion, and the counsel thereupon gave notice of appeal to this court from the action of the superior court (1) in refusing him a rehearing upon his petition setting forth insanity (2) in denying the motion to set aside the report of the commission, and (3) in overruling the defendant's objection to the court's taking jurisdiction of the matter, and denying the motion to suspend and stay the proceeding for want of jurisdiction over the person of the defendant. The counsel for the state have moved to dismiss

NOTE.—As to insanity after commission of criminal act, see *Baughn v. State* (Ga.) 38 L. R. A. 577, and note.  
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this appeal, mainly upon the ground that the orders, rulings, and acts of the superior court in setting a time for carrying into effect the death sentence are not reviewable under the law of this state. Counsel for appellant have filed a motion to strike the motion to dismiss from the files on the ground that it is not authorized by law. But it is sufficient to say, regarding this latter motion, that, if the motion to dismiss is well founded, it cannot be stricken, and if, on the contrary, it is not well taken, it will be denied.

The question presented for our determination is one of first impression in this court. It is conceded that no method of procedure in cases like the present is provided by statute in this state. The question as to whether the action of the court below which is objected to by appellant is reviewable by this court involves somewhat the question whether the appellant had or had not the right to have the question of his present mental condition ascertained by a regular trial, either before a jury or in some other method known to the law. No case has been cited by counsel in which the facts were similar to those in this case, though several are referred to where the question of the trial of the defendant's sanity in criminal cases is discussed. In most of the cases, however, the suggestion of present insanity was made either at the time of the trial or after verdict and before sentence. We think the modern authorities are generally to the effect that the court is not bound to order a trial of the question if it has no reasonable doubt as to the sanity of the defendant. At common law it appears that if the prisoner, when called to the bar for sentence, appeared to be insane, the judge might, in his discretion, relieve him until he regained his senses. 4 Bl. Com. p. 396. In *Spann v. State*, 47 Ga. 549, which is more nearly in point than any other case which has been cited, it is said, on the authority of Coke, that the stay of execution for insanity depends on the discretion of the judge at common law. It is not claimed by the learned counsel for the appellant in this case that the appellant had an absolute right to a trial by jury of the question of his sanity, but the contention is that he had the right to have the question determined "judicially," and that the court refused to accord him that right in this instance. But we are of the opinion that the question, at the time it was presented, was one resting exclusively within the discretion of the court, and that the appellant had no absolute right to a trial by jury or otherwise, the court being satisfied of his sanity. It is said in 10 Enc. Pl. & Pr. p. 1220: "Where, however, no doubt on the part of the court is created as to the sanity of the defendant, it is under no obligation to have the question determined by a preliminary investigation. The method of determining the preliminary question of insanity, where not the subject of statutory regulation, is largely within the discretion of the court, which may itself enter upon the inquiry, or adopt

some other mode without the aid of a jury." See also *State v. Peacock*, 50 N. J. L. 34, 11 Atl. 270; *Bonds v. State*, Mart. & Y. 143, 17 Am. Dec. 795; *People v. Pico*, 62 Cal. 50; *Com. v. Schmous*, 162 Pa. 326, 29 Atl. 644; *State ex rel. Armstrong v. Eighth Judicial Dist. Judge*, 48 La. Ann. 503, 19 So. 475. At common law, decisions and rulings like those now under consideration were, of course, not subject to review, and, if reviewable at all, the authority therefor must be found in our statute. We find no express statutory provision, and we do not think that any provision of the statute relating to appeals is applicable to a case like this. It is true that the statute provides for appeals from final orders after judgments affecting substantial rights. 2 Ballinger's Anno. Codes & Statutes, § 6500. But it is manifest, we think, that the orders there contemplated are not, as are these, collateral to the main case or proceeding before the court; and elsewhere the decisions, so far as we are informed, have been adverse to the contention of the appellant. Mr. Buswell, in speaking of insanity in bar of sentence, says: "So where, after verdict and judgment, the defendant by his counsel alleged as a reason why sentence should not be pronounced that the defendant was a lunatic, it was held that if the court, on its own inspection, was satisfied that the allegation of insanity was false, it might properly proceed to pass sentence without impaneling a jury to try the question. But it was added that, if the court should entertain any doubt on the subject, or the question should appear difficult, a venire should issue, returnable instant, to ascertain the fact. And the question whether an inquiry is called for by the circumstances of the case is for the determination of the court, who may also direct the manner in which such inquiry shall be conducted. Error will not lie to review the proceedings upon such an inquiry, whether the allegation of insanity be made before or after the conviction of the prisoner." Buswell, Insanity, § 461. See *Inskeep v. State*, 35 Ohio St. 482, 36 Ohio St. 145; also *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216. In *Darnell v. State*, 24 Tex. App. 6, 5 S. W. 522, the court of appeals of Texas held that the judgment of the trial court upon an inquiry, after conviction, as to the question of insanity, was conclusive, and that no appeal would lie therefrom. While this decision is based upon a statute of that state, it would seem that it is equally supported by common sense and sound reason. In *Spann v. State*, 47 Ga. 549, the defendant, after his conviction of the crime of murder, and after he had been sentenced to be hanged, was alleged to have become insane. The sheriff, with the concurrence and assistance of the ordinary of the county, proceeded, under a provision of the Code, to summon a jury to inquire into such insanity, and the defendant applied to the superior court for a writ of certiorari to review the proceedings before the ordinary, which court refused the writ, and held that certi-

orari would not lie. The supreme court, in the course of its opinion in that case, observed: "The whole proceeding is merely a stay of execution, and is based rather upon the public will and a sense of propriety than on any right in the prisoner. . . . It is rather a perversion of terms to call an inquisition of this kind the act of a court, and to exercise in reference to it the writ of certiorari. The whole proceeding is rather an inquiry based on public propriety and decency than a matter of right; and, while I do not say that certiorari will not lie at all, yet, for myself, I greatly doubt if such was the intent of the lawmakers." The court, however, notwithstanding its great doubt upon the question, did look into the matter as presented, and affirmed the judgment of the lower court. As said by the supreme court of Pennsylvania in *Laros v. Com.* 84 Pa. 200: "The plea [of insanity] at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation. The rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury." In the case at bar the learned judge of the superior court simply undertook, as stated in his opinion filed in the cause, to satisfy his own mind and conscience as to the question of appellant's alleged insanity; and we think that, under the authorities, he was clearly justified in resorting to the means adopted. The appointment of the commission and the investigation made by them were not deemed or intended to be a trial in any sense of the word. It was simply, in our judgment, the proper exercise of a discretionary power. It was held in the case of *Webber v. Com.* 119 Pa. 223, 13 Atl. 427, where insanity was alleged at the time of the arraignment of the accused, that the court might determine the condition of the prisoner's mind by a personal inspection and examination of him, either public or private; by inquiry from attending physicians, or from those around the prisoner who have means of knowledge; and if, after such investigation and inquiry, the judge has no doubt of the prisoner's sanity, he is neither bound, nor would he be justified, in ordering an inquest; and the court there observed that "it is the judicial conscience alone which can determine this question, and it is that conscience only which must be informed, so that it may act intelligently."

Our conclusion is that the action of the learned trial court in the premises is not 53 L. R. A.

subject to review by this court, and *the motion to dismiss is therefore granted.*

**Gordon, Ch. J., and Fullerton, Reavis, and Dunbar, JJ., concur.**

**Affirmed by Supreme Court of United States May 28, 1901.**

**Paul PETERSON, Resp't.,  
v.**

**SEATTLE TRACTION COMPANY, Appt.**

(.....Wash.....)

1. A member of a construction gang of a passenger railway, whose contract provides for transportation to and from work, and who is furnished with a book of tickets for that purpose, is not, after quitting work for the day and while riding on a regular passenger car of the employer towards his home, a servant of the employer, so as to be a fellow servant of those operating the car.
2. The meeting of two cars in a head-end collision on a single-track railway is proof of negligence on the part of those in charge of the cars, in the absence of any evidence to the contrary, for the consequences of which their employer is responsible.
3. A denial by an employer of an alleged agreement to furnish an employee injured while traveling on its cars transportation to and from work will admit evidence of any material matter to defeat the alleged contract, or to show a different contract.
4. A denial of an alleged contract is not aided by an attempted pleading of defendant's version of the contract.
5. Upon the question of the terms of the contract under which an employee of a railroad company is being transported to and from his work, evidence of his signing an agreement to assume the risk is admissible, although it is not conclusive of such assumption, where he testifies that when he was given his ticket book he was told to sign his name at a designated place, which he did without reading the words above it, and no authority on the part of the one giving the direction to modify any contract the employee may have had with the company is shown.
6. Persons not experts, having knowledge of the facts, may testify as to the conduct of a person injured by a railway collision soon after the accident, and as to the state of his health since, as compared with what it was before the accident.
7. Upon the measure of damages for personal injuries, evidence is admissible of the wages plaintiff could have earned in a business which he understood and which was open to him but for the injuries, although

NOTE.—For other cases in this series as to railroad employees or officers as passengers, see *Texas & P. R. Co. v. Smith* (C. C. App. 5th C.) 31 L. R. A. 321, and note; *Doyle v. Fitchburg R. Co.* (Mass.) 33 L. R. A. 844; *McNulty v. Pennsylvania R. Co.* (Pa.) 38 L. R. A. 376; *Iannone v. New York, N. H. & H. R. Co.* (R. I.) 46 L. R. A. 730; *Louisville & N. R. Co. v. Weaver* (Ky.) 50 L. R. A. 381; *Whitney v. New York, N. H. & H. R. Co.* (C. C. App. 1st C.) 50 L. R. A. 615; and *Chattanooga Rapid Transit Co. v. Venable* (Tenn.) 51 L. R. A. 886.



he had not engaged in it for three years before the injury, and had made no claim of intention to return to that calling.

*On rehearing.*

2. An employee of a passenger railway company, who accepts transportation from the company as a mere gratuity, and not in consideration for his services, stands like anyone else traveling on a free pass conditioned that the user shall assume risk of injury, notwithstanding the transportation would probably not be bestowed in the absence of the employment.

(December 27, 1900.)

**A** PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

*Messrs. Burke, Shepard, & McGilvra*, for appellant:

The plaintiff having been injured while riding on the defendant's car by virtue of free transportation furnished him, in pursuance, as he claimed, of a provision therefor in his contract of employment, his action is barred by the rule of nonliability of a master for injury to his servant caused by negligence of a co-servant.

*Sayward v. Carlson*, 1 Wash. 30, 23 Pac. 830; *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, 771; *Lundquist v. Duluth Street R. Co.* 65 Minn. 387, 67 N. W. 1006; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

Plaintiff was injured in the course of a trip taken on the defendant's cars incidentally to his employment by the defendant, and in pursuance of the contract of employment. Injured under such circumstances, he stood at the instant of the injury in the position of a servant of the defendant, and a fellow servant of defendant's other employees who were running the cars, equally as if his hours of labor had not yet expired and his duties for the defendant were not yet ended.

*Russell v. Hudson River R. Co.* 17 N. Y. 134; *Vick v. New York O. & H. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Seaver v. Boston & M. R. Co.* 14 Gray, 466; *Wright v. Northampton & H. R. Co.* 122 N. C. 852, 29 S. E. 100; 5 Am. & Eng. Enc. Law, 2d ed. p. 516, note 1; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830.

The plaintiff's action is barred by the waiver of damages imposed as a condition accompanying the free transportation furnished to him, by virtue of which he was riding on the defendant's car when injured, if, as the defendant claimed and sought to prove, that transportation was furnished him gratuitously; and even if, as the plaintiff contended, the transportation was fur-

nished him in pursuance of the defendant's agreement, in its contract hiring him, to give him free transportation to and from his work.

*Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 35 Pac. 422; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 465; *Whitney v. New York, N. H. & H. R. Co.* 50 L. R. A. 615, 43 C. C. A. 19, 102 Fed. 850; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385.

*Messrs. Milo A. Root and Brady & Gay*, for respondent:

Respondent, when injured, was not a servant of appellant. He had finished his day's work. He was riding home on transportation he had paid for by his day's work. *Baird v. Pettit*, 70 Pa. 483.

Respondent while on the car was performing no service for the company, and was under no obligation to perform any. His duties for the day had ceased. In riding home he was taking part of his pay for his day's work.

*O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336.

At the time appellant's foreman employed respondent, nothing was said to the latter about his "transportation" having a stipulation attached which should exempt the company from liability for negligence. Tickets with this stipulation were given him a few days afterwards; and, being a foreigner with but little education, it is not strange that he did not understand its meaning. This stipulation was a *nudum pactum*, and the acceptance of the tickets did not bind respondent.

*Vanderbilt v. Schreyer*, 91 N. Y. 392; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75.

Respondent, having paid value for his ticket, was a passenger for hire. Being such, the company had no power to limit or exempt itself from liability for negligence resulting in injury to him. The rule is well established that any stipulation or agreement purporting to exempt a common carrier of passengers from liability for negligence, unless the injured passenger has parted with no value directly or indirectly for his transportation, is absolutely void. This is true even as to one riding upon what purports to be a free pass with a printed or written stipulation or agreement thereon, if the holder as a matter of fact gave something of value for it.

*Muldoon v. Seattle City R. Co.* 7 Wash. 529, 22 L. R. A. 794, 35 Pac. 422; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Omaha & R. Valley R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336.

**White, J.**, delivered the opinion of the court:

Appellant was operating a street railway

in Seattle, and respondent was working for appellant as a day laborer along its track. The contract of employment, as claimed by respondent, gave respondent, per day, \$1.50, and transportation to and from his work. His daily work closed at 6 o'clock P. M. As evidence of respondent's right to transportation, appellant furnished him a book of tickets, which tickets he used when traveling to and from his work. This book had a stipulation printed thereon exempting appellant from any liability for injury to respondent. The first book of tickets was furnished respondent a few days after his employment. At the time of his employment nothing was said to him about his transportation having any conditions upon it exempting the company from liability, and the contract of employment, it was claimed by respondent, did not provide for transportation so conditioned. Respondent was injured by negligence of the company while riding on its car on his way home after his day's work was completed. The evidence does not show what particular officer or employee was guilty of the negligence which caused the injury. The car was inward bound to Seattle on the appellant's single-track Green Lake suburban line, leaving the lake end of the line just after 6 o'clock P. M., and the accident occurred within a few minutes after the car started, being caused by a head-end collision with an outward-bound car on the same line while the cars were on a curve rounding a projecting bluff on the side of the lake, which prevented the motorman of either car from seeing the other until within a short distance from it. The respondent was riding on the rear platform of the inward-bound car, and received his injuries from the shock of the collision, being thrown against the rear wall of the inclosed part of the car, thus receiving a violent blow on the head, and then falling or being thrown to the ground. The respondent recovered judgment for \$3,000. The plaintiff (respondent) only testified as to the contract of employment as follows: "On the 25th of January, 1899, I met Linder, the foreman of the defendant, on Fifth avenue, close to Pike, and asked him for work; and he says, 'All right. Come in the morning.' I says, 'What do you pay?' And he says, 'A dollar and a half a day.' And I says, 'That is very small, aint it?' And he says, 'We pay a dollar and a half a day, and transportation to and from your work.' I says, 'All right. I will come in the morning.' And he says, 'The tool box is between Western avenue and Harrison street. Come down there in the morning.' And I walked from my home in the morning, and walked home in the evening, and walked out again the next morning, down to the tool box; and one day he gave me a book with tickets in it. The foreman of the company gave it to me. I never had any different agreement or contract than that one made at that time." On cross-examination he testified: "I went to work for the traction company about the 26th of January, last 63 L. R. A.

year. The foreman of the track gang hired me on Fifth avenue, close to Pike. I did not see him at the company's office. I had not worked for this same foreman before, but had seen him. He was working for the traction company, and told me that the company would pay a dollar and a half a day, and transportation to and from my work. They gave me a book of tickets. . . . I don't know what the printing was. I received that book from the foreman . . . a day or two after I went to work. I cannot say the date when I received my last book from the company while I was at work. It was further back than just a day or two before this accident. . . . The last book that I had—the one that I got a little before the accident—was given to me by Linder, the foreman, . . . out at Green Lake. I know Mr. Kempster, the secretary of the company. He did not give me this book in the company's office. . . . I did not sign that condition on the back. If I went to the office and got a book, and he came with the book and pen and ink and said, 'Put your name on the back,' I put my name on it and put it in my pocket and went out. I don't know the name of the man who would give a book to me at the office. . . . Before this last book was issued to me, I had received some books like this at the office, and signed my name on the back when the clerk told me to. I suppose that this book that was given to me last was the same sort and had the same cover as those others, but I did not pay much attention to it. I never looked. . . . I got on the car coming into town that night before the accident because I was going home from my work. My day's work was done. When I got on the car again in Fremont (this was the returning car after the accident) the conductor came and wanted the ticket, and I had one in my pocket, and I gave him one. . . . He did not collect the fares before the cars came together, he had not got to me to collect the ticket then, and had not taken up the tickets before I was hurt, but he did afterwards, in Fremont. When I went out to Green Lake on the morning of the day I was hurt, I rode out there to my work, and when the conductor called for my fare I gave him a ticket. I went out to Green Lake that morning to go to work, and did not have any other errand out at Green Lake that day. I went just to go to my work, and when I came in it was to go home from my work." E. Linder, the foreman of the track gang, who employed the plaintiff, testified for the appellant. He was not asked any question relative to the employment of the plaintiff, but his testimony was to the effect that about the middle of June, 1899, he took up from the plaintiff an employees' ticket book which the plaintiff had for use on the line, and that he returned to Mr. Kempster, the secretary of the company, the unused part of the book taken up from Mr. Peterson. He further testified as to the accident, and that he and the members of the track gang, including Peterson, were in the car,

going home, at the end of the day's work. A. L. Kempster, the secretary of the appellant, testified that he issued to the plaintiff on May 29, 1899, a book of coupon tickets, and he identified the book taken up from Peterson as the book; that when it was issued it had on it a cover with certain printed matter, and when it was returned the cover was off. No question was asked this witness as to his authority to make contracts for the company, or as to his authority to employ workmen for the company. Except as hereinafter stated, the foregoing is all the testimony in the case, or offered, touching the employment of the plaintiff, or relative to his transportation. There was testimony tending to show that the plaintiff was injured by the accident, and the nature and extent thereof.

Was the plaintiff a fellow servant of the operators of the cars at the time of the accident? The case of *Lundquist v. Duluth Street R. Co.* 65 Minn. 387, 67 N. W. 1006, cited by appellant, was as follows: The defendant was a street-railway corporation operating a street railway in Duluth. The plaintiff was one of a crew of men employed by the defendant, who were engaged in repairing tracks by taking up and relaying the pavement between the rails over which the defendant's street cars, operated by electric power, passed frequently at irregular intervals. Operators of the cars were required by rule to give warning of their approach to the crew of track repairers. Plaintiff was pursuing his work in reliance on the rule. While so engaged, and without notice, he was struck by the car. He was held to be a fellow servant with the motorman. This case is in point only so far as it holds that the motorman and laborer were fellow servants at the time the accident occurred. In the case at bar the plaintiff was not injured when actually performing labor as a track layer. The case of *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, cited by appellant, holds that a laborer while working on a culvert under a foreman, and who received an injury while at work, through the negligence of a conductor and engineer in moving and operating a passenger train, was a fellow servant of the engineer and conductor. The case of *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, cited by appellant, holds that a brakeman who was killed by the negligence of the conductor while the train was being operated, and the brakeman was discharging his duties as such on the train, was a fellow servant with the conductor. These cases hold that a common employment existed at the time the accident occurred, and then apply the doctrine of fellow servants. In the case at bar it is claimed by respondent that the relation of master and servant did not exist between the parties when the plaintiff received the injury. If this was the case, it is useless to discuss whether or not a track layer and operators of street cars are fellow servants during the time they are

actually engaged in their common employment. The real question to be determined is, Was the plaintiff in the service of the defendant when on the street car at the time the accident occurred? We will first examine the cases cited by the appellant on this proposition.

The case of *Russell v. Hudson River R. Co.* 17 N. Y. 134, was as follows: A laborer was employed by a railroad company to work in connection with a train of cars. The laborer lived in New York city. He was employed in loading gravel and sand, at the pits where they were dug, upon cars, for transportation to places upon the railroad where filling was required. He and others employed in this kind of work were paid monthly at a certain *per diem*. It was the practice of the workmen who lived in New York to come from home in the morning upon the cars of the company, and it was understood that they were to be brought back at night, paying no fare either way. On the day the accident occurred, the plaintiff went upon the cars with every load of gravel for the purpose of assisting to unload it. After the last load of gravel had been discharged, some paving stones were taken upon the cars, which proceeded towards New York. The stones were thrown off a short distance above Spuyten Duyvil creek, and the plaintiff had then, as was testified, no further duty to perform. It appeared, however, that some of the workmen acted as brakemen for the gravel train upon which they rode home. The accident occurred while the cars, after discharging the gravel and stone, were on their way to New York with the workmen residing there. The court decided that the laborer and the engineer of the train through whose negligence the accident occurred were fellow servants, and in so holding said: "But the main ground relied upon to distinguish this case from those previously decided is that at the time when the accident occurred the plaintiff was not an employee of the company, but a passenger merely, and entitled to protection as such. By the arrangement between him and the defendants he was to be taken home to the city upon the gravel train at night; and he insists that his day's work was completed when the last load of gravel was deposited, and that he was under no further obligation to do anything for the company; that carrying him home was a service to be performed by the company in consideration of the labor previously done, and constituted a part of his wages; and that it was entirely optional with him to avail himself of this service or not. It is not, I think, entirely clear that the defendants would not have had a right, under their agreement with the plaintiff, to insist upon his returning to the city at night. The gravel train could not be properly managed by the engineer alone. Men were required to act as brakemen in case of accident. It appears that some of the same men who worked in the gravel pit also manned the brakes. A portion of the hands employed lived in the city, and the defend-

ants may have relied upon them to work the brakes, in case of necessity, upon the return of the train, and may have taken this into consideration in agreeing to bring them home at night. But, conceding that the plaintiff was not bound to return, even if the defendants insisted upon it, it does not follow that while actually returning to the city with the train he was not the servant of the company. If he was a mere passenger, he was not bound to do anything to facilitate the return of the train. If an emergency arose, requiring the use of the brakes, he might refuse to raise his hand. If an obstruction was met with upon the track, he might fold his arms until the company removed it; and what he might do in this respect, every other hand returning to the city under similar circumstances might also do. Such could not, I think, have been the true relation between the parties. The plaintiff was employed by the defendants as a day laborer. He was to be taken up at the city where he lived in the morning, and set down there at night; and he should, I think, be regarded as having been, during the entire interval, the servant of the company, and bound as such to render aid if necessary in promoting the passage of the train both to and from the city. This is decisive of the case." It will be seen that this decision rests upon the theory that until the train returned to New York the relation of master and servant continued, and, if necessary, the servant was bound to render aid in promoting the passage of the train both to and from the city. It is clear in the case at bar that the plaintiff had nothing whatever to do with operating the cars or with dispatching them on their time schedule. For that reason the case cannot be held to be in point. The case of *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228, was as follows: The plaintiff was a common laborer employed in repairing the defendants' roadbed at a place several miles from his residence. Each morning and evening he rode with other laborers to and from the place of labor on the gravel train of the defendants. This was done with the consent of the company, and for mutual convenience; no compensation being paid, directly or indirectly by the laborers, for the passage, and the company being under no contract to convey the laborers to and from their work. The plaintiff was injured by reason of a collision between the train and a hand car through the negligence of those having charge of the train. It was held that plaintiff could not recover. It will be observed in this case the company was under no contract to convey the laborer to and from his work, and no compensation was paid, directly or indirectly, by the laborer for his passage. In *Seaver v. Boston & M. R. Co.* 14 Gray, 467, the court below said: "It appeared that the plaintiff was employed by the defendants to work as a carpenter in repairing fences along the line of the road, in repairing bridges, making switch frames, and other similar work; that he commenced to

work on May 23, 1856, at the rate of \$1.50 per day; that he lived in Lawrence, and that at the time he agreed to work for the defendants at the above rate he asked the agent who employed him if he could be permitted to ride to his place of work without paying fare, and was told that he could, and that none of the workmen employed by the defendants paid fare; that he worked for the defendants from May 23 till September 11, 1856, when the accident happened by which he was injured, during which time he was paid his wages monthly at the rate aforesaid, and rode daily to and from his place of work without paying fare; and that he was so riding at the time he sustained the injury for which he sought compensation in this action. Upon these facts I was of opinion and ruled that the plaintiff could not recover for injuries sustained by him, occasioned by the negligence or carelessness solely of another servant of the defendants, employed as engineer to manage and run their locomotives." The supreme court affirmed this ruling. In this case the company was under no contract to convey its employee to the place where he worked, and it received no compensation, directly or indirectly, for so doing. In the case of *Wright v. Northampton & H. R. Co.* 122 N. C. 852, 29 S. E. 100, the facts were that the plaintiff was a section master in the employment of the defendant, and slept sometimes at Gumberry, the northern terminus of the road, sometimes at Jackson, the southern terminus, and sometimes at Mowfield, an intermediate station. After his day's work was over he went to his sleeping place on a hand car or on the defendant's train, as suited his convenience. On the night when the plaintiff was injured, he and the laborers working under him, having left off work for the day, with a light for a signal on the side of the railroad, were waiting for the train on its way to Gumberry. All were taken on; the plaintiff getting on the engine, and the hands on the flat cars loaded with logs. No fares at any time were received or expected from the plaintiff. The court held that the plaintiff was not a passenger, and that he was a fellow servant with the engineer, citing in support thereof *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228, and *Seaver v. Boston & M. R. Co.* 14 Gray, 467, also *State use of Abell v. Western Maryland R. Co.* 63 Md. 433, and *Tunney v. Midland R. Co.* L. R. 1 C. P. 291. In the last-mentioned case plaintiff was employed as a laborer to assist in loading what is called a "pick-up train" with materials left by plate layers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham, where he resided, and whence the train started, to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into

collision with another train, and the plaintiff was injured. It was held that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow servant when both are acting in pursuance of a common employment. In this case plaintiff was employed in connection with a particular train, and was to travel upon it in performance of his contract.

The case of *State use of Abell v. Western Maryland R. Co.* 63 Md. 433, supports the contention of the respondent in this case. In that case the court says: "Abell [plaintiff] was employed as a regular brakeman on a passenger train that left Union Bridge every morning, except Sundays, for Baltimore city, and returned to Union Bridge every afternoon, Sundays excepted. Abell was employed and paid by the day, and was liable to be discharged at any time. Union Bridge was at one end of his route, and Baltimore city at the other. When the train reached Union Bridge on Saturday evening, it remained there until Monday morning, and Abell was expected to be at Union Bridge from Saturday evening until Monday morning, unless he had permission to leave. Abell's family lived in Baltimore, and he had permission from the conductor to go to Baltimore on Sunday, 2d of September, 1883, and, while traveling to Baltimore from Union Bridge on a train of the appellee, was killed by a collision. The conductor of the train upon which Abell acted as brakeman had a regular pass for himself and all his crew to go to Baltimore on the train upon which Abell was killed. Abell, as one of the crew, was traveling on this pass, and paying no fare, at the time he was killed. The deceased was not paid for the Sundays, unless he was required for duty. He was not required for duty on Sunday, September 2, 1883, the day he was killed. The first question with which we have to deal is the inquiry whether on Sunday, September 2, 1883, Abell was in the employment of the railroad company, in such a manner that the company is entitled to claim the benefit of the rule that would exempt it from liability for the negligence of its other employees. A case very similar to the one before us has already been decided by this court. In the case of *Baltimore & O. R. Co. v. State use of Trainor*, 33 Md. 542, Trainor was employed and paid by the day. At six o'clock p. m. his day's work ended; and on a day that he had been at work, but had finished his day and laid aside his tools, and was on his way home, and not on that portion of the track upon which he worked, the injury occurred. He had expected to resume his work the next morning. With these facts before it, this court decided that at the time of the injury he could not be considered in the employment of the company. The decision in *Trainor's Case* proceeds upon the assumption that he was not at the time of the

injury acting in the service of the company; that his day's labor was over for the day; and, although he expected to resume work again on the next day, that when his day's work was over he occupied towards the company the position of a stranger, and was entitled to all the privileges he would have had if he had not been an employee. The facts in this case are stronger than those in *Trainor's Case*. The deceased had finished his week's work on Saturday evening, expecting to resume it on Monday. He had been expressly relieved from all service to the company until Monday, and was given permission to go to Baltimore. He could call the Sunday on which he was killed entirely his own day, and employ himself in it as he pleased, and he therefore could not be considered on that day as acting in the service of the company."

The case of *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36, was as follows: "The evidence shows that he [plaintiff] had been in the employment of the defendant, as a foreman in its tin shops at Rochester, prior to December, 1876. The defendant at that time removed its shops from Rochester to Buffalo, but before their removal the deceased had left defendant's employment. Many of the employees in the tin shop at Rochester continued in the employ of the defendant after it had removed its shops to Buffalo, but still resided at Rochester. By an arrangement made between them and the defendant, they were to be taken to Buffalo on Monday morning, and brought back Saturday evening, of every week, in the defendant's car. Sometimes they were carried in a baggage car, sometimes in a passenger car, and afterward in a passenger car called a shop car, in which other persons, who paid fares, were permitted to ride. No fare was required of the men thus employed and transported, but by agreement a deduction was made from their wages, at an amount fixed per hour, being the same as when at work, for the time they were upon the train; their wages beginning when they reached the shops at Buffalo, and ending when they left them. In the month of January, 1877, the deceased applied for his former position as foreman, and was employed accordingly by the defendant. He asked if he could go with the rest of the men, and he was told he would be passed with the rest of the men in the defendant's shop car. Upon these terms he again commenced working for the defendant as foreman in the tin shop at Buffalo. The only pass given was one to the master mechanic, Mr. Gould, under which all the men who lived at Rochester and worked in the shops at Buffalo traveled. There was no evidence upon the trial showing that the deceased ever saw the pass, or that he was acquainted with its contents. He was paid for his work in accordance with the arrangement already stated. It appears that the contract for his employment in the tin shops, and for traveling between Rochester and Buffalo while engaged in his work, was one and the same contract,

made at the same time, and the whole must be taken together as an entire agreement. The essence of the contract was that the deceased should work for the defendant as foreman of the tin shop, and in consideration thereof it should pay him a price fixed per hour, and should transport him from his residence to the place where the work was to be done, and back again, upon its railroad, without charge. At the time of the accident the deceased was in the shop car of the defendant, on his way to the place where he was to perform services. As his transportation was a part of the contract, he was there by virtue thereof as an employee. His services had then commenced under the contract. He paid no fare, as an ordinary passenger would have done, but was being transported under the pass referred to. Under these circumstances, the deceased was at the time of the accident in the car under the terms of the contract made for the rendition of his services, and not as a passenger. It was essential that he should be in the car at the time and place of the accident, to enable him to perform the contract of service into which he had entered. But for this he would not have been there at the time, and his traveling on this occasion was in the capacity of an employee, and not as a passenger. If two separate contracts had been intended to have been made, one for the services of the deceased and the other for his transportation, it is fair to assume that the amount allowed for his wages would have been increased sufficiently to pay his fare as a passenger. Clearly, such could not have been the intention, as the contract made was a single one, which related only to the services of the deceased and the compensation he was to receive for the same. It was part of this contract of service that he was to be carried to and from the place of his work every week on the defendant's railroad, and on a train which was usually provided for that purpose. The right to go and return being inseparable from the contract to do the work, it is not obvious that any valid ground exists for claiming that the deceased was a passenger and paid his own fare. As to the position that, because his hours of labor had not commenced at the time of the accident, the deceased was to be regarded as a passenger, it is a complete answer to say that his conveyance to and from his work was incident to his employment, and was part of the contract of service under which he was engaged. This remark will also apply to the position of the respondent's counsel that traveling to the shop where work was to be done was not the beginning of service, but an act done to obtain the service. If it was a part of the contract, then obviously it cannot be said that the deceased gave a portion of his wages as the price of transportation, independent of his contract. He was as much under the control of the defendant when traveling as any other employee who was transported by virtue of a contract with the company for his services, which contract

provided for the right to go and come upon the defendant's cars to and from the place where he was required to work. Although he had no particular duty to discharge while traveling, yet the traveling of the deceased was not as a passenger, but as an employee under the contract of service between him and the defendant." In this case the court expressly held that the principle announced in *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336, hereafter cited, was not sound law. In the *Vick Case* the court held that the plaintiff, when traveling under his contract, was as much under the control of the defendant as any other employee. It will be observed, also, that the plaintiff was to travel usually on a train provided for that purpose; that it was essential that the plaintiff should be in the car at the time and place of the accident, to enable him to perform the contract of service into which he had entered. It was not essential in the case at bar that the plaintiff should be in the particular car he was in when the accident occurred. He was not under the necessity of riding in any car in order to perform his contract of track-laying. He might have walked to his place of labor and home, had he seen fit, without violating any of the terms of his contract.

The respondent cites several cases in support of his contention that when the injury occurred he was not acting in the service of the appellant. We will now consider them. The case of *Baird v. Pettit*, 70 Pa. 477, was as follows: The plaintiff was employed as draftsman in the defendant's locomotive works. A carpenter employed in "jobbing" for defendant in any part of the works was, by the direction of the defendant, superintending the excavation of a cellar under the building, employing and paying hands, etc. He had a large pile of dirt thrown on the public foot walk. The plaintiff, in leaving the house in the dark, after ceasing his day's work, fell over the dirt and was injured. Held, that the plaintiff and carpenters were not fellow servants in the same common employment, so as to relieve the defendants from liability for the carpenter's negligence. In this case the court said: "The relation of master and servant did not exist between the parties when the plaintiff received the injury. He was not then in the service of the defendant. He had quit work and was on his way home. He was no longer subject to the defendant's control, or bound to obey his orders. As soon as he left the building he was his own master. He was then no more in the defendant's service than any other citizen passing along the street, and he was entitled to the same rights and immunities." In the case of *Gillencater v. Madison & I. R. Co.* 5 Ind. 339, 61 Am. Dec. 101, the plaintiff was employed to frame and build a bridge. He was directed by defendant to go to a certain station to help load some timbers. He was traveling free of fare when injured by negligence of the employees who were running the train. Held, that he

could recover. In the case of *Fitzpatrick v. New Albany & S. R. Co.* 7 Ind. 430, plaintiff was employed by defendant as laborer to ballast road. Defendant agreed to transport him to and from his home to where he should be working. While being so carried he was injured by negligence of the engineer operating the train. Held, that the defendant was liable. Among other things, the court said: "He was not, it is true, a mere passenger; . . . but, under an agreement with the defendants, he was to be regularly conveyed to and from his work. This, it seems to us, involves an implied engagement that they would convey him as safely and securely as if he had been a passenger in the ordinary sense of the term." Upon the question of liability of a street-car company to an employee, working as track repairer, while riding upon its car, the supreme court of Colorado, in the case of *Denver & B. P. Rapid Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106, says: "He was in the defendant's employ at the time, and it is undisputed that it was the defendant's custom to furnish transportation to such employees to and from their work, and that upon this occasion, the hand car being out of order, the foreman substituted transportation by the train. Although no fare was collected or expected from the plaintiff, the evidence shows that he was lawfully upon the train." And the court held that he was entitled to recover against the company for injuries occasioned by the negligence of the engineer in managing the train. In the case of *Rosenbaum v. St. Paul & D. R. Co.* 38 Minn. 173, 36 N. W. 447, the supreme court of Minnesota held that a man working as a grader in ballasting the track could recover for injury sustained when riding on the train of defendant without having paid any fare, and at a time when he might be considered an employee, although not actually working at that time; it appearing that the company was in the habit of carrying these workmen to and from their work. In *Stuber v. Louisville & N. R. Co.* 102 Fed. 421, plaintiff, who was a skilled machinist, and employed by defendant to keep its pumps, tanks, wells, etc., in good working order, while riding on one of defendant's engines to reach a point where his duties called him was injured by the engineer's negligently running the engine into a freight train. Held, that plaintiff and the engineer were not fellow servants in such sense as to prevent recovery by plaintiff for the damages sustained. The case of *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336, is in point if the contract was as claimed by respondent. In that case the railroad company hired O'Donnell to do carpenter work upon a bridge 15 miles from where he lived. The company agreed to pay him a certain price per day, and transport him on its trains to and from his place of work free of charge. One day, after O'Donnell had finished his day's work and was riding home on the train, a wreck occurred, and he was badly injured. The su-

preme court of Pennsylvania held that he was not a servant of the railroad company when hurt, but was a passenger for hire. Among other things, the court said: "O'Donnell traveled, not as a part of his employment as a carpenter at the bridge, but as a passenger from and to his home. He was not hired to pursue his business on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was performed he was no longer in the service of the company, but was free to go or to stay, and when he traveled, in effect, paid his fare out of his wages."

We think that when the respondent had ceased his day's work at track-laying he was not in the employ or under the control of the appellant until he again resumed track-laying under the superintendency of Linder, the foreman of the track gang. Linder certainly had no control over the respondent while going to and from his work, and the respondent was not under any obligation to go to and from his work of track-laying on the cars of the appellant. At 6 o'clock his day's work ended. He had no rights and no privileges on that car, other than or different from those of any other passenger. He was not required to perform services on the car. He was under the control of the conductor of the car, and not of his own foreman, just as any other passenger on the car. As was said by the court in *Hutchinson v. York, N. & B. R. Co.* 6 Eng. Ry. & Canal Cas. 580, cited in *State use of Abell v. Western Maryland R. Co.* 63 Md. 433, "We do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury acting in the service of his master. In such a case the servant is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant." Holding as we do that at the time of the accident the respondent was not a servant of the appellant, it is unnecessary for us to consider further the doctrine of fellow servants. And this disposes of the first, fourth, and sixth assignments of error, because, where two cars meet in a head-end collision on a single-track railway, there must be negligence somewhere, by somebody or other. That negligence, in the absence of other showing, must be assumed to have been primarily the negligence of the defendant's employees in charge of the cars, who caused or allowed them to come into collision. It being primarily the negligence of those employees, it is imputable to their employer, and that employer is in law responsible for its consequences.

The plaintiff, in his complaint, alleged that the defendant hired the plaintiff to work as a laborer on its roads, agreeing to pay him therefor the sum of \$1.50 per day, and transportation to and from his work on the cars of the defendant. The defendant denied that it agreed to pay the plaintiff therefor the sum of \$1.50 per day, and transportation to and from his work on the

cars of the defendant; and the defendant denied that it then or at any other time agreed to pay or furnish to the plaintiff transportation to and from his work on the cars of the defendant, or transportation at all on its cars, or on its road or roads. When the plaintiff offered his evidence as to his transportation, and the tickets in connection therewith, under the denial of the defendant, it was competent for it to offer in evidence any material matter to defeat the alleged contract or to show a different contract. The fourth separate answer to the complaint, and as new matter constituting third affirmative defense, to which a demurrer by the plaintiff was sustained, and the same plea as finally amended, and to which a reply was filed, was an attempt on the part of the defendant to plead its version of the alleged contract. It added nothing to the denial already made. This defense cannot be construed as doing more than the denial. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Terr. 483, 7 Pac. 882, 886, and *Williams v. Nine-mire* (filed in this court December 6, 1900), 63 Pac. 534. The defendant, on the cross-examination of the plaintiff and in its testimony in chief, sought to show that the ticket book given to the plaintiff for his transportation to and from his work, and on which he was being carried at the time of the accident, contained the following condition: "In consideration of this pass, I hereby agree to assume, and do assume, all risks of accidents, damages, and loss sustained by me while using it, and expressly agree with the Seattle Traction Company that it shall not be liable, under any circumstances, whether by reason of negligence of its agents or otherwise, for any injury or loss to me as aforesaid." And it offered further to show that the plaintiff, when the book was delivered to him, was told by the secretary of the company to sign it on a line at the foot of the condition intended for his signature, and that the plaintiff did sign his name as directed, and that the book of tickets was, after it was signed by the plaintiff, signed by the secretary, and that the ticket book so signed was the one plaintiff was using at the time of the accident, and that this book contained 100 single-fare tickets. All this testimony was excluded on the ground that it was immaterial, and in various ways the defendant has saved exceptions to the rulings of the court as they were made during the progress of the trial, excluding this evidence. Was this evidence material, under either the denials or the affirmative answer of the defendant? The defendant sought by this evidence to show that the plaintiff, under his contract with the defendant, and in consideration that the defendant would employ and pay the plaintiff \$1.50 a day for track-laying, agreed to accept from the defendant transportation on the cars of the defendant to and from his work, on employees' tickets limiting the liability of the defendant. Was this contract against public policy? In the case at bar the plaintiff was traveling on

the carrier's line, not as an ordinary passenger, but incidentally to his service as an employee. The carrier was not required by law or duty to give the plaintiff work as a track layer, and, when he sought to obtain such work, it seems to us that he had a perfect right to contract as an incident to the principal contract, that he should be carried by the defendant over its lines to and from his work, subject to the condition that the plaintiff would assume, while being so transported, all risk of accidents, etc., contained in the conditions which the defendant sought to prove. The plaintiff was not bound to enter or remain in the defendant's employ. Both parties were free, the one owing no duty, the other being under no obligation to travel on the defendant's line otherwise than as an ordinary passenger, paying fare, and entitled to full redress for injury through negligence.

The cases of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, and *Grand Trunk R. Co. v. Stevns*, 95 U. S. 655, 24 L. ed. 535, have been reviewed by the Supreme Court of the United States in the case of *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385. In that case the railway company, being engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do, and actually doing, the business known as "express business," by which contract the railroad company agreed, solely upon the consideration and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities, and express cars, to be used and employed exclusively by said express company in the conduct of such express business, and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as "express messengers," for that purpose to be allowed to ride in said express cars; to transport such express messengers, for the purposes and under the circumstances aforesaid, free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities, and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employees of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employees, or otherwise. Voigt made application to said express company, in writing, to be employed by it as express messen-



ger on the railroad company, between which and such express company a contract as aforesaid existed; and such applicant, pursuant to his application, was employed by the express company under a contract in writing, signed by him and it, whereby it was agreed between him and the express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it, arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company, on demand, any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release, under his hand and seal, of all claims and demands and causes of action arising out of, or in any manner connected with, said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company. Held, that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger, within the meaning of the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 367, 21 L. ed. 627; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy. In the *Voigt Case* the Supreme Court, in speaking of the decision of the court in *New York C. R. Co. v. Lockwood* and *Grand Trunk R. Co. v. Stevens*, says: "The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore 53 L. R. A.

you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.' " In the *Voigt Case* it was held that the messenger was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it, by securing his appointment as such messenger. So in the case at bar the plaintiff was not constrained to enter into the contract whereby the street-car company was exonerated, but by entering into it he obtained employment as a track layer. There is no difference in principle between the two cases. This court in the case of *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 35 Pac. 422, says: "The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely and without any limiting conditions; and therefore such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz., to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger." In the case just cited the same principle is laid down as in the case of *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385. We think the evidence offered was admissible, as tending to show a contract for transportation different from that alleged in the complaint, and that the court erred in refusing to admit the same. We do not mean, however, to hold that the mere signing of the condition, under the circumstances under which it was signed, is conclusive on the plaintiff, as showing that the contract of transportation was as claimed by the defendant. The allegations of the complaint and the evidence of the plaintiff are to the effect that the transportation was to be unconditional. If such was the case, then the plaintiff would be a passenger for hire, and entitled to all his rights as such. The fact that the plaintiff was employed by the day, and could quit at any time, and that he received from time to time ticket books with conditions thereon like that offered to be proved, would be strong circumstances to show that the contract for transportation was as the defendant contends, but it is not conclusive. It must be remembered that there was no showing or

offer to show that the secretary was authorized to enter into contracts for the employment of track layers, or that he was authorized to bring about a modification of the contract originally made by Linder with the plaintiff, and that at the time Linder employed the plaintiff nothing was said to the latter about his transportation having a stipulation attached which should exempt the company from liability. All these facts and the circumstances under which the plaintiff signed the condition were for the consideration of the jury, under proper instructions, from which they might determine whether the contract of transportation was unconditional, as claimed by the plaintiff, or was conditional, as claimed by the defendant.

Dahl, an acquaintance of the plaintiff, testified as to his appearance prior to the accident as having been that of "a healthy-looking man,—a strong laborer."—and as to his appearance since, as looking more thin and pale, and not seeming to hear as well as before, and being more quiet in manner. The plaintiff's wife testified as to his excited condition when he came home on the evening after the accident, and his complaining that night of pain in his head and back, and as to his impaired condition in various respects from that time onward. This testimony was admitted over the defendant's objection and exception. It is claimed by defendant that this testimony falls under the head of expert and opinion evidence, and as the witnesses were people of ordinary observation, and not qualified as experts, they should not have been allowed to testify to the facts recited. One was the wife and the other an acquaintance of the plaintiff. They had observed his appearance and conduct before and after the accident. We think this evidence was admissible. In *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441, the court says: "Opinions concerning matters of daily occurrence and open to common observation are received, from necessity. *Com. v. Sturtevant*, 117 Mass. 122, 19 Am. Rep. 401. And any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eyewitnesses to form an accurate judgment in regard to it. *De Witt v. Barly*, 17 N. Y. 340; *Bellows, J., in Taylor v. Grand Trunk R. Co.* 48 N. H. 304, 2 Am. Rep. 229. How can a witness describe the weight of a horse, or his strength, or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of the step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, because it is impossible to convey to the mind of another any adequate 53 L. R. A.

conception of the truth by a recital of visible and tangible appearances, because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but at the same time incapable of description, the opinion of the observer is admissible, from the necessity of the case, and witnesses are permitted to say of a person, 'He seemed to be frightened,' 'He was greatly excited,' 'He was much confused,' 'He was agitated,' 'He was pleased,' 'He was angry.' All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual,—appearances which are plainly enough recognized by a person of good judgment, but which he can no otherwise communicate than by an expression of results in the shape of an opinion." See also *Union P. R. Co. v. Gilland*, 4 Wyo. 395, 34 Pac. 953.

The plaintiff testified that he had worked as a deckhand on a steamboat for about six years on and off ending three years before the day of the accident. Since then his activities had been confined to fishing in the summer season and working as a track hand on street railways during the winters. The defendant claims that as the plaintiff had not been working on a steamboat for three years, and did not claim to intend returning to that calling, it could not fairly be regarded as his occupation, or as one of his occupations, either present or prospective, when he received his injuries; that therefore the earnings of a steamboat hand at that time testified to by the plaintiff had nothing to do with the question of how much his physical impairment due to his injuries might deprive him of earning. It was proper to show what wages would be open to the plaintiff in a business he understood, and which he would have the right to resume were it not for the injuries which prevented him from again entering that business. This disposes of the third assigned error.

For error of the court in rejecting the testimony hereinbefore indicated, *the judgment of the court below must be, and the same is, reversed*, and this cause is remanded for a new trial in accordance with the views herein expressed.

**Anders and Fullerton, JJ., concur.**

A petition for rehearing having been granted, **White, J.**, on June 24, 1901, delivered the following additional opinion:

The opinion in this case was filed December 27, 1900. A rehearing was granted. It is necessary only to modify our views in one respect. In the original opinion we said: "The carrier was not required by law or duty to give the plaintiff work as a track layer, and when he sought to obtain such work, it seems to us that he had a perfect right to contract, as an incident to the principal contract, that he should be carried by the defendant over its lines to and from his work, subject to the

condition that the plaintiff would assume, while being so transported, all risk of accidents, etc., contained in the conditions which the defendant sought to prove." A more critical examination of the pleadings in this case satisfies us that the question whether the plaintiff and defendant could so contract is not involved, and that point may still be considered open and undecided. The fourth affirmative defense, in substance, is that, if the plaintiff was traveling on one of the cars of the defendant at the time mentioned in said complaint, and if he then received any such injuries as are therein alleged, said plaintiff was then traveling on one of the defendant's cars along one of its lines of street railway, not as a passenger paying fare for transportation of himself on said car, but by virtue of a free pass ticket, which the defendant had theretofore furnished him, and which was accepted by the plaintiff under an agreement that he (the plaintiff) would assume all risks of damages and loss sustained by him while using it, and that the plaintiff expressly agreed with the defendant that the defendant should not be liable under any circumstances, whether by reason of negligence of its agents or otherwise, for any injury or loss to the plaintiff; that the same had been furnished by the defendant to the plaintiff gratuitously, without any consideration therefor, and not in pursuance of any contract, express or implied, of the defendant with the plaintiff to furnish the same to him on account of his being in the employ of the defendant, and the same was so furnished to him, not as a compensation or partial compensation for any work or labor performed, or to be performed, but solely as a donation by the defendant to the plaintiff of the privilege of free transportation. It is alleged that the tickets so furnished on which the plaintiff was traveling were put up in books, on the back of which the agreement was indorsed. The answer also specifically denied that the defendant agreed to pay the plaintiff the sum of \$1.50 per day and transportation to and from his work on the cars of the defendant. The evidence rejected was offered to sustain the facts pleaded in the fourth affirmative defense, and we think it was admissible for that purpose, under the rulings of this court in *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 35 Pac. 422. But we expressly hold that, if the respondent's transportation constituted a portion of the consideration for his services, he became a passenger for hire, just the same as anybody else who parts with anything of value for transportation; but, if the consideration for his services is independent of his transportation, and his transportation is a mere gratuity bestowed upon him by his employer, as pleaded in the fourth separate defense herein, he stands like anyone else traveling on a free pass so conditioned, notwithstanding his employer would not probably have bestowed the transportation if the recipient had not been in his employ. The original opinion is modified as herein expressed.

pressed, the judgment of the court below is reversed, and this cause remanded for a new trial.

Fullerton, Anders, Mount, and Hadley, JJ., concur.

Henry McALMOND, Appt.,

v.

Robert BEVINGTON, Defendant.

T. H. CANN *et al.*, Garnishees.

G. W. FEAZELL, Claimant, *Respt.*

(.....Wash.....)

**Money deposited by a third person with a justice of the peace as bail for one who has been committed by the justice, and which is receipted for to him, is, until the contrary is shown, presumed to belong to such third person, and is not subject to garnishment for the prisoner's debt after the latter's discharge.**

(November 24, 1900.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of claimant in a proceeding to reach funds in the hands of defendants Cann and others to pay a debt of defendant Bevington. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Morris B. Sachs and Julius F. Hale*, for appellant:

Section 6877, providing, as it does, that the defendant may deposit money in lieu of bail, money deposited in accordance with this section, no matter by whom, becomes the money of the defendant by whom, or for whom, it is so deposited; that is to say, this money in this case, no matter whether deposited by Bevington or by Feazell, being deposited in accordance with this section of the Code which gives the defendant such right, becomes the money of the defendant, Robert Bevington, and subject and liable to be garnished.

*Salter v. Weiner*, 6 Abb. Pr. 191; *People ex rel. Gilbert v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910.

If there is no law which authorizes a committing magistrate or a justice of the peace to accept money in lieu of a recognizance as bail, then the claimant herein charged with the knowledge of the law, participated, aided, and abetted the garnishee defendant, Cann, who was the committing magistrate, in obtaining the illegal release from custody of a person charged with a crime, and thus violated the laws of this state.

**NOTE.**—As to garnishment of property or money in custody of law, see authorities in this series as follows: *Tuck v. Manning* (Mass.) 5 L. R. A. 866; *Curtis v. Ford* (Tex.) 10 L. R. A. 529; *Dunsmoor v. Furstenfeldt* (Cal.) 12 L. R. A. 508, and note; *Ex parte Hurn* (Ala.) 13 L. R. A. 120; *Holker v. Hennessey* (Mo.) 39 L. R. A. 165; and *Allen v. Gerard* (R. I.) 49 L. R. A. 351.

The depositor is *particeps criminis*, having contributed to a wrongful discharge and thus assisted in obstructing justice, and has no right to recover back the money.

*Smart v. Cason*, 50 Ill. 195.

**Mr. John W. Carson** for respondent.

**White, J.**, delivered the opinion of the court:

On the 28th day of January, 1899, Henry McAlmond, the appellant, who was the plaintiff in the garnishee proceedings in the court below, recovered a judgment in the superior court of King county in cause No. 26,125—*Hugh Barbour, Plaintiff, against E. H. McAlmond et al., Defendants*—against Robert Bevington, who was one of the defendants in the action, in which judgment was recovered for the sum of \$500, with interest, etc. The said judgment remained unsatisfied, and on the 21st day of September, 1899, the said Henry McAlmond filed in said court and in said cause in which judgment was recovered an affidavit for garnishment, and thereupon a writ of garnishment was issued out of said court in said cause, and on said day was duly served upon J. Dal Roberts, the garnishee mentioned in the affidavit; and on the 22d day of September, 1899, an affidavit for garnishment was filed in said cause, and on said day a writ of garnishment was duly issued therein, and was duly served upon said T. H. Cann, the garnishee named in said writ. Answers were duly served by the garnishees, J. Dal Roberts and T. H. Cann, in which said answers the said garnishees deny that at the time of the services of the writ of garnishment they were indebted to the defendant Robert Bevington in any sum whatever, and allege that at that time no effects of any kind, nature, or description whatsoever were in their possession or under their control belonging to the said defendant Robert Bevington; and further alleging that since said time they have not become indebted to the said Robert Bevington, nor since said time have they had in their possession or under their control any effects whatever belonging to the said Robert Bevington. Afterwards the judgment creditor, Henry McAlmond, the appellant, filed and served replies to said answers, alleging that at and before the service of the writ of garnishment herein upon said garnishee, to wit, the 22d day of September, 1899, and prior thereto, and ever since said day, said garnishee T. H. Cann was indebted to said Robert Bevington, and is now indebted to said Robert Bevington, in the sum of \$1,000, being the amount of money deposited with the said garnishee on about the 22d day of September, 1899, as cash bail for said Robert Bevington in the case of the state of Washington against Robert Bevington and others, defendants, then pending in the justice court, Seattle precinct, King county, Washington, before T. H. Cann, justice of the peace; that since the service of the writ of garnishment upon said garnishee the said justice court, by an order duly made in said court in said cause in which the state of Washington was plaintiff and Robert Bev-

ington and others were defendants, being the same cause in which the said sum of \$1,000 was deposited by said Robert Bevington with said garnishee as cash bail, did dismiss said cause, and discharge said defendants therein. These replies were duly served and filed on or about the 27th day of September, 1899, on which day the above-named garnishee defendant, T. H. Cann, deposited with the clerk of the superior court of King county, Washington, and paid into the registry of said court, the sum of \$1,000 in response to the garnishment hereinbefore referred to. Afterwards, on the 3d day of October, 1899, one G. W. Feazell filed in said cause in said court an affidavit styling himself plaintiff and claimant, in which affidavit the said Feazell states that the \$1,000 levied upon in the above-entitled cause as the property of the defendant Robert Bevington has been at all times herein mentioned, and now is, the property of the claimant, G. W. Feazell, and that the same is of value of \$1,000, and that said claimant Feazell, is entitled and has the right to the immediate possession thereof. The affidavit and claim of said Feazell were duly controverted by the appellant. A jury was in open court waived by all parties to the cause, and the same was, on the 13th day of November, 1899, tried before the court. Thereupon the court made and filed in the cause findings of fact and conclusions of law as follows: "(1) I find that on the 28th day of January, 1899, Henry McAlmond, plaintiff herein, recovered a judgment in the superior court against Robert Bevington for the sum of \$500, with interest thereon at the rate of 7 per cent. *per annum* from April 27, 1898, and costs of suit, taxed at \$12. (2) I find that on September 15, 1899, said Robert Bevington and one A. B. Mason were charged on a written complaint sworn to by John J. Jones with the crime of obtaining money under false pretenses on or about August 7, 1899, in King county, state of Washington. I find that a warrant was issued by the justice before whom the complaint was made, and that they were arrested, and brought into court September 15, 1899. I find that the complaint could not be heard on that day, and it was continued until September 20. The bail was fixed by the court at \$1,000 each. On the 15th day of September Bevington was not able to give bail for his appearance from time to time until the examination could be concluded by the justice. (3) I find that G. W. Feazell, intervener herein, was a friend of Mr. Bevington, and that he, without the request and knowledge of Bevington, put into the hands of the justice \$1,000 of his own money, in cash, as security for the appearance of Bevington whenever his appearance should be required by the justice during the progress of the preliminary examination. (4) I find that T. H. Cann, the justice of the peace, received it and receipted for it as said G. W. Feazell's money. (5) I find that the preliminary hearing was not completed on the 20th, and was continued until the 21st at 2 o'clock P. M., and thence continued

to September 22d at 10 o'clock A. M.; that late on the afternoon of the 22d day the charge against both defendants was dismissed by the justice of the peace. (6) I find that about 8 o'clock in the morning of the 22d garnishee process was served upon T. H. Cann, claiming the money deposited in the court by Mr. Feazell to be the money of Robert Bevington, and the object of such garnishment proceedings was to secure the application of said money, or as much thereof as might be necessary, for the satisfaction of the judgment obtained by McAlmond against Bevington, above alluded to. (7) I find that T. H. Cann, justice of the peace, deposited said money in the registry of this court to bide its order herein. (8) I find that G. W. Feazell intervened in the garnishment proceedings herein, and claimed the money as his own. I find as a conclusion of law from the above facts that the money was the property and is the property of G. W. Feazell, intervener herein, and that he is entitled to the possession of the same." Prior to the making and filing of the aforesaid findings of fact and conclusions of law the appellant asked the court to make the following conclusions of law: "That the claimant and intervener, Feazell, having deposited the funds in question with the garnishee defendant, T. H. Cann, for the use and benefit of defendant Robert Bevington, such funds then became, and ever since have been, the property of said Robert Bevington, and are subject to garnishment by the judgment creditor, Henry McAlmond, and that, consequently, said money, which was in the hands and under the control of garnishee defendant, T. H. Cann, and afterwards deposited by him in the registry of this court, or so much thereof as may be necessary to satisfy the judgment of said Henry McAlmond, should be appropriated to the payment of said judgment." Thereupon the appellant excepted to the third finding of fact and the conclusions of law made and entered by the court, and the refusal by the court to make the conclusions of law submitted by the appellant. On the 24th day of November, 1899, the court made and entered a decree authorizing the claimant and intervener, G. W. Feazell, to withdraw from the registry of the court the \$1,000 therein deposited by the garnishee defendant, T. H. Cann, and giving and granting a judgment in favor of said claimant and intervener and said garnishee defendants, and each of them, and against the said Henry McAlmond, for costs and disbursements; and thereupon the said appellant applied to the court for an order fixing the amount of the appeal and supersedeas bonds in said cause in order that he might appeal the said case to the supreme court of the state of Washington, and supersede said judgment and decree; and the court thereupon fixed the bond aforesaid at \$500. Thereupon the appellant duly gave notice of appeal, as required by law, and filed an appeal and supersedeas bond in the sum of \$500, as fixed by the order of the court; and thereafter the court made and entered an order which recited that,

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judgment in the cause having been rendered in favor of the claimant, G. W. Feazell, and the court having made an order fixing the supersedeas bond at \$500 on application of Williams and Jacobs, attorneys for claimant, and which ordered that said claimant be permitted to withdraw from the registry of the court the \$1,000 deposited by said T. H. Cann upon giving a bond, to be approved by the court, to Henry McAlmond, in the sum of \$1,000, conditioned to pay all costs and damages he may sustain by reason of such withdrawal; to which said Henry McAlmond excepted. On the 28th day of November, 1899, the court made the following order: "Upon approving and filing bond herein it is ordered that \$500 of the money deposited herein be delivered to G. W. Feazell, or his attorney, Solon T. Williams." Thereafter there was filed in court a bond in the sum of \$250, which was approved by the judge, and thereupon the said claimant withdrew from the registry of said court, and of the \$1,000 deposited by said T. H. Cann, garnishee herein, the sum of \$500, and this case comes to this court upon the appeal of said Henry McAlmond from the judgment and decree and the orders of the superior court of King county.

The findings of fact, except the third, are not questioned. The statement of facts recites that, "subsequent to Bevington's commitment to jail, but prior to his said preliminary examination, G. W. Feazell, the above-named intervener or claimant, deposited with said justice of the peace, Cann, the sum of \$1,000 in cash, in lieu of bail, as security for the appearance of said Bevington before said justice of the peace for his preliminary examination." This is the only matter in the statement justifying the third finding of fact. From the fact that the money was deposited by Feazell the court found that it was Feazell's money, and that he was a friend of Bevington. The difference between the third finding of fact and the statement is immaterial. The fourth finding of fact is to the effect that the justice of the peace received the money from Feazell, and receipted to him for it. Until the contrary is shown, the presumption, under such circumstances, is that it was Feazell's money that was deposited.

The second assignment of error is based upon the conclusion of law made by the court, and the third assignment upon the refusal of the court to find the conclusions of law requested by the appellant. We will consider them together. The appellant takes the position that, because the money was deposited as security for Bevington's appearance, it became, for all purposes, Bevington's money, and became subject to garnishment for his debts. From the undisputed findings this money was deposited by the respondent for a special purpose. There is no evidence showing or tending to show that, prior to its deposit, Bevington had any interest whatever in it. The justice receipted to the respondent for it, not as the money of Bevington, but as the money of the respondent. Had the respondent ex-

tered into a recognizance for Bevington's appearance, no one doubts but that on the discharge of Bevington the recognizance would be *functus officio*, and the respondent's liability at an end. The money took the place of a recognizance entered into by the respondent for Bevington's appearance, and was accepted by the justice of the peace in lieu thereof; and when it had answered the purpose for which it was placed in the hands of the justice, and he had no longer a right thereto for the purpose for which it was deposited, why should it not be returned to the respondent? Certainly, Bevington could not maintain an action against the justice for the recovery or conversion of the money, unless he was able to show that when it was deposited it was his money, and the respondent was only his agent. Why, then, should the judgment creditor of Bevington acquire any greater right to the money than that possessed by Bevington? As was said by this court in *Mervin v. Fowler*, 20 Wash. 587, 56 Pac. 374: "The material question is, To whom did the money belong that was paid into court? . . . When the decree which was the basis of the transaction failed, intervenor became at once entitled to the money. . . . If it was security merely, then the failure of the security before the application of the money could be made would, upon well-understood equitable principles, entitle the intervenor to its return. That this would be the rule between the intervenor and Fowler [for whose benefit the deposit was made] cannot well be doubted, and the plaintiff in garnishment can claim no greater right to the fund than could his own debtor." And in *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, this court says: "The garnisher can get no better right to the debt garnished than his debtor has; and, if the latter has no right in or to the debt, the former acquires none by his garnishment." The principle announced in these cases should be applied to the case under consideration, and is decisive against the contention of the appellant.

The case of *People ex rel. Gilbert v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910, relied upon by appellant, can be distinguished from the case at bar. In that case one Nye was arrested in the city of New York on the charge of assault, and was held to bail in the sum of \$300 for his appearance for trial at the court of special sessions. Gilbert, for Nye, deposited with the justice \$300 in lieu of bail. Nye was convicted, and sentenced to pay a fine of \$250. The fine was ordered to be paid from the money on deposit. The money deposited was Gilbert's. There was also a statute providing "that, when money has been deposited, if it remain on deposit and forfeited at the time of judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and after satisfying the fine, must refund the surplus, if any, to the defendant." The court held that the section quoted must be read in connection with the section authorizing a money deposit in lieu of bail; that Gilbert, when he

deposited the money, must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them; that, if he was deprived of his money in the payment of the fine, it was by his voluntary act and implied assent. It was not held in that case that the money was impounded for all purposes, and that creditors could seize it as the money of Nye. The case of *Salter v. Weiner*, 6 Abb. Pr. 191, does hold, however, that the money deposited by another for bail of the defendant was loaned to the defendant, and that loaned money is the property of the loanee, and was therefore subject to attachment. But in that case the money was ordered by the court to be turned over to the defendant before the attachment was levied. The opinion takes up four lines of the report, and no reasons, further than we have quoted are given for so holding. We think the rule established in *Mervin v. Fowler*, 20 Wash. 587, 56 Pac. 374, is more logical, equitable, and just than that announced by the New York court. There is no statute in this state authorizing a justice of the peace on a preliminary examination to accept a deposit of cash in lieu of bail. It is not necessary in this case to decide whether he may or may not do so. The statute (2 Ballinger's Anno. Codes & Statutes, § 6878) allowing defendant to deposit with the clerk of the court money in lieu of bail applies only to criminal proceedings in the superior court. In this case the justice, without statutory authority, received the money of the respondent as surety for the appearance of Bevington in place of a recognizance entered into by respondent for Bevington's appearance. When the purpose for which the money had been deposited was served, so far as ownership is concerned, it is as if the money had never passed from the possession of the owner. His right to recover it immediately attaches. The title to the money was never for a moment in Bevington for any purpose.

The assignment to the effect that the court, in allowing respondent to withdraw a portion of the fund, erred, requires no consideration. As we have held that the money on deposit was the money of the respondent, the ruling of the court, even if erroneous, would not be injurious to the appellant.

*The judgment of the Lower Court is affirmed, with costs to respondent.*

Dunbar, Ch. J., and Reavis, Anders, and Fullerton, JJ., concur.

E. C. NEUFELDER, *Appt.*,  
v.

THIRD STREET & SUBURBAN RAIL-  
WAY COMPANY, *Respt.*

(.....Wash.....)

**Machinery not manufactured especially**

NOTE.—As to what are fixtures as between mortgagor and mortgagee, and the right to remove them, see, in this series, Southbridge Sav.

for a building, but of a kind which can be purchased generally in the market, does not become, in favor of a mortgagee, part of the realty by being attached by bolts and screws to the building for the purpose of steadying it while in use, if it is not intended to become part of the premises and can be removed without any material injury to or alteration of the building.

(December 12, 1900.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action to recover damages for the alleged wrongful removal of certain fixtures from real estate. *Affirmed.*

The facts are stated in the opinion.

**Messrs. Morris B. Sachs, John P. Hoyt, and Pierre P. Ferry**, for appellant: The conceded facts bring this case within the class in which the rule as to fixtures is most strongly construed in favor of their becoming a part of the real estate. The ownership of the land and of the machinery was common and absolute at the time of the annexation, and the respondent has succeeded only to the rights of the mortgagor of the real estate. So that the law applicable is the same as it would have been had the Western Mill Company itself removed this property and been sued by the holder of the mortgage on account thereof.

13 Am. & Eng. Enc. Law, 2d ed. pp. 597 et seq.; 1 Jones, *Mortg.* 4th ed. §§ 428, 429, 436; *Wade v. Donau Brewing Co.* 10 Wash. 284, 38 Pac. 1009; *Heim v. Gilroy*, 20 Or. 517, 26 Pac. 851; *Albert v. Uhrich*, 180 Pa. 283, 36 Atl. 745; *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399; *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221; *Cook v. Condon*, 6 Kan. App. 574, 51 Pac. 587; *Snedecker v. Warring*, 12 N. Y. 178; *Eksstrom v. Hall*, 90 Me. 186, 38 Atl. 106; *National Bank v. Levanseier*, 115 Mich. 372, 73 N. W. 399; *Voorhees v. McGinnis*, 48 N. Y. 278; *Hill v. Farmers & M. Nat. Bank*, 97 U. S. 450, 24 L. ed. 1051; *Foot v. Gooch*, 96 N. C. 265, 1 S. E. 525; *Fisk v. People's Nat. Bank*, 14 Colo. App. 21, 59 Pac. 63; *MERCHANT'S Nat. Bank v. Great Falls Opera House Co.* 23 Mont. 33, 45 L. R. A. 285, 57 Pac. 445; *Cooper v. Harvey*, 41 N. Y. S. R. 594, 16 N. Y. Supp. 660; *Gray v. Holdship (Pa.)* 17 Am. Dec. 680, and notes; *Treadway v. Sharon*, 7 Nev. 37; *Merritt v. Judd*, 14 Cal. 65; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.* 15 Colo. 29, 24 Pac. 920.

**Messrs. Bausman, Kelleher, & Emory**, for respondent:

Is it possible to say that this machinery became part of the land, without abandoning altogether the line of previous decisions repeatedly announcing during several years past what the people of this state should regard as the law?

*Cherry v. Arthur*, 5 Wash. 787, 32 Pac.

744; *Chase v. Tacoma Box Co.* 11 Wash. 377, 39 Pac. 639; *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 267, 47 Pac. 224; *Philadelphia Mortg. & T. Co. v. Miller*, 20 Wash. 607, 44 L. R. A. 559, 56 Pac. 382.

The entire equipment of a box factory, though fastened to the floor by screws and nails, can be removed from it as against a mortgagee.

*Chase v. Tacoma Box Co.* 11 Wash. 377, 39 Pac. 639; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 267, 47 Pac. 224; *Philadelphia Mortg. & T. Co. v. Miller*, 20 Wash. 607, 44 L. R. A. 559, 56 Pac. 382.

**Fullerton, J.**, delivered the opinion of the court:

In 1884 the Western Mill Company, being then the owner of certain real property, mortgaged the same to Myer Lewis to secure a loan made to it on that day by Lewis. The mortgage was in the usual form of a real-estate mortgage, and the description of the property was ample to cover everything on the mortgaged premises that could properly be said to be a part of the realty, but contained nothing from which it could be inferred that it was intended to cover the personal property then on the premises, or which might thereafter be put thereon by the mortgagor. At the time of the execution of the mortgage there was a sawmill on the land, having a capacity of about 45,000 feet of lumber per day. In 1888 and 1889 the mortgagor erected a new sawmill building thereon, and fitted it out with machinery in part taken from the old mill, and in part newly purchased, giving the new mill a capacity of about 100,000 feet of lumber per day. The old building was turned into a planing mill and sash and door factory, and was fitted out with the usual machinery used in conducting a business of that character. Subsequent to that time the property was sold and conveyed to the respondent herein. The mortgage was not paid, and in 1895 a suit to foreclose the same was duly commenced by the then owner of the mortgage. While this foreclosure proceeding was pending, respondent removed from the premises certain of the machinery used in the sawmill and sash and door factory. Subsequent thereto the real property was sold under a decree of foreclosure of the mortgage, and purchased by the mortgagee at a sum less than the amount the court found to be due upon the mortgage debt. This is an action brought by the successor in interest of the mortgagee to recover damages alleged to have been suffered because of the removal of the property, the contention being that the property removed was a part of the realty. The trial court found the following facts: "I find that all the ma-

*Bank v. Mason (Mass.)* 1 L. R. A. 350; *Hope-well Mills v. Taunton Sav. Bank (Mass.)* 6 L. R. A. 249, and note; *Binkley v. Forkner (Ind.)* 3 L. R. A. 33, and note; *McFadden v. Allen (N. Y.)* 19 L. R. A. 446; *German Sav. & L. Soc. v.* 53 L. R. A.

*Weber (Wash.)* 38 L. R. A. 267; and cases in note to *Overman v. Sasser (N. C.)* 10 L. R. A. on page 725. See also, as to effect of agreement as to fixtures on mortgaged premises, succeeding case and footnote thereto.

chinery in the planing mill and sash and door factory removed by the defendant herein as aforesaid was attached to the building by lag screws, for the purpose of steadying it while in use; that all of this machinery was capable of being moved from the premises without material injury thereto; and that it was in fact removed by the defendant without material injury thereto. I find that all the machinery in the planing mill and sash and door factory, removed as aforesaid by the defendant, was machinery of common sort and description; that it was machinery of a sort bought and sold by price list and sample, according to catalogues, and that it was not specially made or designed for that building or those premises; that it can be used as well in any other premises of like nature; and that like machinery can be purchased and put in use upon these premises for the purposes of a planing mill and sash and door factory without alteration of the premises. As to block A (the sawmill property), I find that with the exception of one engine, hereinafter referred to, all the machinery and apparatus in the sawmill thereon, removed as aforesaid by defendant, was machinery of common lot and description, bought and sold in the markets according to price list and sample, and found in catalogues; that it was not more specially adapted to that structure than to any other milling structure; that it can be used in any other mill as well as in that; that when the mill itself was built some of this machinery was contemplated, but that it was built substantially in the manner of any other sawmill; and that it can again be equipped with machinery suitable for its purposes without alteration of the structure. I find, also, that all the machinery on block A so removed was never intended to become a part of the premises; that it was attached to the mill structure only for the purpose of steadying it while in use; that it could be removed from the premises without any material damage or alteration thereof. The machinery in the mill removed by the defendant was in some cases fastened to the floor by screws or lag bolts. In other cases the machinery was fastened to the frame of the building by the use of bolts of various lengths, averaging in size from a half inch in diameter to an inch and one-quarter in diameter. The engines in some instances were placed upon a foundation of timbers of several thicknesses or layers. These timbers were bolted to the framework of the mill in some cases, and were held together with iron bolts extending into or through them so as to hold them solidly in place. The engines were bolted to this foundation of timbers. In most if not all cases the engine could be removed by unscrewing the nuts and lifting it off the bolts." As a conclusion of law therefrom the court found that the property taken (with the exception of the engine mentioned) was personal property, and entered a judgment denying the right of the appellant to recover therefor.

The appellant contends that the property  
53 L. R. A.

removed was attached to the realty in such a manner as to make it, especially as between a mortgagor and mortgagee, a part thereof, and has brought to our attention many cases, some of which, at least, fully support his contention. This question, however, is no longer an open one in this state. This court has by repeated decisions established the law that property of this character, attached as this was to the realty, is not a part thereof, but is personal property, and may be removed therefrom by its owner without incurring liability to any person who may have a lien on such real property. In *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744, the question was whether a planer used in a sawmill, which was bolted to the floor in such a way as to keep it from moving from its place when being used, was a part of the realty or was personal property. In that case the court said: "In ascertaining whether such a machine does become part of the realty, in favor of mortgagees, the rule is that the manner, purpose, and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening, such as would cause permanent injury if removed. But mere furniture, although some fastening be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there." In *Chase v. Tacoma Box Co.* 11 Wash. 377, 39 Pac. 639, the question was whether the machinery of a box factory attached to the land in substantially the same manner as the property in this case was attached was a part of the realty. After an extended review of the decisions of courts of other states, as well as the case of *Cherry v. Arthur*, it was held that the machinery, notwithstanding the manner in which it was affixed to the realty, still retained its character of personality. In the course of the opinion the court, after quoting from *Cherry v. Arthur* the paragraph above set out, said: "We are entirely satisfied with what is here said upon the subject, and think it best accords with reason and modern authority." In *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736, the machinery in question was, as the record shows, "a planer and matcher, a surfacer and sizer, a gang edger, and a double-block shingle machine." The machines were fastened to the floor of the mill in which they were then being used by means of lag screws and bolts running through the feet of the machines into the floor and timbers of the mill upon which they rested. The contest was one between mortgagor and mortgagee, and one of the questions was whether the machines formed a part of the realty, or were personal property. Passing on that question, the court said: "No general rule can be promulgated under which it



can be determined whether a particular piece of machinery is or is not a fixture to the real estate with which it is used. So many considerations enter into the determination of this question that no general rule can be stated which will apply in all cases. Not only can no general rule be adduced from the decisions of the courts which will apply to all cases, but it will appear from an examination of the decisions upon this question that there is a great want of harmony even where the circumstances were identical. There is a class of cases which have adopted a rule which, if applied to the facts shown by the evidence to have existed as to the placing of this machinery in the mill building in which it was used, would require us to hold that such machinery was a fixture, and passed to the mortgagee as a part of the real estate. A leading case of this kind is *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719. But the learned court which decided it, though apparently well satisfied with the conclusion to which it had come, was forced to admit that a contrary doctrine had been established by the courts of a majority of the states which had passed upon the question. This machinery was attached to the building in substantially the same manner as was that in controversy in the case of *Chase v. Tacoma Box Co.* 11 Wash. 377, 39 Pac. 639, and *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; and under the rule announced in those

cases, which rule we believe to be supported by the weight of authority, it must be held to have been personal property, and not such a fixture as to pass to the mortgagee." This case also answers the argument of the appellant to the effect that a different rule applies where the controversy is between a mortgagor and mortgagee than is applicable where the controversy is between the mortgagee and one claiming adversely to the mortgagor. On this question it was said: "If the question as to the nature of this property had arisen between the mortgagee named in said chattel mortgage and the appellant, there could be no doubt but that under the rule heretofore announced by this court it would be held to be personal property, and in our opinion the rule was not changed by the fact that the question was raised between the parties to the real-estate mortgage." Further, on the question what will in this state be considered personal property, see *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 267, 47 Pac. 224; *Philadelphia Mortg. & T. Co. v. Miller*, 20 Wash. 607, 44 L. R. A. 559, 56 Pac. 382. Concluding, as we do, that the case at bar falls within the rule of these cases, it is unnecessary to discuss the other questions suggested.

*The judgment is affirmed.*

Dunbar, Ch. J., and Reavis and Anders, JJ., concur.

### WISCONSIN SUPREME COURT.

FULLER-WARREN COMPANY, *Respt.*,

v.

Gilbert HARTER, *Appt.*

(.....Wis.....)

- \*1. The rule that a choice of one of two inconsistent remedies or causes of action waives the other applies only where there are two such remedies or causes of action.
2. If a person pursues a cause of action which he erroneously supposes he has, and is defeated because of the error, he is not precluded thereby from suing over upon the proper cause of action.
3. The vendor of personal property sold to be and in fact attached to real estate by the owner thereof or with his consent, as a permanent improvement, may by contract with such owner preserve the chattel character of the accession.
4. In the circumstances stated, the character of the accession cannot be preserved by contract between the vendor and vendee of the personalty as against the owner of a mortgage of the realty existing when the accession is made, who is not a party to such contract.

\*Headnotes by MARSHALL, J.

5. A contract between a vendor and vendee of personal property to be incorporated into the real estate of the latter as a permanent improvement thereof, such realty being encumbered by mortgage and the mortgagee not being a party to the contract, reserving the title to or any lesser interest in the subject of the sale after such improvement, for any purpose, is invalid as to the mortgagee.

6. Personal property annexed to mortgaged real estate, which, as between mortgagor and mortgagee, becomes part of the mortgage security, becomes such as between the latter and a third person regardless of any contract between the former and such person and whether the removal thereof from the building can be effected without material injury thereto or to the value of the mortgage security as it existed prior to the accession.

(April 9, 1901.)

APPEAL by defendant from a judgment of the Waukesha County Court in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of certain personal property belonging to plaintiff. *Reversed.*

NOTE.—As to effect on mortgagee of agreement between mortgagor and another as to character of improvements to be attached to realty, see *McFadden v. Allen* (N. Y.) 19 L. R. A. 446; 53 L. R. A.

cases in note to *Muir & McDonald v. Jones* (Or.) 19 L. R. A. on page 444; and *German Sav. & L. Soc. v. Weber* (Wash.) 38 L. R. A. 267. See also the case next preceding.

Statement by Marshall, J.:

Action for a wrongful conversion of personal property. The trial was by the court. The findings were to the effect that in 1894 plaintiff sold and delivered to Ann T. Shurts a No. 290 Fuller & Warren hot-air furnace and the necessary connections for use in heating her dwelling house, and caused the same to be set up therein under a contract guaranteeing the capacity thereof to heat such house to a specific temperature under specified conditions, and providing that, in the event of a failure so to do and notice thereof to plaintiff, it should have the option to make the plant do the work guaranteed or remove the same, plaintiff refunding any money that may have been paid thereon. Mrs. Shurts claimed that the property failed to fulfil the guaranty. She gave plaintiff notice thereof and that she would not accept or pay for the apparatus. Plaintiff then endeavored to remedy the alleged insufficiency, but failed, whereupon Mrs. Shurts refused to accept the apparatus and offered to return it. Plaintiff, claiming that the plant was as good as guaranteed, sued to recover the purchase price thereof and to enforce such recovery under the lien laws of the state because it was incorporated with and a part of the real estate on which it was located. Judgment was rendered in favor of Mrs. Shurts because the sale contract had been rightfully rescinded on the ground that the plant wholly failed to come up to the guaranty. When the plant was put in place there was a real-estate mortgage on the house. Before the final determination of the action against Mrs. Shurts such proceedings were duly taken to enforce such mortgage that defendant herein became the owner of the property as purchaser at the foreclosure sale, and is still such owner. The plant never became a part of the building in which it was located so but that it could be removed without material injury thereto. Seasonably after the decision aforesaid, plaintiff asserted its right to the plant as personal property, and before this action commenced demanded of defendant, who was then in possession of the real estate, the right to sever such plant therefrom and remove it, which was refused. The value of the furnace and its connections is \$180.

Upon such findings judgment was rendered in plaintiff's favor and defendant appealed.

**Messrs. Tullar & Lockney**, for appellant:

In the former action concerning this same furnace the plaintiff had elected to treat the sale of the furnace as a complete transfer of the title thereof to Mrs. Shurts, had elected to waive its conditional right under the contract to reclaim such property by suing for the purchase price, and had elected to treat the furnace and its connections as a fixture in this dwelling house. Either one of these elections by the plaintiff in its former action is fatal to its claim for conversion in the case at bar.

*Carroll v. Fethers*, 102 Wis. 437, 78 N. W. 53 L. R. A.

604; *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Smith v. Waggoner*, 50 Wis. 161, 6 N. W. 568.

Having elected to affirm the sale, the plaintiff cannot now be heard to rescind it. Its election was final.

*Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Crompton v. Beach*, 62 Conn. 25, 18 L. R. A. 187, 25 Atl. 446.

The furnace in question, with its pipes, stacks, registers, and connections is now, as it at all times has been, a fixture in this dwelling house.

Having regard for the purpose and necessity for which the furnace and its connections were employed, the physical annexation of the same to the building, and the intention of the plaintiff at the time it made such annexation, the furnace in question, with its connections, pipes, and registers, under the later and better authorities, constitutes a fixture.

*Gunderson v. Swardthout*, 104 Wis. 186, 80 N. W. 465; *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Turner v. Wentworth*, 119 Mass. 459; *Goodin v. Ellearsville Hall Assn.* 5 Mo. App. 289; *Allen v. Mooney*, 130 Mass. 155; *United States Nat. Bank v. Bonacum*, 33 Neb. 820, 51 N. W. 233; *Cooke v. McNeil*, 49 Mo. App. 81; 1 Kerr, Real Prop. p. 136; Phillips, Mechanics' Liens, § 177.

The plaintiff has estopped itself from now denying that the alleged personal property is a fixture.

*Smith v. Waggoner*, 50 Wis. 161, 6 N. W. 568.

The plaintiff having heretofore claimed and averred that it sold and delivered this furnace to Mrs. Shurts, and having refused to put the furnace in proper shape or take it out when requested so to do, having insisted that its contract of sale was fully performed, and having demanded payment of purchase price, cannot be heard to say, in this action, that it was the owner and entitled to the immediate possession of said furnace, pipes, etc., at the time of the commencement of this action.

*Ibid.*: *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Crompton v. Beach*, 62 Conn. 25, 18 L. R. A. 187, 25 Atl. 446; *Connihan v. Thompson*, 111 Mass. 272; *Kearney Mill & Elevator Co. v. Union P. R. Co.* 97 Iowa, 719, 66 N. W. 1059; *Richards v. Schreiber, O. & W. Co.* 98 Iowa. 422, 67 N. W. 569; *McLean v. Ficke*, 94 Iowa, 283, 62 N. W. 753; *Klocow v. Patten*, 93 Iowa, 432, 61 N. W. 926; *Lawrence v. McKenzie*, 88 Iowa, 432, 55 N. W. 505; *Wilson v. Wilson*, 30 Ohio St. 365; *White v. White*, 68 Vt. 161, 34 Atl. 425.

The defendant in this action succeeded to all the rights of the former defendant, Ann T. Shurts, in the dwelling house and premises where this furnace is located, by purchase at a mortgage foreclosure sale of said premises, and he could no more unlawfully convert this furnace to his own use than could Mrs. Shurts.

*Terry v. Munger*, 121 N. Y. 161, 8 L. R.

A. 216, 24 N. E. 272; *Woodin v. Olemons*, 32 Iowa, 280.

The plaintiff had its day in court in an action to recover the purchase price of this furnace, and by bringing such action it elected to affirm the sale, and passed the title to the defendant in the action.

*White v. White*, 68 Vt. 161, 34 Atl. 425; *Crompton v. Beach*, 62 Conn. 25, 18 L. R. A. 187, 25 Atl. 446; *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604; Bigelow, Estoppel, chap. 19, p. 562; *Webster v. Phœnia Ins. Co.* 36 Wis. 67, 17 Am. Rep. 479; *Cannon v. Home Ins. Co.* 53 Wis. 593, 11 N. W. 11; *Kaehler v. Dobberpuhl*, 60 Wis. 261, 18 N. W. 841; *Evans v. Enloe*, 64 Wis. 671, 26 N. W. 170; *Warren v. Landry*, 74 Wis. 151, 42 N. W. 247; *Crook v. First Nat. Bank*, 83 Wis. 32, 52 N. W. 1131; *Kidder v. Knights Templars & M. Life Indemnity Co.* 94 Wis. 538, 69 N. W. 364; *Francy v. Wauwatosa Park Co.* 99 Wis. 40, 74 N. W. 548; *Rasmussen v. New York L. Ins. Co.* 91 Wis. 81, 64 N. W. 301.

A party may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate choice of one will preclude him thereafter from going back and electing again.

*Thompson v. Howard*, 31 Mich. 309; *Thomas v. Watt*, 104 Mich. 201, 62 N. W. 345; *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328; *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *McDonald v. McDonald*, 67 Mich. 122, 34 N. W. 276; *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216, 24 N. E. 272; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 4 L. R. A. 145, 21 N. E. 172; *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Rodermund v. Clark*, 46 N. Y. 354; *Morris v. Reaford*, 18 N. Y. 552; *Kinney v. Kiernan*, 49 N. Y. 164; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Hess v. Smith*, 16 Misc. 55, 37 N. Y. Supp. 635; *Diets v. Field*, 17 Misc. 26, 39 N. Y. Supp. 257; *Campbell Printing Press & Mfg. Co. v. Walker*, 43 Hun, 449; *Tucker v. Tarbell*, 11 Allen, 131; *Connihan v. Thompson*, 111 Mass. 272; *Crompton v. Beach*, 62 Conn. 25, 18 L. R. A. 187, 25 Atl. 446; *White v. White*, 68 Vt. 161, 34 Atl. 425; *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246; *Parker v. Panhandle Nat. Bank*, 11 Tex. Civ. App. 702, 34 S. W. 196; *Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030; *Model Dry Goods Co. v. North British & M. Ins. Co.* 79 Mo. App. 550; *Bank of Santa Fé v. Haskell County Comrs.* 61 Kan. 785, 60 Pac. 1062; *Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73; 7 Enc. Pl. & Pr. 364; *Kearney Mill. & Elevator Co. v. Union P. R. Co.* 97 Iowa, 719, 66 N. W. 1059.

Messrs. Winkler, Flanders, Smith, Bottum, & Vilas, for respondent:

The doctrine of election of remedies applies only where a party has two inconsistent remedies open to him on the facts as he understands them to exist at the time of his supposed election. It has no application

where the party acts on a mistaken understanding of the facts: and it has no force to prevent one who has pursued the wrong remedy upon a mistaken understanding of the facts from afterwards pursuing the right remedy when the facts are ascertained.

In determining whether or not an article is to be regarded as a fixture, the intention of the parties to make it a permanent accession to the freehold is the most important consideration.

*Penn Mut. L. Ins. Co. v. Semple*, 38 N. J. Eq. 575; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. 806; *Foots v. Gooch*, 96 N. C. 265, 1 S. E. 525; *Van Ness v. Paard*, 2 Pet. 137, 7 L. ed. 374; *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268; *Orion v. Noonan*, 27 Wis. 272.

Admissions or statements, though appearing in judicial records, estop the person making them from explaining them or denying their truth, only as against those who were parties or claimed rights under such records, or who acted upon, or were influenced by, such statements.

*Dahlman v. Forster*, 55 Wis. 382, 13 N. W. 264.

It is expressly found that the removal of the furnace will not injure or impair the value of the real estate on which the mortgage was given and on which it became a lien. This being so, the defendant, claiming only under the mortgage, has no right to complain. The plaintiff has the same right in such case to remove the furnace as against the purchaser as it would have had as against the prior owner.

*Walker v. Grand Rapids Flouring Mill Co.* 70 Wis. 92, 35 N. W. 332; *Manncaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 269, 47 Pac. 224; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 413, 51 N. W. 1061; *Binkley v. Farkner* (Ind.) 3 L. R. A. 33, and note; *Page v. Edwards*, 64 Vt. 124, 23 Atl. 917; 13 Am. & Eng. Enc. Law, p. 630; *General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 460, 42 Atl. 101.

Marshall, J., delivered the opinion of the court:

The first point made by appellant, that is deemed sufficiently important to be worthy of consideration, is that plaintiff, having elected to sue upon the contract when a way was open to treat it as at an end and to take the property in controversy, was legally bound thereby, and that the trial court should have so held by dismissing this action. The rule is quite familiar that a person cannot have the benefit of two inconsistent remedies or causes of action; that when there are such, either of which will remedy the wrong against him, the choice of one forever waives the other. Many applications of that have been made by this court. *Warren v. Landry*, 74 Wis. 144, 42 N. W. 247; *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131; *Bank of Lodi v. Washburn Electric Light & P. Co.* 98 Wis. 547, 74 N. W. 363; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604. It was very recently quite thor-

oughly discussed in *Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846. Does that rule apply where a person, supposing he has two causes of action for the satisfaction of his claim, when he in fact has but one, sues upon the supposed cause which has no existence, and is defeated on that ground? Is he under such circumstances precluded from suing upon the only cause of action which he in fact had? The proposition of appellant's counsel is that, because plaintiff sued upon the contract, supposing it had a cause of action thereon, and was defeated because the contract had been rightfully rescinded by defendant's predecessor, leaving the subject thereof the property of respondent, it must nevertheless lose the same because another remedy is necessary to its recovery; that while it was defeated because the subject of the action was not the property of Mrs. Shurts, it is in any event powerless to claim the thing which, by the judgment of the court, it owns. That seems to be unreasonable. If the doctrine as to the effect of an election between two inconsistent causes of action goes that far, it is certainly liable to cause great injustice in some cases. That, of itself, without investigation, suggests that it does not go that far. We should hesitate to sustain counsel's theory if the question involved was new, but it is not.

The same seemingly unreasonable application of the rule, as regards the effect of an election between inconsistent remedies, as that contended for here, has been several times insisted upon in other courts, as appears from reported cases, and always unsuccessfully. In *Morris v. Rexford*, 18 N. Y. 552, the circumstances were that plaintiff sold a quantity of oats to the defendant, payment therefor to be made on delivery. The delivery was made but the purchase price was not paid. After some delay the plaintiff endeavored to rescind the sale contract and brought replevin. Subsequently he sued for the purchase price of the oats. On the trial it did not appear that recovery was had in the replevin action or what had become of the same. The court held that the mere commencement of the replevin action did not necessarily preclude plaintiff from prosecuting the action on the sale contract: that whether there was an election of remedies within the meaning of the rule on that subject depended upon whether the plaintiff had in fact two remedies; that if he had but one, the pursuit of one that he did not possess would not bar him from subsequently resorting to the one which he did possess. In *Kinney v. Kiernan*, 49 N. Y. 164, the court stated the rule in these words: "The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights he really possesses." In *McNutt v. Hilkins*, 80 Hun. 235, 29 N. Y. Supp. 1047, the decision was based on that in the preceding case cited. The rule declared substantially fits the exact facts of this case. The syllabus states it briefly as follows: "An action brought for the conversion of personal property, wherein it was successfully main-

tained by the defendant that the title to the personal property alleged to have been converted was in him and in which judgment was rendered in his favor is not a bar to a subsequent action between the same parties brought to recover damages for a breach of the contract of sale of such property." In reaching such conclusion the court used the following language as to the contention of the losing party: "The defendants, by their contention, succeeded in establishing that there had been an absolute sale, and that, therefore, the plaintiff had mistaken her remedy, and they cannot now set up the judgment which they then obtained to prevent the plaintiff recovering the purchase price of the property which they formerly urged and established was sold to them by her, and which it is conceded they have not paid for, and thus not only retain the property, but also the purchase price." To the same effect are *Re Van Norman*, 41 Minn. 494, 43 N. W. 334; *Gould v. Blodgett*, 61 N. H. 115.

In applying the rule as regards the effect of a choice between two inconsistent remedies or causes of action, it must be kept in mind that there must be two such remedies or causes of action, in fact, before a choice can be made within the meaning of the rule. A misconception of remedies should not be mistaken for an election between inconsistent remedies. Here there was no remedy upon the contract. Mrs. Shurts recovered of appellant upon that ground. Such recovery effectively answers the suggestion that the resort to the supposed remedy stands in the way of insisting upon the only remedy plaintiff had. Not only is plaintiff not bound as having made an election of one of two inconsistent remedies, but Mrs. Shurts, and appellant claiming under her, are estopped by the former judgment from asserting to the contrary or that the property in dispute was not the property of respondent, at least as between it and Mrs. Shurts, and as between it and the appellant unless the fact be otherwise because as against him the heating plant became a part of the real estate and passed to him under the foreclosure sale.

So, as between Mrs. Shurts and respondent, the heating plant is personal property, notwithstanding its physical annexation to the building it was designed to heat. The plant was not simply set up in Mrs. Shurts' building on trial. It was actually sold and delivered to her and placed in her building to remain there as an improvement thereof, subject to the guaranty of its efficiency. The parties were competent to preserve its character as personalty, between themselves. That does not admit of a question. *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110. They accomplished that, though the relations of vendor and vendee between them were not severed by resorting to the contract in that regard, but by the use by Mrs. Shurts of her remedy for the breach of warranty.

Did the heating plant become a fixture as to the mortgagee? That is the important question. That there was an intent on the part of respondent and Mrs. Shurts that it should be incorporated into and made a part of the building, subject to the right of the former to reclaim the same in case of inability to make the apparatus do the work guaranteed, is unquestioned. As before indicated, the contract of sale contemplated physical annexation of the plant to and incorporation of it with the building it was designed to heat as a permanent improvement thereof, reserving the right to remove it as a mere security against losing the property as well as the pay for it if it failed to satisfy the warranty. All the essentials to change the chattel character of the property to real estate were satisfied, viz.: physical annexation of one to the other, adaptation of the improvement to the use to which the realty was devoted, and intent of the person causing the annexation to make a permanent improvement of the freehold. *Tyler, Fixtures*, 114; *Gunderson v. Swarthout*, 104 Wis. 180, 80 N. W. 465. The relations between the parties after the plant was set up were substantially the same as they would have been had respondent sold it under an agreement that the title thereto should not pass to the vendee till it was paid for, and if payment was not made respondent should have the right to remove it from the building, doing no more injury thereto than necessary. Counsel for appellant claim that personal property incorporated into mortgaged realty under such circumstances, and without the mortgagee being a party to the transaction, becomes a part of the mortgage security, and cite many authorities to support that view. Counsel for respondent claim that in such circumstances, where the accession can be severed from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, the same character is impressed upon the accession as between the vendor and the mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be severed from the realty and removed without invading the rights of the mortgagee. The learned trial court so held and there is ample authority to support that view, to some of which counsel for respondent have referred us. The difficulty is that there are two well-defined doctrines on the subject, one being directly opposed to the other. In many jurisdictions the doctrine contended for by appellant's counsel prevails, and in many others that contended for by respondent's counsel prevails. The former view is maintained by the following of the numerous authorities that might be cited: *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. 128; *Clary v. Owen*, 15 Gray, 522; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 1 L. R. A. 350, 18 N. E. 406; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105; *Watertown Steam* 53 L. R. A.

*Engine Co. v. Davis*, 5 Houst. (Del.) 192; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14; *McFadden v. Allen*, 134 N. Y. 489, 19 L. R. A. 446, 32 N. E. 21. The later view is as firmly maintained by the following of many authorities that might be mentioned: *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279; *Binkley v. Forkner*, 117 Ind. 185, 3 L. R. A. 33, 19 N. E. 753; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Crippen v. Morrison*, 13 Mich. 23; *Belvin v. Raleigh Paper Co.* 123 N. C. 138, 31 S. E. 655; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 267, 47 Pac. 224; *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064.

In *Clary v. Owen*, 15 Gray, 522, the Massachusetts court, speaking by Mr. Justice Hoar, said: "We think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty." In *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, the same court said that a building put on mortgaged land and annexed to it in the usual way, without the mortgagee being a party to the transaction, became a part of the mortgage security notwithstanding an agreement between the owner of the building and the mortgagor that it should remain personal property with the right of such owner to remove it, and that the purchaser of the land at the foreclosure sale became the owner of such building, though he bought with notice of such agreement. In *Hawkins v. Hersey*, the supreme court of Maine, speaking by Mr. Justice Whitehouse, said: "When machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, will not bind or affect the mortgagee of the realty without notice, and such machinery will pass to the mortgagee as a part of the realty."

On the other hand, in *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 267, 47 Pac. 224, the supreme court of Washington said that material sold and used in the construction of a building located upon mortgaged real estate, under an agreement with the mortgagor that the seller shall retain the title to such material till paid for, with the right to remove the same in case of nonpayment, does not become a part of the building and realty so that the mortgage lien will attach thereto as against the seller, if such material can be removed from the building without injury thereto. Similar language was used by the Minnesota court in *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064, where it was held that an apparatus, which formed a necessary part of a cold-storage plant and was attached to the storage building subsequent to the execution of a mortgage thereon, under an agreement between the vendor of the apparatus and the mortgagor that the

former should retain the title thereto till it should be paid for, and have the right to remove the same in case of default, did not become a part of the mortgaged realty, but remained personal property during the existence of the condition, as against both mortgagor and mortgagee, since its removal from the building to which it was attached was shown to be practical without injuring such building or the value of the mortgage security as it existed before the apparatus was placed therein. The other cases cited to that doctrine are to the same effect. Probably the leading case on the subject is *Campbell v. Roddy*, 44 N. J. Eq. 244, where the two doctrines are discussed at great length.

The rule that a contract between a mortgagor of real estate and his vendor of chattels, to be and which are actually wrought into such real estate as an improvement thereof, will preserve the chattel character of the accession, does not militate against the mortgage attaching thereto as a part of the security if the mortgagee is not a party to such agreement, is referred, for its original support in this country, most generally to the supreme court of Massachusetts, and it is sometimes called the Massachusetts rule. If it applies to this case, the finding that it is practicable to remove the heating plant from the appellant's building is immaterial, and the judgment appealed from is wrong.

It seems that this court adopted the so-called Massachusetts rule at a very early day, in *Frankland v. Moulton*, 5 Wis. 1, where the opinion was delivered by Chief Justice Whiton, citing *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *Corliss v. McLagin*, 29 Me. 115, and *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757. The circumstances in the *Frankland Case* were that machinery was sold to the owner of the real property while it was encumbered by an equitable mortgage, to be attached to such realty as an improvement thereof, the vendor of the machinery retaining a chattel mortgage interest therein to secure the payment of the purchase money. It was held that the chattel mortgage was wholly inoperative as against the holder of the equitable mortgage; that the agreement between the chattel mortgagee and mortgagor, preserving the chattel character of the machinery after it was physically attached to and had become an appropriate improvement of the building in which it was located, was effective only between the parties to such mortgage. In *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364, a chattel mortgage was taken, by the vendor of a heating plant set up in a building, to secure the purchase money of such plant, and it was held that the chattel mortgage was not effective to preserve the chattel character of the heating plant as against prior lien claims upon the property. The very opposite was held in *Campbell v. Roddy*, the leading New Jersey case to which we have referred, where several Massachusetts cases that have received the approval of this court were re-

viewed and rejected as unsound. *Frankland v. Moulton*, in principle, covers the whole subject under discussion. It does not appear ever to have been criticised here since it was decided, but has been repeatedly approved as stating the true rule. *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364; *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117; *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465.

The judicial policy for this state having been established for nearly half a century, as indicated, it is considered that we are not permitted to question it now. The opposite doctrine may be the most equitable. It is probably supported by the greater weight of authority if that is to be determined by the number of decisions. Possibly it may be by the better reasoning, though the indications, it is believed, from a study of the numerous cases that have dealt with the subject in recent years, are that it has been losing rather than gaining ground. The tendency of courts is to fence it within as narrow limits as practicable. For example, in *McFadden v. Allen*, 134 N. Y. 489, 19 L. R. A. 440, 32 N. E. 21, decided in 1892, the Massachusetts rule, so called, was adopted in its entirety, with the possible exception of where an interest in the accession to realty is reserved as security for purchase money. In all other cases it was distinctly said that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and that the question of whether it can or cannot be removed without injury to the realty is immaterial. What reason there is for saying that a contract between a vendor of chattels and a mortgagor of real estate, in regard to the character of the former after being incorporated into the latter, shall be binding on the mortgagee in one case and not in another, when the mortgagor is left in the same position, without the benefit of the accession to the realty, in one case as in the other, is not easily perceived. *McFadden v. Allen* seems to limit or overrule some early New York cases cited by the New Jersey court as supporting authorities. The general rule stated in the New York court is in perfect harmony with the holdings of the Massachusetts court. It is as follows: "The lien of a mortgagee therefore covers all that was realty when he accepted the security, and all accessions to the realty except when, by a valid agreement to which he was a party, the character of chattels is impressed upon them." The invalidity of a contract between a mortgagor of realty and his vendor of chattels to be annexed and which are annexed to the mortgaged property, preserving the chattel character of the accessions, has been recently repeatedly maintained by the Federal courts. *Phonix Iron-Works Co. v. New York Security & T. Co.* 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed.

757; *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. Rep. 741, 122 U. S. 283, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1206.

In a New Jersey case decided in 1898,—*General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 460, 42 Atl. 101,—a conclusion was reached contrary to that of the Federal Supreme Court in the case last above cited, such court's decision being vigorously attacked as promulgating an unsound doctrine. The difficulty is that the judicial policy of the Federal court, indicated in the several cases cited, and the other courts that are in harmony therewith, is one way, while that of the New Jersey court and others in harmony with its policy is the other. Each court having adopted a policy for its jurisdiction, for it that policy is the proper one and the opposite policy is unsound. An expression in *Phoenix Iron-Works Co. v. New York Security & T. Co.* may be cited as indicating clearly that, where the doctrine prevails that the vendor of chattels to be attached to real estate cannot control their character after the accession is made, as against the mortgagee of the realty, by a contract with the mortgagor, the question of whether such accession can be severed from the realty without injury thereto is of no significance. Clark, district judge, in delivering the opinion of the court of appeals, said: "The determination of the case does not depend on any narrow question of mere physical injury to the building in the removal of the machinery placed therein."

*Walker v. Grand Rapids Flouring Mill Co.* 70 Wis. 92, 35 N. W. 332, is cited to our attention by respondent's counsel with confidence, but we think it has no application to the facts of this case. There an apparatus for a gristmill was consigned by the manufacturer to a contractor who was engaged in building over the mill for the owner, with permission to set it up for trial. There was no sale, conditional or otherwise. The owner of the apparatus did not part with the title or have any intention of adding the apparatus to the mill as a permanent improvement thereof, conditional or otherwise. If there had been no sale of the heating plant in question, conditional or otherwise, but a mere permission obtained of Mrs. Shurts to set it up in her house and test it, there would be some analogy between this case and *Walker v. Grand Rapids Flouring Mill Co.* Whether it could be removed under such circumstances might depend upon whether the removal would materially injure the building to which it was attached. The trouble is that it was actually sold and delivered to Mrs. Shurts. The title thereto passed to her. She afterwards divested herself of the title as between herself and respondent, by rescinding the sale contract for breach of warranty, as before indicated.

There appears to be no legitimate way open to us to decide otherwise than that the trial court adopted the wrong doctrine in reaching a conclusion in this case. It was made to turn upon two facts: First, the heating plant is personal property as be-

tween the mortgagor and respondent because of the contract between them; second, it is of the same character as regards appellant claiming under the mortgage, because it can be removed without any material injury to the realty. Those facts are entirely immaterial, since the title to the heating plant was vested in Mrs. Shurts and set up in her building as a permanent improvement thereof, subject to the contract right reserved to remove it, as a mere security against loss thereof to the vendor in case it failed to satisfy the warranty. The intention that the plant should actually be incorporated into the realty, regardless of the conditional right reserved, satisfied the element of intent necessary to make the plant realty as between the vendor thereof and the mortgagee of such realty. As soon as the accession to the realty took place, the mortgage lien attached thereto and could not thereafter be removed without either payment of the mortgage or the mortgagee's consent. The rule stated in *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117, applies. There being no intention to remove the chattel when it was attached to the realty, it passed to appellant under the mortgage, who acquired title by the foreclosure thereof, and this although it was capable of being removed without injury to the building. Mr. Justice Pinney, in so stating the rule, cited in support thereof *Frankland v. Moulton* and one of the leading Massachusetts cases.

The judgment is reversed and the cause remanded with directions to render judgment in defendant's favor for costs.

ELECTRIC APPLIANCE COMPANY,  
Respt.,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY, Impleaded, etc., Appt.

(.....Wis.....)

1. Subrogation to the rights of the municipality as against the contractor and his sureties is not the remedy of one who has furnished materials to enable a contractor to perform his contract to construct a plant for the municipality, to secure payment for such materials after the municipality has accepted the plant and paid the contractor therefor, since the municipality has no claim, having suffered no loss or injury.
2. No action can be maintained on a contract and bond in favor of a municipal corporation, conditioned to erect a plant for it and turn it over free and clear of all claims for materials, by a third person who furnished materials which have

NOTE.—For earlier authorities in this series as to right of third party to sue on contract made for his benefit, see *Jefferson v. Asch* (Minn.) 25 L. R. A. 257, and note; *Schmidt v. Louisville & N. R. Co.* (Ky.) 38 L. R. A. 809; *Baxter v. Camp* (Conn.) 42 L. R. A. 514; *Buchanan v. Tilden* (N. Y.) 44 L. R. A. 170; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* (N. Y.) 44 L. R. A. 512; *Case v. Hoffman* (Wis.) 44 L. R. A. 728; and *Ferris v. American Brewing Co.* (Ind.) 52 L. R. A. 305.

not been paid for, where there is neither an intent to secure his claim, nor any promise legally enforceable in his favor.

3. **Payment in full and acceptance of a plant by a city** under a contract for its construction will release sureties on the contractor's bond from liability under a condition that materials shall be paid for, where the contract provides that before payment is made the contractor shall present receipts in full for all materials furnished.

(April 9, 1901.)

**A** PPEAL by defendant surety on a bond of a contractor for public work from an order of the Circuit Court for Dodge County overruling its demurrer to a complaint in an action to hold it liable for materials furnished to the contractor. *Reversed.*

Statement by **Bardeen, J.:**

The defendant the United States Fidelity & Guaranty Company has appealed from an order overruling a demurrer to the plaintiff's complaint. The complaint was challenged on the ground that there was a defect of parties defendant, and that it did not state facts sufficient to constitute a cause of action. It appears that the city of Waupun was desirous of erecting a municipal lighting plant. Bids were invited, and on September 2, 1899, a contract was entered into between the city and the defendants Rockwell & Snyder to erect the same, and have it fully completed and ready for delivery on or before November 15th of that year. The contract stipulated, among other things, that the plant should be delivered "free and clear of all claims or liens for labor performed or materials furnished or otherwise," and that, before final payment should be made therefor or be deemed to be due on said contract, the contractors should present to the city receipts in full for all labor performed and materials furnished in and about the construction and installation of the plant. It also provided that the contractors should furnish a bond in the sum of \$20,000, conditioned for the faithful performance of the contract on their part, and for the payment by them of all claims for materials and labor. A bond was given by the defendant guaranty company conditioned that the contractors should "well, truly, and faithfully comply with all the terms, covenants, and conditions of said contract on their part to be kept and performed, according to its terms," subject to certain provisions now to be stated: The city was to notify the surety, in writing, of any act on the part of the contractors under the contract, which might involve a loss for which the surety might become liable, immediately after the occurrence of such act shall have come to the city's knowledge. In the event of a breach of any condition of the bond, the surety was to be subrogated to all rights of the contractors growing out of the contract, and all deferred payments or moneys thereafter to become due were to be credited upon any claim the city might make upon the surety because of such breach. An-

other condition was that the city should give the surety "due notice before the last payment under the contract herein referred to is made to the principal; otherwise, this obligation shall be void as to any liability of the surety hereunder." The complaint then sets out that, in order to carry out the contract, the contractors purchased merchandise and machinery of the plaintiff amounting to \$2,396.79, which were used in the construction and equipment of the plant. The contractors have fully complied with the conditions of the contract on their part, except that they have not paid plaintiff's demands and the claims of others. The city has accepted the plant and paid the contractors therefor. It is further alleged that the surety was duly notified by the city of the failure of the contractors to comply with the conditions of their contract as to the payments of said claim immediately after its breach, and immediately after the occurrence of such breach had come to the knowledge of the city, a copy of such notice being attached to the complaint. The prayer for relief is that plaintiff be subrogated to the rights of the city as against the other defendants, and for judgment against them for the amount of its claim. The bond in question runs to the city of Waupun and the state of Wisconsin, but, inasmuch as it does not appear that the state had any interest in the contract or any interest in the controversy, the case will be considered the same as though the state was not a party to such bond.

**Messrs. Dupree, Judah, Willard, & Wolf, with Messrs. Winkler, Flanders, Smith, Bottum, & Vilas, for appellant:**

The bond does not undertake to guarantee payment for labor and materials furnished to the contractors; and the surety was under no liability to anyone except the city of Waupun and the state of Wisconsin, the obligees named in the bond.

*W. W. Kimball Co. v. Baker*, 62 Wis. 529, 22 N. W. 730.

The parties to the contract acted on that assumption when the city accepted the plant and paid for it without regard to whether the claims for labor and materials were paid or not.

The practical construction which the parties to a contract have placed upon it is, in cases of doubt, conclusive as to its meaning.

*Long-Bell Lumber Co. v. Stump*, 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; *Sanders v. Munson*, 20 C. C. A. 581, 45 U. S. App. 32, 74 Fed. 649.

Whatever may have been the undertaking of the contractors, the surety cannot be held liable to anyone for their default under the contract except the obligees in the bond.

*Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712. Assuming that the bond does guarantee the payment of the claims of laborers or materialmen, still no action can be maintained upon the bond by such claimants under the circumstances of this case.

To enable a third party to maintain an action on a contract to which he is not a



party the contract must not only have been made for his benefit, but such third party must have some legal or equitable rights in particular property out of which payment is to be made, or some legal or equitable claim against the person to whom the promise is made.

*Jefferson v. Asch*, 53 Minn. 446, 25 L. R. A. 257, 55 N. W. 604; *Durnherr v. Rau*, 135 N. Y. 222, 32 N. E. 49; *Williamson v. Michigan F. & M. Ins. Co.* 86 Wis. 393, 57 N. W. 46; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Dow v. Clark*, 7 Gray, 198; *Rogers v. Union Stone Co.* 130 Mass. 581, 39 Am. Rep. 478; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469; *Morrill v. Lane*, 136 Mass. 93.

A city, in contracting for a work of this kind, acts purely in its private, and not at all in its public, capacity.

1 Dill. Mun. Corp. § 27; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Wilks v. Wyandotte County Comrs.* 30 C. C. A. 445, 58 U. S. App. 665, 86 Fed. 872; *Cincinnati v. Cameron*, 33 Ohio St. 336; *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

The city had no authority or power to enter into such a guaranty for the benefit of third parties.

*Breen v. Kelly*, 45 Minn. 352, 47 N. W. 1067; *Park Bros. & Co. v. Sykes*, 67 Minn. 153, 69 N. W. 712; *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694.

Assuming that the bond in question contains a guaranty for the payment by the contractors for labor and materials supplied under the contract, the respondent to maintain an action on the bond must still show that such guaranty of payment for labor and materials was intended primarily and exclusively for its benefit and that of others of its class.

*Treat v. Stanton*, 14 Conn. 445; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *German State Bank v. Northwestern Water & Light Co.* 104 Iowa, 720, 74 N. W. 685; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Wright v. Terry*, 23 Fla. 160, 2 So. 6; *Markel v. Western U. Teleg. Co.* 19 Mo. App. 80; *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 222; *Wheat v. Rice*, 97 N. Y. 296; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Simson v. Brown*, 68 N. Y. 355; *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405.

It does not appear from the complaint that the plaintiff ever accepted, knew of, or assented to, the alleged provisions in the contract for its benefit until after such provisions had been practically rescinded by the acceptance of the plant and payment therefor by the city, without requiring the claim of the plaintiff or any similar claims to be paid.

53 L. R. A.

The rescission of a contract made between two parties for the benefit of a third, prior to the assent of such third party to the contract, is a good defense to an action brought thereon by such third party.

*Bassett v. Hughes*, 43 Wis. 319; *Putney v. Farnham*, 27 Wis. 187; *Davis v. Callocway*, 30 Ind. 112, 95 Am. Dec. 670; *Emmitt v. Brophy*, 42 Ohio St. 82; *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 554, 43 Am. Rep. 436; *Crowell v. Hospital of Saint Barnabas*, 27 N. J. Eq. 650; *Ridge v. Olmstead*, 73 Mo. 578; *Wheat v. Rice*, 97 N. Y. 296; *Durham v. Bischof*, 47 Ind. 211; *Strayhorn v. Webb*, 47 N. C. (2 Jones L.) 199, 64 Am. Dec. 580; *White v. Hunt*, 64 N. C. 496; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *Dunning v. Leavitt*, 85 N. Y. 35, 39 Am. Rep. 617; *Crowe v. Lewin*, 95 N. Y. 423.

The right of subrogation cannot be extended beyond the rights of him under whom it is claimed.

*Knatt v. Sturges*, 36 Vt. 721; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397; *Dunn v. Missouri P. R. Co.* 45 Mo. App. 29.

Where the relief demanded is equitable in its nature the action must be regarded as in equity.

*Fraedrich v. Flieth*, 64 Wis. 187, 25 N. W. 28; *Denner v. Chicago, M. & St. P. R. Co.* 57 Wis. 218, 15 N. W. 158.

When a complaint attempts, but fails, to state a cause of action in equity, a general demurrer thereto will be sustained, notwithstanding it may contain allegations which might be sufficient to state a cause of action at law.

*Ibid.*

It was a part of this contract that the obligation of the surety (the appellant) should be void unless the notice referred to was given.

It was the absolute right of the surety to say on what conditions it would be bound.

*Hessell v. Johnson*, 63 Mich. 623, 30 N. W. 209.

As the contract was that the surety should only be liable in the event that it was previously notified, the complaint, failing to allege that the notice was given, is fatally defective.

*Carberry v. German Ins. Co.* 51 Wis. 605, 8 N. W. 406; *Foster v. Fidelity & C. Co.* 99 Wis. 450, 40 L. R. A. 833, 75 N. W. 69; *Rice v. Fidelity & Deposit Co.* 43 C. C. A. 270, 103 Fed. 427; 2 Wait Pr. pp. 383, 385, 378; 2 May, Ins. p. 1333, note 6; 4 Enc. Pl. & Pr. pp. 627, 630, 640, 653, 945; 14 Enc. Pl. & Pr. pp. 1067, 1069; *W. W. Kimball Co. v. Baker*, 62 Wis. 529, 22 N. W. 730; *Franklin Supers. v. Kirby*, 25 Wis. 498.

*Messrs. C. E. Hooker and Ela, Grover, & Graves*, for respondent:

After the person for whose benefit the contract is made has been informed of and assented to it the contract cannot be rescinded by the contracting parties without his consent.

*Bassett v. Hughes*, 43 Wis. 319; *Curtis v.*

*Tyler*, 9 Paige, 432; *King v. Whitely*, 10 Paige, 465; *Laurence v. Fox*, 20 N. Y. 268.

When one person for a valuable consideration engages with another (whether by simple contract or by covenant under seal) to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement.

*Bassett v. Hughes*, 43 Wis. 319; *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67; *Houghton v. Milburn*, 54 Wis. 554, 11 N. W. 517, 12 N. W. 23; *Grant v. Diebold Safe & Lock Co.* 77 Wis. 72, 45 N. W. 951; *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17, 75 N. W. 421; *Cotterill v. Stevens*, 10 Wis. 423; *Kimball v. Noyes*, 17 Wis. 696; *Putney v. Farnham*, 27 Wis. 187; *Balliet v. Scott*, 32 Wis. 174; *McDowell v. Laev*, 35 Wis. 171; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322; *Cook v. Durham*, 61 Wis. 15, 20 N. W. 670; *Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912; *Johannes v. Phenix Ins. Co.* 66 Wis. 50, 57 Am. Rep. 248, 27 N. W. 414; *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697; *Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304; *Larson v. Cook*, 85 Wis. 564, 55 N. W. 703; *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106; *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275, 72 N. W. 837; *Kuhl v. Chicago & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155; 7 Am. & Eng. Enc. Law, 2d ed. p. 106; *Ramsdale v. Horton*, 3 Pa. 330; *Beers v. Robinson*, 9 Pa. 229; *Thompson v. Thompson*, 4 Ohio St. 333; *Helms v. Kearns*, 40 Ind. 124; *Mize v. Barnes*, 78 Ky. 506; *Green v. Morrison*, 5 Colo. 18; *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Starha v. Greenwood*, 28 Minn. 521, 11 N. W. 76; *Greenwood v. Sheldon*, 31 Minn. 254, 17 N. W. 479; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Second Nat. Bank v. Grand Lodge, F. & A. M.* 98 U. S. 123, 25 L. ed. 75; *Lyman v. Lincoln*, 38 Neb. 794; 57 N. W. 531; *Doll v. Orume*, 41 Neb. 655, 59 N. W. 806; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649, 62 N. W. 50; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Jordan v. Kavanaugh*, 63 Iowa, 162, 18 N. W. 851; *Huntington v. Fisher*, 27 Iowa, 276; *Rice v. Savery*, 22 Iowa, 470; *Habig v. Layne*, 38 Neb. 743, 57 N. W. 539; *Shamp v. Meyer*, 20 Neb. 223, 29 N. W. 379; *Cooper v. Foss*, 15 Neb. 515, 19 N. W. 506; *Stewart v. Snelling*, 15 Neb. 502, 19 N. W. 705; *Baker v. Bryan*, 64 Iowa, 561, 21 N. W. 83; *Grant v. Diebold Safe & Lock Co.* 77 Wis. 72, 45 N. W. 951; *Knapp v. Swaney*, 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162; *Austin v. Seligman*, 21 Blatchf. 506, 18 Fed. Rep. 519; *Burton v. Larkin*, 36 Kan. 247, 59 Am. Rep. 541, 13 Pac. 398; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *Beasley v. Webster*, 64 Ill. 458; *Snell v. Ives*, 85 Ill. 279; *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 18 Ill. 88; *Bristow v. Lane*, 21 Ill. 196; *Rabbermann v. Wiskamp*, 54 Ill. 179; *Miliani v. Tognini*, 19 Nev. 133, 7 Pac. 279; *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304; *Merriman v. Moore*, 90 Pa. 80; *Hoff's Appeal*, 24 Pa. 200; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 53 L. R. A.

438; *Justice v. Tallman*, 86 Pa. 147; *Treat v. Stanton*, 14 Conn. 445; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; *Emmitt v. Brophy*, 42 Ohio St. 82.

**Bardeen, J.**, delivered the opinion of the court:

If any liability exists on the part of the guaranty company, it must rest upon the fact that it has contracted with the city to pay the debt due from the contractors to the plaintiff. The demand to be subrogated to the rights of the city as against the contractors has no foundation to rest upon, because it affirmatively appears that the city has accepted the plant and paid the contractors therefor. The city has no claim against the surety, because it has suffered no loss, and has sustained no injury, by reason of the failure of the contractors to pay the plaintiff's claim. By reference to the contract, it will be seen that the contractors bound themselves to furnish a bond, not only for the faithful performance of the contract, but for the payment of all claims for labor and materials. The bond accepted by the city omitted this latter provision, and was conditioned only for the performance of the contract. The contract was apparently drawn upon the theory that the city might be liable for the claims of laborers and materialmen. Such, however, is not the fact. In *Burnham v. Fond du Lac*, 15 Wis. 193, approved in *Buffham v. Racine*, 26 Wis. 449, this court held that a municipal corporation was not subject to the process of garnishment. Basing it upon grounds of public policy, and as being in harmony with the rule just stated, this court, in *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816, held that statutes giving a mechanic's lien did not extend to, and could not be enforced against, the buildings and real estate of municipal corporations held for public use. The rule was further extended in *Chapman Valve Mfg. Co. v. Oconto Water Co.* 89 Wis. 264, 60 N. W. 1004, by denying the right to a lien upon the property of a water company organized for the purpose and under contract with a city for furnishing its water supply. The fact that the city expressly contracted that the bond given should be for the payment of materialmen and laborers, and then accepted a bond without such a condition, is clearly a waiver of that condition of the contract, and indicates an intention to abandon or relinquish its scheme in that respect. But, it is urged, the contract says the plant shall be completed and ready for acceptance "free and clear of all claims or liens for labor performed or material furnished or otherwise." The plaintiff has a claim for material that has not been paid; hence there is a breach of the contract. Claims against whom? Certainly not against the plant, because the law says that no such claim can exist. Therefore there was no breach of the contract on any theory that plaintiff's claim was one against the plant which the city was legally bound to discharge. Whatever may be the state of the law elsewhere, it is

not believed that the cases in this jurisdiction will sustain the proposition that the third party can maintain an action against an alleged promisor based upon an implied promise to pay. The express promise, either by simple contract or covenant under seal, must exist. A few of the many cases in this state are as follows: *Kimball v. Noyes*, 17 Wis. 695; *Putney v. Farnham*, 27 Wis. 187; *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67; *Johannes v. Phenix Ins. Co.* 66 Wis. 50, 57 Am. Rep. 248, 27 N. W. 414; *Nix v. Wiswell*, 84 Wis. 334, 54 N. W. 620; *Fulmer v. Wightman*, 87 Wis. 573; 58 N. W. 1106; *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275, 72 N. W. 872; *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774. The surety's engagement in the bond was to pay to the city, and not to third parties. There are cases going to the limit of holding that, to entitle the third person to recover upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but the contract must have been entered into directly and primarily for his benefit. *Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712. An exhaustive note on the general subject may be found in 25 L. R. A. 257 (*Jefferson v. Asch*). We consider the true rule to be that there must not only be an intent to secure some benefit to the third party, but there must be a promise, legally enforceable. The contract and bond in this case fail to meet these requirements. The situation presented shows a want of any intent to secure a benefit to third parties. When the city accepted a bond that did not attempt to secure the payment of materialmen, and which provided that the surety should be subrogated to the rights of the city in case of a breach, and be entitled to credit on the claim of the city for all payments due the contractors, thereafter to become due, this was inconsistent with the theory that it was the rights of third parties that were being secured.

There is, however, another branch of this case fatal to the plaintiff's alleged cause of action. The contract provided that, before the final payment should be made by the city or be deemed to be due, the contractors should present receipts in full for all labor performed and materials furnished in the construction and installation of the plant. The complaint alleges that the contractors fully complied with the conditions of the contract, except the payment of plaintiff's claim and the claims of others, and that the city duly accepted the plant and paid the contractors therefor. No provision in the contract required any payment of the contract price until the work was completed and accepted. The city paid the contractors in full for the plant, and the inference is irresistible that such payment was made in defiance to the express terms of the contract that it should not be made until receipts in full had been produced. As said in *W. W. Kimball Co. v. Baker*, 62 Wis. 529, 22 N. W. 730: "It is elementary that sureties are favorites of the law, and have a

right to stand upon the strict terms of their obligation when ascertained. Beyond the burdens thus taken upon themselves they are not bound." So far as anything appears in the complaint, the city had the entire contract price in its possession when the alleged notice was given. The surety had a right to rely upon the fact that the city would hold the contractors to strict fulfillment of their obligations. Any variance therefrom to the prejudice of the surety would work a discharge. This is elementary. That this stipulation was of importance to the surety admits of no doubt. That it was broken by the city is certain. No successful attempt can be made to resolve the undertaking of the surety into different factors, and say that they are independent, and one subsists for the benefit of this plaintiff, and another may fail because of the conduct of the assured. So far as this case is concerned, the obligation of the surety is a unit, and no liability can be predicated thereon except in accordance with the terms of the contract. This is not shown by the complaint, and hence this action cannot be maintained.

Our attention has been directed to several cases in Nebraska apparently sustaining the plaintiff's contentions. They go far beyond any case to be found in this court, and are based on premises we do not care to adopt. The case of *Baker v. Bryan*, 64 Iowa, 561, 21 N. W. 83, also cited by plaintiff, shows that the engagement of the sureties was that the contractor should "pay all claims for material, labor," etc. The court was of the opinion that the contract and bond indicated an intent to secure all persons furnishing labor and materials to be used in the construction of the building, and therefore held the sureties liable. We have arrived at the conclusion that the contract and bond in suit do not disclose an intent to secure third parties. We deem it clear, under the circumstances, that the bond was taken for the city's benefit, and this conclusion is amply confirmed by the practical construction given it by the parties.

The order appealed from is reversed, and the cause is remanded, with directions to sustain the demurrer to the complaint, and for further proceedings according to law.

Rehearing denied.

J. B. PATRICK, *Appt.*,

v.

Town of BALDWIN, *Respt.*

(109 Wis. 342.)

\*1. Mistakes in a notice of appeal from a judgment rendered in justice court do not render such notice ineffective if it con-

\*Headnotes by MARSHALL, J.

NOTE.—As to implied right to recover from municipality for support furnished poor person, see, in this series, *Rowell v. Vershire* (Vt.), 8 L. R. A. 708.

tains enough to identify, with reasonable certainty, the judgment, the parties, and the court, and to show that it was made by the party appealing, personally, or by some person or persons duly authorized, in behalf of such party.

2. A notice of appeal from a judgment rendered in justice court against a town, signed by three persons, with the word "Supervisor" under the last signature, the signatures and the official designation being so located that if the plural number were used instead of the singular it would clearly indicate that all signed officially, shows with reasonable certainty that it was so signed, where there is no indication in the notice to the contrary.
3. There is no legal obligation resting on a municipal corporation to maintain or relieve poor persons, in the absence of a statute creating one, and the court has no power, upon the ground of moral obligations or the equities of any given case, to hold such a corporation liable to a private person who may have relieved or supported a poor person.
4. Where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants, upon which such party can act and hold the municipality liable as upon an implied contract.
5. The statute requiring each town in this state to support poor persons in certain cases, and the supervisors thereof to see that such support is furnished, does not permit a private party to aid or relieve such a person at the expense of the town, without a contract to that effect, made between him and such supervisors or a majority thereof.

(February 26, 1901.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for St. Croix County in favor of defendant in an action brought to recover the value of services rendered in caring for a poor person who was alleged to be a charge on the defendant town. *Affirmed.*

Statement by **Marshall, J.:**

The cause was commenced against the defendant town in justice court, wherein such proceedings were had that judgment was duly rendered in plaintiff's favor for \$101 damages and \$20.91 costs, for services rendered as a physician in attending Richard Bruaas, a poor person, having a legal settlement in said town, without any direction or employment by the supervisors of said town, or either of them, and, so far as the complaint states the facts, without any notice to such supervisors or either of them, or any knowledge on their part of the rendition of such services or the necessity therefor. Within the time required by law an appeal from such judgment was attempted to be taken by the supervisors of the town to the circuit court. Each of such supervisors made an affidavit in due form of law for the purposes of such appeal, in which he testified that he made such affidavit in his official capacity. Such affidavits, with a paper

intended as a notice of appeal in the action, were duly served on the justice. Such notice of appeal was signed as follows: "P. C. Finvold, Wm. Ferg, Jacob De Jong, Supervisor of the Town of Baldwin, Defendant." Such notice and affidavit were recognized by the justice to be in due form of law, and sufficient to perfect an appeal from said judgment on the part of defendant, and the papers were accordingly certified to the circuit court. When the cause came on for trial in such court, plaintiff's attorneys moved for an order dismissing the appeal because the notice thereof was insufficient, which motion was denied, due exception being taken to the court's ruling. In due time objection was made to the reception of any evidence because the complaint failed to state facts sufficient to constitute a cause of action against defendant. The objection was sustained. Plaintiff's counsel then made application for leave to amend the complaint by alleging that on December 23, 1898, plaintiff caused the chairman of the board of supervisors of the town to be notified of the necessity for immediate medical services to be rendered to Richard Bruaas and of the fact of his being a proper subject for relief by the town, as a pauper. The application was denied. Judgment was thereupon rendered dismissing the action, with costs. Plaintiff's counsel excepted to each of the court's adverse rulings, including that on a motion made for a new trial.

**Messrs. E. B. Kinney and A. J. Kinney**, for appellant:

Section 1499, Rev. Stat., makes it the duty of the defendant town to relieve and support all poor and indigent persons lawfully settled therein.

Municipal corporations may be bound by implied contracts within the scope of their powers, or by liabilities springing from the neglect of duties imposed by law.

Dill. Mun. Corp. 4th ed. § 459; *Mappes v. Iowa County Supers.* 47 Wis. 31, 1 N. W. 359.

It was not necessary to plead a promise on the part of the defendant to pay the plaintiff.

*Beach v. Neenah*, 90 Wis. 623, 64 N. W. 319; *Farron v. Sherwood*, 17 N. Y. 227; *Easte*, Pl. § 320.

It was not necessary to plead that the services were performed at the request of the defendant.

*Joubert v. Carl*, 26 Wis. 594; *Hicks v. Burhans*, 10 Johns. 243; *Livingston v. Rogers*, 1 Cai. 583; *Summit Twp. Poor Dist. v. Byers* (Pa.) 9 Cent. Rep. 523, 11 Atl. 242; *Directors of Poor v. Donnelly* (Pa.) 5 Cent. Rep. 269, 7 Atl. 204.

It is not necessary, in pleading, to state facts which the law implies.

*Ball v. Beaumont*, 59 Neb. 631, 81 N. W. 558.

The defendant being under a legal obligation to relieve this pauper, the fact that he was, on the 24th day of December, 1898, in such a condition that "unless he received proper medical and surgical care and treat-

ment promptly he would die," shows that one or the other of two things is true: Either the supervisors were neglecting the duty imposed upon them by law, or the pauper was suddenly stricken down and prompt surgical relief was imperative. In either case the town is liable to the physician who treats the pauper.

*Madison County v. Haskell*, 63 Ill. App. 657; *Clinton County v. Pace*, 59 Ill. App. 576; *Lee County Supers. v. Gilbert*, 70 Miss. 791, 12 So. 593; *Tipton County Comrs. v. Brown*, 4 Ind. App. 288, 30 N. E. 925; *Christian County v. Rockwell*, 25 Ill. App. 20.

In such case the physician recovers on the same principle that gives a right of action to one who furnishes necessaries to, or pays the burial expenses of, a child or other dependent relative of the defendant.

15 Am. & Eng. Enc. Law, 2d ed. pp. 1080, 1081.

Mr. James A. Frear for respondent.

Marshall, J., delivered the opinion of the court:

The notice of appeal was sufficient. Strict accuracy is by no means necessary in such a paper in order to confer jurisdiction upon the appellate court. Mistakes, however numerous, are immaterial if the notice yet contains enough to fairly identify the judgment, the parties, and the court, and to show that it was made by the party appealing, or some one authorized to do so, which authority need not expressly appear, it being sufficient if it be fairly inferable from the language of the notice and the manner in which it is signed. The law in that regard is too well settled to need any citation of authority to support it. The alleged defect in the notice is that it was not signed by the town of Baldwin, using the name of the town, or showing that some person or persons acted in the matter as agent or agents for the town, having authority so to do. A corporation must of necessity act by an agent, and that agent need not necessarily be an officer of the corporation, nor need any proof of the agency accompany the notice. If there is enough in a notice of appeal to indicate that it was made by a person assuming to act as agent of the appellant, though the agent in signing used only his name as such, his authority will be presumed till the contrary is shown. *Benjamin v. Houston*, 24 Wis. 309. The notice in question was signed by three persons, with the word "Supervisor" under the last signature, indicating that at least such signer acted in his official capacity for the town. We think it is fairly inferable that all the signers acted officially, and that by mistake the singular number was used instead of plural in specifying the official character.

The contention is made that, inasmuch as by Rev. Stat. 1898, § 1499, the defendant was required to relieve Brusaas, no notice of his necessities to its supervisors was necessary to create a legal liability to one who voluntarily, from motives of humanity, administered to his wants, and that since by

§ 1501, Id., such supervisors were required to see that he was properly relieved, neglect on their part, after receiving notice from plaintiff of circumstances calling for action to that end, was tantamount to a request to plaintiff to perform the service required. To support those propositions, *Mappes v. Iowa County Supers.* 47 Wis. 31, 1 N. W. 359, is cited. That, with what is said in *Davis v. Scott*, 59 Wis. 604, 18 N. W. 530, supports both propositions. If they declare the law correctly, the judgment appealed from is wrong. In the first case mentioned the claimant supported an aged woman, who was a pauper, without notifying the municipal officers of the facts, and without knowledge on his part that such person's relatives had failed to comply with an order made according to law requiring them to support her, rendering it necessary for public relief to be furnished, and without the claimant knowing that she was a pauper. The court held that such ignorance excused the claimant for not giving notice of the situation to the municipal authorities; that he was entitled to recover upon the ground of the legal obligation alone; that in view of such obligation the only thing that could preclude the claimant from recovering would be negligence on his part in failing to notify the proper officers so as to give them an opportunity to perform their duty in the matter, and that the claimant was not chargeable with such negligence, since he did not know that the person relieved was a pauper. No authority was cited to support the decision. *Meyer v. Prairie du Chien*, 9 Wis. 233, was referred to on the general subject of the legal duty of a town to support paupers having a legal settlement therein. Such case does not refer even remotely to the principle upon which the *Mappes Case* turned, it being held in effect that a contract between the town authorities and the party furnishing the relief was necessary to give the latter a legal claim against the former. There was a recovery in the court below, and no bill of exceptions on the appeal. In that situation this court said that it would be presumed that a proper contract was made entitling the claimant to recover. The rule of the *Mappes Case*, to its full extent, has never been followed in this court, or at all here, except in *Davis v. Scott*. In several cases it has been in effect overruled by holdings that a claim against a municipality for the relief of a pauper must be based on an express or implied contract, actually made between the claimant and the proper officials. Cases exist holding that a public corporation may be held liable without even notice to its officers having authority to act in its behalf, of the necessity for relief to be given a pauper, but they are based on statutes to that effect, as, for instance, by Vt. Rev. Stat. 1840, chap. 16, § 12, in force when *Charleston v. Lunenburg*, 23 Vt. 525, was decided, it is provided that in certain emergencies a person furnishing relief to a pauper, until the lapse of a reasonable time for notifying the proper public officers of such pauper's needs, can recover therefor of the municipality in

which such relief is furnished, and that if, after such notice, such officers neglect to perform their duty, he can continue to furnish such relief and look to such municipality for his pay. We have no such statute. There is much judicial authority to the effect that if one furnishes necessary relief to a poor person, after notice to the public officers of the pauper's needs and neglect on their part to perform their duty, he may recover therefor as on an implied contract. Most of such authority, however, is based on statutes; as, for examples, Mass. Rev. Stat. 1836, chap. 46, § 18, in force when *Smith v. Colerain*, 9 Met. 492, was decided, provides that "every town shall be held to pay any expense which shall be necessarily incurred for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of the said town, and until provision shall be made by them." Conn. Gen. Stat. 1875, title 15, part 1, chap. 2, § 4, in force when *Wile v. Southbury*, 43 Conn. 53, was decided, was to the effect that any person relieving a poor person, after notice to the proper public officers of the needs of such poor person, and a neglect of such officers to perform the duty, may recover therefor upon an implied contract. Me. Rev. Stat. 1841, chap. 32, § 48, in force when *Perley v. Oldtown*, 49 Me. 31, was decided, is to the same effect; but in *Beetham v. Lincoln*, 16 Me. 137, it was decided that, in the absence of a statute making it the duty of a municipality to relieve a poor person standing in need thereof, and neglect of its proper officers to attend to the matter, after receiving notice of such need, sufficient to constitute an implied request by such officers to another to furnish relief, such circumstances do not create contract relations between such municipality and such other upon which the latter can recover of the former. *Seagraves v. Alton*, 13 Ill. 366, is to the opposite effect, but it is not a well-considered case, as is evidenced by the fact that none of the authorities cited supports the conclusion reached. It holds that the legal obligation of a municipality to support a poor person, and neglect of its officers to act in its behalf, is sufficient to warrant the court in inferring a promise by such officers, to one who stands in place of the municipality and prevents the suffering that would otherwise result from the neglect of its agents, to compensate him therefor. The case went to the full extent of holding that such a promise will be inferred in certain emergency cases, even in the absence of any neglect on the part of municipal officers. The decision followed closely the lines of those cases we have referred to that are based on statutes, seemingly ignoring the rule often laid down that, while there is a strong moral obligation resting upon organized society to relieve all poor persons in its midst standing in need thereof, there is no legal obligation to do so in the absence of a statute creating it, and that the courts cannot go further than the legislative will has been expressed. To what extent, under what circumstances, at what place and by

what agencies poor persons shall be relieved at the expense of the public, are all purely legislative questions. When the legislature has gone no further than to create a legal obligation to support poor persons, and to designate municipal agents to incur the necessary obligations to that end, no such obligation can exist without some clearly expressed municipal consent given by such agents. In short, where the statute contemplates that all liabilities for the support of the poor shall rest on contract, that is the exclusive way of incurring them, and a meeting of minds is just as essential to such a contract as to any other. The doctrine thus stated is generally recognized as controlling. In *Overseers of Poor v. Overseers of Poor*, 3 Serg. & R. 117, often cited on the subject discussed, it was said: "Whatever may be the duty of individuals, from religious or charitable considerations, it is certain the public is bound by no moral obligation to support the poor of the community. That duty, being legal and of positive institution, is to be carried no farther than the express provisions of the poor laws." In *Smith v. Colerain*, 9 Met. 492, the situation was this: The statute expressly made a town liable on an implied contract in certain, but not in all, cases of a person furnishing necessary relief to a pauper whom such town was legally bound to support. Relief was furnished to such a person by a private party, the officers of the town having refused to do so. The person relieved was not at the time located where the law required as a condition of an implied contract to pay for such relief, when furnished by a private party, though he was where the overseers of the poor placed him and might have continued to support him. In deciding the case Chief Justice Shaw said: "There was no express undertaking to pay the plaintiff: and whether a contract could be implied depends upon the statute liability. . . . It has been too often decided to be now questioned, that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation."

In *McCaffrey v. Shields*, 54 Wis. 645, 12 N. W. 54, it was said that "the defendant town cannot be held liable . . . unless its supervisors, or at least two of them, requested" the service to be performed. The court did not feel called upon to overrule *Mappes v. Iowa County Supers.* because the facts in the two cases were different, though it seems that the principle involved, of whether a contract is necessary upon which to found a legal liability against a town for the relief of a poor person, was decided differently in the one case than in the other.

In *Dakota v. Winneconne*, 55 Wis. 522, 13 N. W. 559, it was held that a contract is necessary to a liability of the kind in question, though it is not necessary that the supervisors act in a body in making it; that if one supervisor requests the service to be rendered, with the knowledge and tacit consent of another, and the person furnishing the relief relies upon the conduct of the

two as a joint request, it is within reason to say that there is a meeting of minds, and a contract made.

In *Davis v. Scott*, 59 Wis. 604, 18 N. W. 530, the court held squarely that the liability of a town to compensate a person furnishing support to a proper subject for relief as a poor person is fixed by notice to the supervisors to take charge of such subject, and their neglect to do so. It was said that the case was distinguishable from *McCaffrey v. Shields*. That is true as to the facts, but why it is as to the principle of whether some clear indication of a request to furnish relief is necessary to a contract obligation of the town to pay the person performing that service, is not perceived. It seems that an error was committed in that case. Rev. Stat. 1878, §§ 1513, 1514, not now in force, were in substance as follows: If any poor person shall become a charge for support to a town in which he has no legal settlement, any town in this state in which such person has such settlement shall be liable over to the former upon condition of its supervisors giving to at least one of the latter's supervisors notice of the facts and requiring them to take charge of such person. If he shall not be so taken charge of within thirty days after such notice, and all expenses be paid up to such taking, the delinquent town shall be liable to the other for such expenses and all others incurred while such person remains a public charge. *Dakota v. Winneconne*, 55 Wis. 522, 13 N. W. 559, arose under such statutes. The defense was made that the plaintiff was not entitled to recover because it did not, acting by its full board of supervisors, contract for the relief furnished and audit the expense thereof. This court, after deciding that a request by two of the supervisors of the town to furnish the relief, satisfied all the requisites of a contract under the previous decisions of the court, said that the town ultimately liable could not be heard to complain of any irregularity in regard to making the contract and auditing the claims by the town primarily liable, since the person relieved was a legitimate charge upon the former; and notice to its supervisors of the facts, and a request of them to take charge of such person, was all that was necessary to fix its liability to the plaintiff town. This language was used: "The plaintiff town having given the defendant town the requisite notice to take charge of the pauper, the liability of the latter became fixed." "It could not, by neglecting its own legal duty, compel the plaintiff to make the expenditures in question," and then defeat its claim therefor, because such expenditure was not made by authority of the full board. The court properly said, on the facts of that case, that notice to the town in which the pauper had a legal settlement fixed its liability to the town primarily liable for the relief, because such was the express mandate of the statute. In *Davis v. Scott* the liability was claimed under §§ 1499, 1501. Only that part of *Dakota v. Winneconne* holding that a contract between the supervisors of the plaintiff and the per-

son furnishing the relief was requisite to its liability therefor to such person, applied. The idea that the part holding that notice to the town responsible over fixed its liability to the town primarily liable, applied, manifestly was a mistake. For that reason the case cannot be considered as authority ruling the case before us.

In *Jones v. Lind*, 79 Wis. 64, 48 N. W. 247, there was proof of a general request by the chairman of the board of supervisors to furnish relief and make monthly reports. Relief was furnished on the faith of such request, reports thereof were made, and bills therefor paid, up to the expiration of such chairman's term of office. He and his associate supervisors supposed that the arrangement was to end with their term of office. He testified to that as a conclusion, though there was nothing in what was said between him and the claimant indicating that the contract was not to continue so long as necessary. Such claimant supposed it was not to terminate without express notice to that effect, if the necessity continued. He was never notified to discontinue his service. The need therefor remained unchanged, and the person served continued to be a proper town charge. The action was for services rendered after the term of office of the supervisors employing the claimant expired. It was held that he was not entitled to recover, the court saying: "As the town can only be chargeable for the services rendered by virtue of some contract" therefor, we think the circuit court was clearly justified in holding that plaintiff had no cause of action.

In *Beach v. Neenah*, 90 Wis. 623, 64 N. W. 319, there was notice to the chairman of the town and a promise by him that the destitute persons should have whatever they needed; and it was said that the evidence was sufficient to show that the supervisors of the town consented that the person giving notice, and to whom the declaration was made, should care for such persons at the expense of the town until they were otherwise cared for.

It is believed that the law that an obligation against a town for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated in the statute, was recognized and correctly declared in *Meyer v. Prairie du Chien*, *McCaffrey v. Shields*, *Dakota v. Winneconne*, *Jones v. Lind*, *Beach v. Neenah*, and *Putney Bros Co. v. Milwaukee County*, 108 Wis. 554, 84 N. W. 822; that the agents empowered to act for the municipality in such matters must, either by express contract or by some act or acts from which a contract can be reasonably inferred, bind such municipality, or it cannot be bound at all. Mere passive neglect is not sufficient.

The statute, as has been said, does not indicate that the supervisors must act in a body in contracting for the relief of a poor person. The nature of the duty in such cases is not consistent with such a requirement. The statute must have a reasonable,

sensible construction, in view of the duty imposed. It says "the supervisors" shall see that poor persons are taken care of as required by law. That clearly indicates that at least a majority must consent to relief being furnished to a pauper at the expense of their town in order to bind it. If one supervisor acts with the knowledge and consent of another, given either expressly or by his keeping silent when good faith requires him to speak, it may properly be inferred that the two concur in the matter and that there is a sufficient meeting of minds between the proper municipal agents and the person furnishing relief, to satisfy all the essentials of a contract. While an implied contract is sufficient, as indicated, it must be established, if one endeavors to recover upon it, the same as any other implied contract. The statute creates a liability to relieve destitute persons, but not a liability to individuals who may voluntarily perform that service. It empowers appropriate agents of municipalities to make their liability effective by necessary contracts to that end, and imposes upon such agents the duty to exercise such power. If they refuse to do so, they are doubtless amenable in some way for such misconduct, but the law gives no private person the right to perform the duty of such officers. *Otis v. Strafford*, 10 N. H. 352. Performance of that duty by the person designated by law is absolutely essential to create a binding obligation upon the municipality to compensate one for relieving a poor person, legally entitled to relief at its expense. If the statutes on the subject are defective, it is not for the court to judicially extend them.

They came to us from Massachusetts indirectly, having been adopted by Michigan, then by this state. It must be presumed that there was a purpose in making the change which we have pointed out between the Massachusetts statutes and our own, for, without the change, mere neglect of the supervisors of a town to act when they ought to act for the relief of a poor person would give a private party, not liable by law to furnish such relief, and residing in such town, the right to do so at the expense thereof. There is no more reason for holding that a person may aid a pauper, upon the supervisors of the town in which such pauper has a legal settlement neglecting their duty, and hold such town liable therefor, than for holding that one may repair the highways of a town because its supervisors neglect their duty in that respect, and recover of such town therefor. The duty of the municipality in both cases is regulated by statute, and in neither case can it be bound to a private person for services rendered except by contract made as contemplated by law.

From what has been said it follows that the complaint was insufficient and that the objection to any evidence under it was proper. There was not even a suggestion in the complaint that the supervisors of the respondent town had notice of the necessity for furnishing the relief for which the claim

was made. The application for leave to amend was properly denied, if for no other reason, because it alleged mere notice to the chairman of the board of supervisors of the respondent that Bruaas was a proper town charge and stood in immediate need of relief as such, and that the person giving such notice, the appellant here, was under no legal obligation to furnish such relief. The amendment followed closely the line of decisions to which we have referred, based on express statutes creating a liability under such circumstances. *Smith v. Colerain*, 9 Met. 492.

*The judgment is affirmed.*

Charles F. TESCH, *Respt.*,  
v.  
MILWAUKEE ELECTRIC RAILWAY &  
LIGHT COMPANY, *Appt.*

(108 Wis. 593.)

\*1. The doctrine of comparative negligence does not prevail in this state. Therefore, in a case involving the subject of contributory negligence, the rule that obtains in some jurisdictions does not apply, that if plaintiff was guilty of contributory negligence he may yet recover if defendant discovered his peril in time to have avoided injuring him by the exercise of ordinary care; nor the rule that, notwithstanding plaintiff's negligence, he may recover if defendant was guilty of gross negligence, speaking of fault not amounting to actual intent to injure, or that wanton disregard for the safety of others equivalent thereto sometimes called constructive intent; nor the rule that if plaintiff's negligence preceded that of the defendant in time, and the latter by the exercise of ordinary care could have avoided injuring the former and failed to do so, the negligence of the former is considered a condition, and the negligence of the latter the sole proximate cause of the injury, notwithstanding such condition was a mere continuance of the negligent act, and concurred with defendant's fault at the instant of the accident, and produced it.

\*2. The doctrine in this state is that contributory negligence of the plaintiff, however slight, precludes his recovering of the defendant on the ground of negligence, regardless of the degree thereof, speaking of

\*Headnotes by MARSHALL, J.

NOTE.—For earlier cases in this series as to rule of last clear chance in negligence cases, see *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287; *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257; and *Thompson v. Salt Lake Rapid-Transit Co.* (Utah) 40 L. R. A. 172.

As to negligence of person in failing to stop, look, and listen before crossing street-car track, see *Newark Pass. R. Co. v. Bloch* (N. J. L.) 22 L. R. A. 374; *Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 126; *McGee v. Consolidated Street R. Co.* (Mich.) 26 L. R. A. 300; *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276; *Consolidated Traction Co. v. Scott* (N. J. L.) 33 L. R. A. 122; *Baltimore Traction Co. v. Helms* (Md.) 36 L. R. A. 215; *Johnson v. St. Paul City R. Co.* (Minn.) 36 L. R. A. 586; and *Hoelsel v. Crescent City R. Co.* (La.) 38 L. R. A. 708.



conduct characterized by inadvertence, not that misconduct known in the decisions of this court as gross negligence.

3. Before crossing a railway track, regardless of whether it be a steam or electric street railroad, a person should look both ways and listen for a coming car and perform that duty when and where it will be reasonably certain to effect its purpose; and diversion of attention, generally speaking, will not excuse the performance of such duty; neither will misconduct on the part of the railway company.
4. If in taking a special verdict questions be submitted covering singly all the material controverted facts in issue, a refusal to submit other questions covering the same subjects in a different form, or covering evidentiary facts, is proper.
5. A refusal to instruct a jury in accordance with suggestions contained in special questions presented for submission to them, or the giving of instructions in regard to a particular subject, is not reversible error, if, by the verdict rendered, it is clear that the facts necessary to the applicability of such instructions given or refused did not exist.
6. An ordinary traveler upon a public street where a street-car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars has not the same right to go upon the track and compel the stopping of a car to enable him to pass over the track as the operator of the car has to delay his passage to enable the car to pass.
7. The ordinary traveler has the right of way in crossing a street-car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car if its rate of speed is lawful; and if it turns out that he has miscalculated, he is not chargeable with want of ordinary care, or with violating any rights of the railroad company if it is compelled to retard the motion of the car or even stop it to enable such person to cross the track; and in no event is such a person a wrongdoer so as to excuse the operator of the car from not exercising ordinary care to avoid injuring such person, though the fault of such person may preclude him from recovering damages for any injury that may result in part from his conduct.
8. If a person about to cross a street-car track in the circumstances above stated observes a car that is coming towards him at an unreasonable rate of speed, or if in the exercise of ordinary care he ought to observe it, such care requires him to take that into consideration in determining the probability of his being able, proceeding reasonably under the circumstances, to clear the track and avoid being injured by a collision with the car.
9. If a person traveling with a horse and carriage approaches a street crossing to pass over double street-car tracks located on the street running at right angles with that on which he is approaching, observes a car coming from the left on the track nearest him and one from the right on the other track, and stops for such cars to pass, the horse being located about 10 feet from the nearest car rail, and the car from the left passes by and stops at the right-hand cross walk, and the one from the right

passes over the street; the conditions being such that he can see the farther track at the right, looking by the front end of the stationary car, from a point about 100 feet from the crossing to a point about 100 feet farther to the right, and can see such track in front of him to the left of the stationary car for about 40 feet from the point of crossing, leaving about 60 feet of the farther track to the right out of view because of the stationary car; and a second car is approaching from the right on the farther track, a little way behind the first car coming from that direction; and at the instant the second car passes by he looks both ways for other approaching cars and sees one coming from the left, though not dangerously near, and none coming from the right, though at the instant of taking the observation one has just passed out of view within the 60 feet of track shut out from observation by the stationary car, and is approaching at a speed of 10 miles an hour, an unusual rate of speed for that situation and under the circumstances, without giving any signal of its approach; and he then starts to cross the track believing the way to be safe,—he is not guilty of a want of ordinary care as a matter of law. The rule requiring one to take an observation of a railroad track before attempting to cross it, reasonably calculated to acquaint him of the presence of cars in dangerous proximity to the crossing, is not in conflict herewith.

(January 8, 1901.)

**A** PPEAL by defendant from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Marshall, J.:

Action to recover damages for a personal injury. The evidence produced bearing on the issues made by the pleadings established or tended to establish the following: Virginia street runs east and west and Reed street crosses it at right angles running north and south, in the city of Milwaukee. Such streets are about 60 feet wide between curb lines. The defendant has a double-track electric street railroad on Reed street, operated by the overhead trolley system. The streets are much used, particularly at the crossing. Street cars pass both ways at short intervals, those going south using the west track and those going north the east track. Plaintiff was perfectly familiar with the crossing and all the dangers attending its use by travelers with teams. Both streets were sufficiently level to permit a view of them either way by one standing at the crossing. There were buildings on the corners on the west side, so that one approaching the railway tracks on Virginia street from that side could not see the tracks up and down the street till he arrived at the crossing. On November 26, 1897, commencing about 8 o'clock A. M., there was a snowstorm which lasted till after the happening of the injury, which was a little later in the day. The falling snow prevented a clear view of objects up or down the street, but the difficulty was not so great

but that an approaching street car could readily be seen for a distance of more than 150 feet. The falling snow and other weather conditions caused the street-car track to be slippery, so that it was impracticable for a motorman to control his car as completely as he otherwise could. On account of such conditions the motorman on the car that produced the injury was unable to determine readily within what distance he could stop it, because the wheels were liable to slip on the track. In the circumstances stated, plaintiff and his brother riding in a covered buggy, with no curtains thereon, drawn by a gentle horse, approached the crossing from the west, driving on Virginia street. As they arrived at a point where they had a full view of the street-car tracks both ways on Reed street, they observed two cars approaching, one from the north on the west track and one from the south on the east track. The cars were so near the crossing that plaintiff did not think it was safe to attempt to cross. He stopped his horse so that its feet were located about 12 feet from the west rail and the buggy seat was located about at the curb line, distant about 25 feet from such rail. While plaintiff was so located the car coming from the north passed and stopped to allow a passenger to alight at the south cross walk. Immediately thereafter the car going north on the east track passed over the crossing without stopping. Plaintiff then looked both ways for coming cars and observed one coming from the north about 150 feet from the crossing, but did not see any coming from the south, though one had just disappeared from view behind the car that was located at the south cross walk. The car approaching from the north was moving pretty fast and the motorman, observing plaintiff's purpose to cross, sounded his gong vigorously. Plaintiff, thinking he had time to make the crossing, started and moved pretty fast in order to do so. He passed over the west track safely and as he did so he looked to the south and saw a car coming from that direction and so near that it was impossible for him to escape from the region of danger before the injury occurred. As the hind wheels of his buggy were about to pass over the east rail, he being located about over the rail, the car struck the buggy, partially demolished it, and threw him out forward and to one side a distance of some 25 feet, where he landed on the surface of the street and was injured. There was some conflict in the evidence as to whether the gong on the car was sounded; also as to the speed of the car and the distance it traveled after striking plaintiff's buggy. On the part of plaintiff the evidence was to the effect that it was going faster than usual and some 10 miles an hour. On the part of defendant the evidence was very positive to the effect that it was going at a moderate and usual rate of speed and not over 5 to 7 miles an hour. As to the sounding of the gong, the evidence on the part of plaintiff was that he did not hear it; that other witnesses in the vicinity did not, and that if it had been

sounded plaintiff would have heard it. On the part of defendant the testimony of the motorman, passengers in the car and others, was to the effect that the gong was sounded vigorously and seasonably. As to the distance the car traveled after striking plaintiff's buggy, the evidence on his part was to the effect that it passed clear over the crossing and a considerable distance beyond, one witness placing it as far as half a block. On the part of defendant the evidence was to the effect that the current was reversed and the brakes set as soon as practicable after plaintiff was observed, and that the car stopped still before passing entirely over the north cross walk. The evidence was further to the effect that the car that stopped at the south cross walk stood there till about the instant plaintiff started to cross the tracks; that as he arrived at a point where he could have seen the north-bound car, had he been looking in that direction, and the motorman could have seen him, such car was very near the crossing. Plaintiff testified that the car he saw coming from the north 150 feet away was coming so fast that he hurried to get by; that he did not see the other car till it was nearly to him, and then it was too late.

The jury rendered the following verdict, the substance of the findings being given, not the particular language of the verdict:

(1) Plaintiff was injured at the time and place alleged, by one of defendant's street cars.

(2) The car was going at an unreasonable and dangerous rate of speed when the injury occurred.

(3) Such unusual and dangerous rate of speed was the proximate cause of the injury.

(4) The motorman, in the exercise of ordinary care, ought to have seen plaintiff's peril in time to have avoided injuring him.

(5) The failure to observe such peril in time to avoid the collision was not the proximate cause of the injury.

(6) The motorman did not signal the approach of his car to the crossing by sounding the gong.

(7) Said failure to sound the gong was not the proximate cause of the injury.

(8 and 9 omitted as immaterial.)

(10) The motorman, after seeing plaintiff's peril, used all reasonable means to avoid the collision.

(11 and 12 omitted as immaterial.)

(13) Plaintiff was not guilty of a want of ordinary care in that he did not see the car in time to avoid the injury.

(14) Plaintiff was not guilty of any want of ordinary care which contributed to his injury.

(15) Plaintiff suffered damages to the amount of \$800.

At the close of the evidence a motion for a nonsuit was denied. On the coming in of the verdict there was a motion on the part of defendant to change the finding on the subject of contributory negligence of plaintiff, so as to find that he was guilty thereof; also to change the affirmative to negative answers to the questions relating-

to the speed of the car and its effect in producing the injury. The motions were made specific and proper upon the theory that the evidence conclusively established the facts as defendant desired them to appear in the findings. All of defendant's motions were denied and exceptions to the rulings in that regard and other rulings were duly preserved for review. Judgment was rendered in plaintiff's favor on the verdict.

**Messrs. Spooner, Rosecrants, & Spooner**, for appellant:

If the car was coming at a proper rate of speed, the fact that plaintiff was struck is a clear indication that it was so near as to make the hazard which he took one incompatible with prudence. If the car was coming at a dangerous rate of speed, and he took the chance upon the assumption that it would be run with ordinary care, he made an assumption which a proper use of his sense of sight would have shown him was unfounded, and in making which the law does not sustain him.

*Vant v. Chicago & N. W. R. Co.* 101 Wis. 363, 77 N. W. 713.

The testimony allows of no other reasonable conclusion but that he could, in the exercise of ordinary care, have seen the car which struck him after he claims his view was intercepted by the first south-bound car.

Assuming that the plaintiff did not or could not see the car which struck him before the first south-bound car stopped at Virginia street, and that after it stopped it intercepted his view, so that he could not see down the street, it was his duty to wait until he could see down the street before attempting to cross the tracks.

*Hovenden v. Pennsylvania R. Co.* 180 Pa. 244, 36 Atl. 731; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067; *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 405, 32 L. R. A. 149, 42 N. E. 736; *Kilbride v. New York C. & H. R. R. Co.* 17 App. Div. 177, 45 N. Y. Supp. 302; *Vahue v. New York C. & H. R. R. Co.* 18 App. Div. 452, 46 N. Y. Supp. 359; *Atlantic & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Salter v. Utica & B. River R. Co.* 75 N. Y. 273; *Merkle v. New York, L. E. & W. R. Co.* 49 N. J. L. 473, 9 Atl. 680; *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574, 27 Atl. 1064.

Travelers have no right to relax vigilance upon the assumption that trains will only be run according to schedule as they know it.

*Salter v. Utica & B. River R. Co.* 75 N. Y. 273; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 71 N. W. 179.

**Mr. Edgar L. Wood**, for respondent:

The rule that one should look and listen before attempting to cross a railway track is subject to limitations. Where the attention of the plaintiff is momentarily distracted, or where the conduct of the defendant is such as to lure the plaintiff into danger by allaying reasonable apprehension of danger, or where an intervening obstruction

cuts off from the plaintiff the view of the approaching train,—under such circumstances the plaintiff may be relieved from the rigor of the rule.

*Phillips v. Milwaukee & N. R. Co.* 77 Wis. 351, 9 L. R. A. 521, 46 N. W. 543; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 256, 46 N. W. 165; *Thoresen v. La Crosse City R. Co.* 94 Wis. 132, 68 N. W. 548, 87 Wis. 597, 58 N. W. 1051; *Duane v. Chicago & N. W. R. Co.* 72 Wis. 523, 40 N. W. 394; *Winstanley v. Chicago, M. & St. P. R. Co.* 72 Wis. 375, 39 N. W. 856; *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. 665; *Ferguson v. Wisconsin C. R. Co.* 63 Wis. 151, 23 N. W. 123; *Atty. Gen. v. Chicago, M. & St. P. R. Co.* 35 Wis. 606; *Bower v. Chicago, M. & St. P. R. Co.* 61 Wis. 461, 21 N. W. 536; *Butler v. Milwaukee & St. P. R. Co.* 28 Wis. 501; *Seefeld v. Chicago, M. & St. P. R. Co.* 70 Wis. 219, 35 N. W. 278; *Heath v. Stewart*, 90 Wis. 418, 63 N. W. 1051; *Wanzer v. Chipewaga Valley Electric R. Co.* 108 Wis. 319, 84 N. W. 423; *Berg v. Milwaukee*, 83 Wis. 603, 53 N. W. 890; *Gums v. Chicago, St. P. & M. R. Co.* 52 Wis. 679, 10 N. W. 11.

This rule as applied to steam railroads does not apply in all of its rigor to the crossing of electric street railways, and the fact that the traveler does not look and listen, or, looking, sees the car at such a distance that, if it is run at a reasonably safe rate of speed, he can cross in safety, and he assumes that he can so cross, if he is injured in the attempt he is not thereby convicted of contributory negligence.

*Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197, 32 L. R. A. 276, 43 N. E. 207; *Smith v. Union Trunk Line*, 18 Wash. 351, 45 L. R. A. 173, 51 Pac. 400; *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 4 L. R. A. 126, 18 N. E. 772; *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L. R. A. 539, 37 Atl. 379; *Evansville Street R. Co. v. Gentry*, 147 Ind. 408, 37 L. R. A. 379, 44 N. E. 311; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L. R. A. 126, 34 Atl. 1094; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 379, 27 Atl. 1067; *Callahan v. Philadelphia Traction Co.* 184 Pa. 425, 39 Atl. 222; *Saunders v. City & Suburban R. Co.* 99 Tenn. 130, 41 S. W. 1031; *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423, 38 Atl. 885; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, 37 Atl. 135; *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902; *Riley v. Minneapolis Street R. Co.* 80 Minn. 424, 83 N. W. 376; *Wosika v. St. Paul City R. Co.* 80 Minn. 364, 83 N. W. 386; *Merts v. Detroit Electric R. Co.* (Mich.) 7 Det. L. N. 393, 83 N. W. 1037; *Ryan v. Detroit Citizens' Street R. Co.* 123 Mich. 597, 82 N. W. 278; *Moran v. Detroit, Y. & A. R. Co.* 124 Mich. 582, 83 N. W. 606; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 217, 36 Atl. 110; *Duncan v. Union R. Co.* 39 App. Div. 497, 57 N. Y. Supp. 326; *Reilly v. Metropolitan Street R. Co.* 57 N. Y. Supp. 278; *Capital Traction Co. v. Lusby*, 12 App. D. C. 295; *Lawler v. Hartford Street R. Co.* 72 Conn. 82, 43 Atl. 545; *At-*

*lanta Consol. Street R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41; *Clark v. Bennett*, 123 Cal. 278, 55 Pac. 908; *Hall v. Ogden City Street R. Co.* 13 Utah, 243, 44 Pac. 1049; *Patterson v. Townsend*, 91 Iowa, 725, 59 N. W. 205, Appx.; *Kelly v. Wakefield & S. Street R. Co.* 175 Mass. 331, 58 N. E. 286; *Citizens' Street R. Co. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028.

Street railways have no superior right of way over vehicles at street crossings, as they have at other points along the line.

*Watson v. Minneapolis Street R. Co.* 53 Minn. 551, 55 N. W. 742; *Hickman v. Union Depot R. Co.* 47 Mo. App. 65; *Bernhard v. Rochester R. Co.* 68 Hun, 369, 22 N. Y. Supp. 821; *Pope v. Kansas City Cable R. Co.* 99 Mo. 400, 12 S. W. 891; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 123, 33 S. W. 920; *Booth, Street Railways*, § 304.

The plaintiff might rightfully assume that the defendant would run its cars at a reasonably safe rate of speed.

*Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 492, 31 N. E. 391; *Read v. Brooklyn Heights R. Co.* 32 App. Div. 507, 53 N. Y. Supp. 209; *Hart v. Cedar Rapids & M. City R. Co.* 109 Iowa, 631, 80 N. W. 662; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 379, 27 Atl. 1067; *Moran v. Detroit, Y. & A. A. R. Co.* 124 Mich. 582, 83 N. W. 606; *Smith v. Union Trunk Line*, 18 Wash. 351, 45 L. R. A. 173, 51 Pac. 400; *Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197, 32 L. R. A. 278, 43 N. E. 207; *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L. R. A. 539, 37 Atl. 379.

**Marshall, J.**, delivered the opinion of the court:

This case involves a few plain familiar principles. Little or no help can be obtained by citing cases from other courts where the facts were materially different or the principles applied not recognized as law by this court. There are no precedents, as regards the facts, in the decided cases of this or other courts, that can be considered controlling or materially helpful. Counsel for respondent has, with great industry and some misdirected professional energy, brought to our attention a mass of cases in support of the judgment; but so many of them are out of harmony with the settled rules of law recognized here that an attempt to apply them to the facts of this case is confusing instead of helpful. There is little use in referring to adjudications to the effect that a diversion of attention will excuse a person, approaching a railway track with the intention of crossing the same, from performing the duty to look both ways and listen for coming cars, so as to carry the case to the jury on the question of whether the plaintiff, seeking to recover upon the ground of the defendant's negligence, was guilty of contributory negligence; because the rule here is, as it is in most courts, that such duty is governed by a rule of law and not to be determined as a fact, from evidence, by the jury. It is as useless

to bring to the attention of this court cases where it has been held that, though the duty to look and listen exists, the testimony of the plaintiff that he performed that duty, yet did not see nor hear a coming car that was unquestionably within his sight and hearing, is sufficient to carry the case to the jury on the subject of his contributory negligence; because the rule here is that the duty to see those dangers that are in plain sight, and hear those that are plainly within hearing by paying proper attention thereto, is just as absolute as is the duty to look and listen for them, and that a jury cannot be permitted to say that a person called upon to perform that duty did not see or hear such dangers, and base a verdict thereon. It is just as useless to urge upon the attention of this court adjudications to the effect that if plaintiff was guilty of contributory negligence he may yet recover if the defendant, after observing his peril, could have avoided inflicting the injury complained of, by the exercise of ordinary care; or cases to the effect that, notwithstanding plaintiff's contributory negligence, he may yet recover if the defendant was guilty of gross negligence, speaking of his conduct as characterized by negligence strictly so called, not intent, actual, or constructive, to do the deed (see *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 84 N. W. 440); or adjudications to the effect that if plaintiff's negligence preceded defendant's a considerable period of time, by the act of going upon the track, and defendant by the exercise of ordinary care could have avoided the occurrence of the accident, the negligence of the plaintiff must be considered remote and his situation at the time of the injury a mere condition of it, and the negligence of the defendant the sole proximate cause thereof, notwithstanding plaintiff's negligence actually continued to and met that of the defendant at the instant of the accident. Such rules are found, in whole or in part, where the doctrine of comparative negligence, in whole or in part, prevails. But it does not prevail here at all. The doctrine of this court, like that of all courts that entirely discountenance comparative negligence, is that contributory negligence of the plaintiff, however slight, precludes his recovering in an action grounded on the defendant's negligence, however great such negligence may have been. In this we do not refer to wilful misconduct of a wrongdoer, which has come to be spoken of as gross negligence, meaning, however, intent, actual or constructive, to do the injury, and not negligence at all, strictly so called. The doctrine of contributory negligence applied here has the sanction of the common law from time immemorial, the support of most of the courts and standard text writers, and half a century of the adjudications of this court. To change it, otherwise than by legislative enactment, would be judicial usurpation. Therefore it is idle to urge upon our attention authorities that cannot be applied except by such transgression.

Cases supporting each of the lines of com-

parative negligence, and the other rules to which we have referred, are presented here as bearing on plaintiff's right to recover, and many more might be found, especially in the inferior appellate courts of some of the states. Upon the faith of such authorities, it is believed, much money has been uselessly expended, and false, unattainable hopes built up. Other courts have found it necessary, by vigorous language, to stay the tendency of such mischief. In a very recent case in Missouri the court used these emphatic words: "There is no comparative negligence in this state. . . . The rule that the negligence of the plaintiffs [want of ordinary care was undoubtedly meant] which contributes directly to the cause of the injury will prevent a recovery is without exception or qualification." The court was speaking of where recovery is sought on the ground of defendant's want of ordinary care. *Hogan v. Citizens' R. Co.* 150 Mo. 36, 51 S. W. 473.

What has been said is addressed to the efforts of respondent's counsel to combat the main contentions upon which reliance is placed to secure a reversal of the judgment, viz., that the verdict finds and the evidence shows, as a matter of law, contributory negligence. Against that the authorities were cited, among others, which we have seen fit to criticize in a general way only, there being too many of them to warrant a review thereof in detail. We will reserve the discussion of the grounds put forth by appellant's counsel to support their main point, and the reasons for the conclusion we have arrived at, for the closing subject of this opinion.

It does not appear to be contended that there was not evidence sufficient to carry the case to the jury on the subject of whether the car was run at a negligent rate of speed, and whether such fact, under the circumstances, was a proximate cause of the injury; so we need not discuss that question, though it is proper to say, in passing, that the situation disclosed by the evidence fairly raised a jury question as to each of such elements.

Some complaint is made because the court refused to subjoin questions requested by counsel for appellant, but it does not seem that there is any merit therein, as all the facts in issue were fully covered by the special verdict.

Complaint is also made because the court neglected to instruct the jury in regard to the duty of plaintiff to look and listen before going upon the railway track, in accordance with the suggestions contained in the questions. Also because of instructions which the court did give on that subject. In answer to such complaints, it is sufficient to say that the evidence is undisputed that plaintiff did both look and listen for a car coming from the south on the east track, before he attempted to cross it, and that he neither saw nor heard a car; and the circumstantial evidence and the verdict are consistent therewith. So it must be said that the evidence clearly shows that, at the

instant when plaintiff started to cross, the coming car that did the injury was obscured from his view by the car standing at the south cross walk. The jury found as a fact, on conflicting evidence, that the car gong was not sounded. In view of such undisputed facts and the fact found by the jury, if error was committed either in the instructions in respect to plaintiff's duty to look and listen for a coming car and to see and observe the speed thereof, or in refusing instructions in regard thereto according to the suggestions contained in the questions which appellant's counsel requested the court to submit to the jury, no harm resulted to it therefrom. So the case comes down to what we have said is the main contention.

Appellant's counsel insist that the verdict indicates such contributory fault, because the reasonable meaning of the finding that the motorman ought, in the exercise of ordinary care, to have seen respondent in time to have avoided the injury, is that he ought to have seen him before the view was cut off by the standing car, in which case, obviously, plaintiff ought at the same time to have seen the coming car and not started across the track. We do not think counsel's idea of the meaning of the verdict is correct. Taking the finding in connection with that in regard to the dangerous speed of the car, and in connection with the undisputed evidence, it is very clear that what the jury meant was, that if the motorman had been operating his car at a reasonable rate of speed, under the circumstances, he would have seen plaintiff upon the track in time to have checked it and thereby avoided the injury. In that view, the finding as to the motorman's failure of duty in not seeing respondent is perfectly consistent with the finding of freedom from contributory fault on the part of the latter in failing to observe the car in time to keep out of its way.

To further support the main contention, it is insisted that respondent, as a matter of law, not only should have looked for the coming car from the south on the east track before he started to cross, but should have seen the car that did the mischief if it was within the line of his vision looking by the front end of the car located at the south cross walk, and that if it was not, because it had passed out of view within the territory shut out from observation by the stationary car, he should have anticipated the probability of a car being so located, and not attempted to cross the tracks until such stationary car moved on; that is, that the rule of law requiring a person to look and listen for a coming car before entering upon a railway track, includes the duty, not only to discover what is observable by the senses of seeing and hearing, but the duty to use such senses when and where they will be reasonably certain to discover the existence of a car dangerously near the crossing, if there be one. No fault can be found with the rule, but, applying it to the evidence as a test of plaintiff's conduct, in view of other settled legal principles, we still have

difficulty in saying that there was not a fair question of fact left for the jury to solve. The industry of counsel for appellant has not been rewarded by discovering precedents which may be referred to as material aids in solving such difficulty; and our labor to that end has not met with any more satisfactory result. Counsel for respondent has not been more successful. The cases cited to our attention by the latter, the strongest of them being from inferior appellate courts, to the effect that respondent was not bound to wait for all the cars that might be coming to pass by,—that he had as much right to use the crossing so as to make defendant check the car to allow him to pass over the tracks as appellant had to delay respondent in order to allow the car to pass over the crossing,—are not useful. Such expressions, found in legal opinions to support decisions, do not accurately state the law. They proceed on a misapprehension of the relative rights of street-car companies and ordinary travelers, and have a mischievous effect. Such travelers have only the common right, while a railroad company has special rights granted to it by the state through the municipality as its agent. The public thoroughfares are under the control of such public agencies, to be used in such reasonable ways as their appropriate governing bodies may determine not inconsistent with the original design. In the exercise of undoubted power, the common council of the city of Milwaukee granted appellant, or some person under whom or corporation under which it claims, the right to maintain and operate its double-track street railroad, and, so far as appears from the evidence, without any restrictions as to the speed of cars or the manner of crossing streets. Such granted rights contemplated rapid transit within reasonable limits, and that ordinary travelers on the street should, to a reasonable extent, shape their conduct with regard thereto. In the use of its granted rights appellant is considered a public agent. It has, impliedly, such privileges as are reasonably necessary to effect the object of its grant. In order that it may enjoy such privileges, ordinary travelers, when upon its track, should give way for the passage of cars, and be ready to do so in order not to delay the transit thereof. They ought not to go upon the track if a car is approaching at a lawful rate of speed and reasonable opportunity does not exist to pass over in safety. If the car is approaching at a negligent rate of speed, and the traveler observes it or ought reasonably to do so, such negligence will not justify a traveler in breaching his duty, to exercise ordinary care for his own protection, by placing himself in the way of such car.

The traveler's duty, confining it to a street crossing of a street-car track, is stated by the supreme court of New Jersey substantially in this way: The driver of a team in crossing a street-car track has the right of way if, by proceeding at a rate of speed which under the circumstances of time and locality is reasonable, he will reach

the place of crossing in time to safely go upon the track in advance of an approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it will reach him; that is, if the driver, proceeding reasonably under all the circumstances, enter upon the track, having exercised reasonable judgment as regards the time necessary to stop the car before reaching him, he is not guilty of any breach of ordinary care, even though it shall turn out that he has miscalculated. *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645. Respondent's counsel relies on that and similar cases. It should be said in passing that the court, in connection with stating the rule as indicated, approved a charge given by the trial court to the effect that a person, in approaching a street-car track for the purpose of crossing the same, where his view is impeded by vehicles or he cannot see up the track, should wait till he reaches a point where his sight is not impeded, before going upon the track; that he ought to be able to see far enough up the track to see that he has the right of way. To that the trial court added this test of when such right of way exists: He has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed. That was condemned by the appellate court because of two elements: First, that indicating a right on the part of the traveler to get in the way of a coming car by his activity, and compel the person in charge thereof to check its speed; second, the right to ignore the actual speed of the car however plainly observable. The true test was given in substance as before indicated, omitting the element permitting the traveler to run a race with a car in order to go upon the track in advance of it, and that permitting him to ignore the unusual rate of speed, but retaining the idea that the traveler need not check his speed to allow a car to pass, but traveling at a usual rate may go in front of the car, giving time only for the motorman to stop it if need be before reaching the traveler. That is in the nature of an amendment of street-car franchises. Certainly, such privileges as are reasonably necessary to the discharge of the duty of a street-car company to the public in transporting persons from place to place on the street, in the way in which such business is ordinarily conducted, are incident to the franchise to maintain and operate the road, in the absence of municipal regulations or something in the franchise or some state police regulation to the contrary. In the absence of any such regulation, the purpose of such a utility is so inconsistent with every traveler upon the street where it exists having the right to go upon the track in advance of a coming car by merely calculating on the time necessary for the car to be stopped before reaching the crossing, that it is not perceived how a court can say that such right exists without exercising legislative functions and judicially, in form, restricting the plain intent of the

legislative grant. The test of the ordinary traveler's right in crossing a street-car track, to harmonize reasonably with the spirit of an unrestricted franchise to maintain and operate, as regards the rights of other users of the way, may properly be stated thus: A person desiring to cross a street-car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else.

We are not unmindful of the fact that the rule stated places quite a burden upon the ordinary use of the streets by persons traveling thereon in the ordinary way, especially where there are double tracks with center supporting poles and cars passing both ways at short intervals; but that is one of the incidents of our modern civilization. Everything must move fast. People as a rule will not tolerate anything else. Street-car companies are expected to conform to the public demand in that regard, and are granted franchises, as indicated, in that view. The dangers that result are great and constant. The army of dead and maimed because of such dangers is numerous and being daily added to. But a remedy therefor must not be sought by appealing to courts to change established rules of law in order to indemnify the sufferers; but by appealing to the law-making power for such regulations of the construction and operation of street railroads, and the use of streets for such purpose, as will concur with and render such use more in harmony with their safe and convenient use by ordinary travelers, leaving courts to administer justice for wrongs committed notwithstanding, according to the law as they find it.

Now when we apply the test above indicated to respondent's conduct, the difficulty with saying he was guilty of contributory negligence by no means disappears. We must keep in view the peculiar situation he was in when and just before he started to cross the track, in determining whether there was a breach of duty on his part in not discovering the coming car, or waiting till he had opportunity therefor. The east track south, looking by the south end of the stationary car, was observable for a dis-

tance of probably 100 feet at least; we cannot say further with certainty, in view of the evidence as to the storm that was in progress and other conditions. The track was observable, looking directly east and southeast, by the north end of the stationary car, for a distance of about 40 feet. Between the two parts of observable track there was a space of about 60 feet that was obscured by the standing car. From a point where the car came into view from the south till it passed out of view in the region obscured by the stationary car, at the speed it was moving, it took only about six seconds. As respondent came to a stop on the west side of the street, he saw a car approaching from the south as well as one from the north, and waited for them both to pass. The one from the north passed first. As soon as the one from the south was clear of the crossing, he looked again both ways, and not observing any car approaching from the south, but seeing one coming from the north, a sufficient distance away, however, to enable him to safely cross the tracks, he started. In the time it took for the first car from the south to pass over the crossing, and while respondent was waiting for it to so pass, the six seconds reasonably elapsed necessary for the second car from the south to come into view, pass over the track that was observable to the south, and enter the region of obscurity behind the stationary car, so that when respondent looked before starting to make the crossing there was no moving car in view, south. He made the start supposing that it was safe to do so.

There was no breach of duty to look both ways and listen. Was it, as a matter of law, want of ordinary care on the part of respondent not to have anticipated the probability of a car being obscured from his sight within the 60 feet of space he could not see by reason of the stationary car? It seems that the term "probability" should be changed to "possibility" in view of the verity in the case that the car was going at an unusual rate of speed, so that it came into and passed out of sight in a few seconds of time. That would be placing the standard of ordinary care, which one must exercise as a matter of law, higher, as it seems, than any established rule of law with which we are familiar will permit, or any precedent, that has been cited to our attention or that we have been able to discover, will justify. If the track had been obscured from the region of the crossing south for substantially all of the way within which an approaching car could otherwise have been seen, and would have been as a matter of law, dangerously near as regards plaintiff's crossing the track, the situation would be far different. It was to such a circumstance, among others, that the attention of the court was directed in *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645. The same is true of *Langhoff v. Milwaukee & P. du Ch. R. Co.* 19 Wis. 480. There two trains were approaching on parallel tracks and substantially side by

side, one of the trains being obscured from view by the other, and the track on which it was moving, except from the crossing to about the head of the observable train, was all out of view; yet the court held that the plaintiff was not guilty of want of ordinary care in not anticipating the probability of there being a second train obscured from the injured person's point of observation by the one that was in sight. The situation was similar, on principle, in *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067; *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 405, 32 L. R. A. 149, 42 N. E. 736; *Hovenden v. Pennsylvania R. Co.* 180 Pa. 244, 36 Atl. 731; and other cases cited by appellant's counsel, and many others to be found in the books. They are analogous to *Johnson v. Superior Rapid Transit R. Co.* 91 Wis. 233, 64 N. W. 753, where the railway track, except at the crossing and the immediate vicinity thereof, was obscured from view by the curtains of the driver's vehicle.

There is nothing in what has been said, nor the conclusion here reached, militating against the rule that a person, approaching a railway track with a view of entering upon it, must look both ways and listen, and that the performance of that duty is not excused by negligence on the part of the railway company, and that the duty to look and listen includes that of performing such duty when and where it will be reasonably cer-

tain to effect its purpose, as laid down by standard text writers, numerous decisions of this court and most of the courts elsewhere. 2 Elliott, Railroads, § 1166; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. Y. 179; *Oleson v. Lake Shore & M. S. R. Co.* 143 Ind. 405, 32 L. R. A. 149, 42 N. E. 736. This decision goes no further than that, under the circumstances of this case,—the most significant being that a car had just passed by on the east track, that the entire track within which an approaching car would have been dangerously near was in view except a small space thereof over which a car going at the speed of the one in question would pass in four seconds, and that no signal of the presence of the car was given,—it is susceptible at least of a reasonable inference that the attempt to cross the track on the theory that a car was not hidden from view in such short space, was not inconsistent with ordinary care. That raised this question of fact: What was the proper inference to be drawn? It was the province of the jury to solve that question. Every principle of law bearing on the case seems consistent with this conclusion, and all light obtainable from precedents is consistent as well.

*The judgment of the Superior Court is affirmed.*

Bardeen, J., took no part.

## MICHIGAN SUPREME COURT.

William B. WYANT *et al.*, Plffs. in Err.,  
v.

George CROUSE.

(.....Mich.....)

One who wrongfully enters a blacksmith shop and kindles a fire in the forge will be liable in case for the consequential injuries caused by the fire spreading and destroying the building and personal property therein.

(*Montgomery, Ch. J., dissents.*)

(June 17, 1901.)

NOTE.—Extent of trespasser's liability for consequential injuries resulting from the trespass.

### I. In general.

### II. Consequential injuries to property.

#### a. In general.

#### b. From removal of fences.

##### 1. In general.

##### 2. Loss of stock.

##### 3. Injuries to crops.

#### c. Caused by third persons.

### III. Consequential injuries to the person.

#### a. In general; health.

#### b. Mental suffering.

#### c. Fright and its consequences.

#### d. Injury to reputation.

### IV. Conclusion.

#### I. In general.

The cases uniformly hold that a trespasser is liable for the natural, direct, immediate, prox-

ERROR to the Circuit Court for Cass County to review a judgment in favor of defendant in an action brought to recover damages for loss caused by fire alleged to have been wrongfully set out by defendant. *Reversed.*

The facts are stated in the opinion.

Mr. M. L. Howell, for plaintiffs in error:

The burning of the dwelling and barn at least could, at common law, be recovered for in case, and perhaps only in case; but to recover for them at all the defendant must be shown to be a wrongdoer. The allegation

mate, and necessary consequences of the trespass, but whether or not the consequences are such depends upon the particular facts and circumstances of each case.

Thus, consequential injuries are recoverable if flowing directly from the trespass. *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751.

Plaintiff in trespass for taking goods may give in evidence, for the purpose of enhancing the damages, the circumstances accompanying the wrong, and any inconveniences and injuries thereby occasioned to him may be considered in estimating the damages. *Snively v. Fahnestock*, 18 Md. 391; *Young v. Mertens*, 27 Md. 114.

In trespass, not only the direct damages, but the probable or inevitable damages, and those which result from the aggravating circumstances attending the act, are proper to be estimated by the jury. *Denison v. Hyde*, 6 Conn. 508.

If the original breaking and entering of one's close be wrongful, the retention of the property



of his trespass upon the tenant's premises was necessary to put him in the attitude of a wrongdoer in regard to all the property burned, and was therefore a proper allegation.

Negligence is a failure of duty.

*Michigan C. R. Co. v. Coleman*, 28 Mich. 440; *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 430, 23 N. W. 67.

It is the failure to observe, for the protection of another's interests, such care, precaution, and vigilance as the circumstances justly demand, and the want of which causes injury.

*Brown v. Congress & B. Street R. Co.* 49 Mich. 153, 13 N. W. 494; *Potter v. Moran*, 61 Mich. 60, 27 N. W. 854.

When any act may naturally result in injury to another, the actor must see to it at his peril that injury does not follow.

thereafter is also wrongful, and consequential damages are recoverable therefor. *Norfleet v. Vaughn*, 68 Ga. 830.

Where a tenant is wrongfully ousted before the expiration of his term he is entitled to recover for all the necessary and natural consequences of the trespass. *Smith v. Wunderlich*, 70 Ill. 426.

Only such consequential damages as are the direct result of a trespass, such as inability to use the premises until retitled, are recoverable in an action against a landlord for wrongfully taking out fixtures and other property. *Willis v. Branch*, 94 N. C. 142.

A landlord who tears down the adjoining building, which is also owned by him, the wall of which is necessary to support the leased building, rendering it necessary to tear down the latter building, is guilty of a trespass making him liable to a tenant for thus depriving him of the benefits of his lease. *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1069.

The expense of an enforced removal from premises, made necessary by a trespass, may be recovered, as it is a proximate result of the trespass. *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114.

Where a trespass is committed on premises occupied by barbers, rendering them unfit for the purpose for which they were intended, in consequence of which the barbers are compelled to abandon them, they may recover as part of the damages the loss of hot-water privileges which they were also compelled to abandon, as such loss is proximately caused by the trespass. *Ibid.*

For a trespass in forcibly entering and holding certain property used to shelter hands and mules while engaged in railroad work the trespasser is liable for the loss of hands for want of the shelter. *Carlisle v. Callahan*, 78 Ga. 320, 2 S. E. 751.

Where one wrongfully erects a wall on plaintiff's close, by which she is prevented from using water in a well belonging to defendant which she is entitled to use, damages cannot be assessed in an action of trespass *quare clausum fregit* for the independent injury thus suffered by the plaintiff, although evidence thereof may be admitted in aggravation of damages. *Shafer v. Smith*, 7 Harr. & J. 67. The court in this case holds that the proper remedy is an action on the case, and at least implies that a recovery might have been had for such injury in such an action.

But where the trespass consists of taking corn from plaintiff he cannot show that in consequence thereof he was obliged to work as a day laborer to obtain the means to purchase more 53 L. R. A.

*Martin v. Levagood*, 47 Kan. 36, 27 Pac. 122; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Hay v. Cohoes Co.* 2 N. Y. 159, 61 Am. Dec. 279; *St. Peter v. Demison*, 58 N. Y. 416, 17 Am. Rep. 258; *Cahill v. Eastman*, 18 Minn. 324, Gil. 292; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Cooper v. Randall*, 53 Ill. 24; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65.

When an accident is such a one as does not, in the ordinary course of things, happen without a negligent cause, the accident itself is evidence of negligence, in the absence of any other explanation.

*Dixon v. Plums*, 98 Cal. 384, 20 L. R. A. 698, 31 Pac. 931, 33 Pac. 268; *Ugla v. West End Street R. Co.* 160 Mass. 351, 35 N. E. 1126; *Hootner v. Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154, 30 Atl. 906; *Jud-*

corn. *Sims v. Glasener*, 14 Ala. 695, 48 Am. Dec. 120.

And in trespass for cutting lead pipe laid by plaintiff under a license on defendant's land to convey water to plaintiff's house and stable, plaintiff cannot recover the damages he may have suffered in his stable in consequence of the stopping of the water at that particular time. *Houston v. Laffee*, 46 N. H. 505. The court also says that he could not do so in any form of action.

No recovery can be had against one who builds an obstruction preventing the repair of a mill race, causing the mill to shut down, for the increased cost of transporting plaintiff's grain to another mill, under an allegation that plaintiff lost all the benefit and profit which he otherwise would have had from the working of the mill. *McTavish v. Carroll*, 18 Md. 429.

And where one is guilty of a trespass in taking the horses, wagon, and harness of another and keeping them for some time, preventing the owner from moving with his family, evidence that the roads were good at the time of taking, and were bad at the time of their return to the owner and for some time afterwards, and that the owner could not obtain employment in the vicinity of the place where he was detained, is inadmissible, as such damages did not result naturally from the taking of the property, but were due to accidental circumstances. *Vedder v. Hildreth*, 2 Wis. 427.

And where lumber cut under authority of the United States on a military reservation was unlawfully seized and taken away, expenses of going to Washington in regard to the matter were not so connected with the act of trespass as to constitute a distinct cause of action on the case, "If, indeed, they could be used to increase the damages in an action of trespass." *Crawford v. Waterson*, 5 Fla. 472.

## II. Consequential injuries to property.

### a. In general.

One who commits a trespass in unhitching a horse from a post in the highway and hitching it to another post is liable for its death if such death is the natural and immediate consequence of the trespass. *Bruch v. Carter*, 32 N. J. L. 554.

And where the owner of a field which does not have a lawful fence ties up a horse which strays into it he is guilty of a trespass and liable for its death by choking if its death is the natural and proximate consequence of his act. *Wilhite v. Speakman*, 79 Ala. 400.

A recovery may be had in trespass *et et armis*

*son v. Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718, 40 Pac. 1020; *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492, 41 N. E. 620; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33, 50 N. W. 989.

If a intermeddles with or appropriates what belongs to B, he clearly does so at his peril, and, being liable for the full value of the goods, is precluded from raising the question whether the loss, whether total or partial, which ensues while they are under his control, was, or was not, due to an extraordinary, or even irresistible, force.

Note to *Gilson v. Delaware & H. Canal Co.* (Vt.) 36 Am. St. Rep. 821; *Eten v. Luyster*, 60 N. Y. 253.

*Mr. Cassius M. Eby*, for defendant in error:

The declaration sounds in trespass *quare clausum* only, and any damages that result-

ed from defendant's alleged wrongful act are consequential, not arising from the wrongful entry, if wrongful.

The fact that the pleader calls his action one in case cannot change its character from one in trespass *quare clausum*. The body of the declaration and matters set out therein determine its nature.

*Wood v. Michigan Air Line R. Co.* 81 Mich. 358, 45 N. W. 980; *Ives v. Williams*, 53 Mich. 638, 19 N. W. 562.

The pleader, having declared in trespass *quare clausum*,—the only action that could be brought under the acknowledged facts,—must abide the consequences of delaying his suit until the statute has run against it.

*United States Mfg. Co. v. Stevens*, 52 Mich. 332, 17 N. W. 934; *Haines v. Beach*, 90 Mich. 565, 51 N. W. 644; *Burdick v. Wor-*

against one who sets his dogs upon the horse of another for her death caused by a stake entering her side while running from the dogs, as the injury is immediate. *James v. Caldwell*, 7 Yerg. 88. The question at issue in this case was whether case was the proper remedy and the liability for the death of the horse does not seem to have been questioned.

One who undertakes to chastise the slave of another is liable in trespass *vi et armis* for the breaking of his leg while jumping down a precipice in attempting to escape, as the injury is the direct result of the wrongful act. *Johnson v. Perry*, 2 Humph. 569. In this case, also, the question was whether the proper remedy had been chosen.

One who pursues a boy with a pickax is liable for loss of wine from a cask, the faucet of which the boy knocks out in trying to escape, as it is the direct and natural result of his conduct. *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268.

In *Courtney v. Collett*, cited in *Reynolds v. Clarke*, 1 Strange, 684, the court held that the plaintiff in an action of trespass for taking fishes from a river might recover damages for the breaking down of the bank of the river by which other fishes escaped, as it was a mere aggravation of damages for which a separate action in case need not be brought.

Where one digs into a river bank on the land of another, and removes gravel, a recovery for the carrying away of several acres of soil and a cider mill during a flood three weeks after the trespass occurs may be had in trespass *quare clausum fregit*, as the trespass is the efficient cause of such loss. *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281.

Where one places his vessel behind a sea wall which another has the exclusive right to use, and refuses to leave it on request, requiring the other to anchor his vessels outside, he is liable for the sinking of such vessels during a storm which is not an uncommon one and might be reasonably anticipated, as it is the natural and probable consequence of the trespass. *Derry v. Filtnier*, 118 Mass. 131.

One who deposits upon the highway a quantity of stone and rubbish, blocking up a drain with intent to injure one who has contracted to keep the highway in repair for a specified time, is liable for the damage resulting by dirt and earth being washed off the highway, thereby increasing the cost of keeping it in repair. *McNary v. Chamberlain*, 34 Conn. 384, 91 Am. Dec. 732.

In an action of trespass for the forcible invasion of a plantation and carrying off some of the slaves and frightening away the others, 53 L. R. A.

the owner may recover for cord wood carried off by a flood because there was no one to care for it, and for the destruction of the crops by stock of the neighborhood through lack of hands to care for them. *McAfee v. Crofford*, 13 How. 447, 14 L. ed. 217.

And where a tenant left the key of a house with a neighbor, and told the landlord to rent the house if he could do so, and that he might procure the key of such neighbor, and the landlord, on applying for the key to show the house to one who proposed renting it, found that the neighbor had absconded, and accordingly entered the house by means of an unfastened window, he was held liable for the loss of clothing and furniture stolen soon after by one who entered in the same manner, as his license to rent the house did not authorize him to enter in that manner, and his doing so was an invitation to others to enter in the same manner. *Ancaster v. Milling*, 2 Dowd. & R. 714, *sub nom.* *Ancaster v. Blinney*, 1 L. J. K. B. N. S. 168. This case has been criticised as carrying the liability of the trespasser to the extreme limit.

A tenant of a store may recover from the landlord for injury to his stock of goods by a storm on the night following the landlord's wrongful removal of the roof. *Herbst v. Hafner*, 7 Pa. Super. Ct. 363.

But a tenant unlawfully evicted cannot recover for injury to his goods by subsequent exposure for three months to the elements, unless such damage is specially pleaded, as it is not the natural or necessary consequence of the unlawful act. *Rauma v. Bailey*, 80 Minn. 336, 83 N. W. 191. The court also says that, even if it had been pleaded, it is not clear but that the damage is entirely too remote.

And in *Vedder v. Hildreth*, 2 Wis. 427, a recovery for the mildewing of goods which the owner was prevented from moving by the wrongful seizure of his horses, wagon, and harness and their retention for some time thereafter, was refused on the ground of remoteness.

And one who commits a trespass by turning the cattle of another out of an inclosure is not liable for their death by starvation, where their owner, although notified, does nothing to prevent such result, as their loss is not the consequence of the trespass. *Story v. Robinson*, 32 Cal. 205.

See also *infra*, II. b. 1,—*St. Louis Cattle Co. v. Gholson* (Tex. Civ. App.) 30 S. W. 269.

And in *Clark v. Gay*, 112 Ga. 777, 38 S. E. 81, the plaintiff sought to recover the value of his house in which defendant had killed a servant of plaintiff in the presence of the latter's family, on the ground that on account of such crime his family had abandoned the premises and re-

*rall*, 4 Barb. 598; *Sturgis v. Warren*, 11 Vt. 433; *Richardson v. Milburn*, 11 Md. 340.

The entry is alleged to have been wrongful and without leave or license, by a breaking and entering; hence, the only action that will lie is trespass *quare clausum*, as case will not lie for an injury to the realty.

*Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; 3 Bl. Com. 212.

No claim is made that the alleged wrongful entry is "the proximate cause of the injury." This must always appear when the act is charged to be negligence *per se*.

*Pennsylvania R. Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Hayes v. Michigan O. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

When the circumstances require great care it is but ordinary care under the circumstances.

refused to live in them. The court stated that the plaintiff could have brought a suit for trespass and invasion of his home or for injury to his peace and happiness resulting from such outrage in his family's presence, but held that the value of the house could not be the measure of damages.

In *Crawford v. Waterson*, 5 Fla. 472, the court holds that where one unlawfully seizes and takes away lumber cut on a military reservation under authority of the United States, the loss of a dwelling house by fire while the owner was absent in Washington in regard to the matter was not so connected with the act of trespass as to constitute an independent cause of action on the case, and expressed a doubt as to whether it could even be used to increase the damages in an action of trespass.

BUT WYANT v. CROUSE holds that one who wrongfully enters a blacksmith shop and kindles a fire is liable in case for the consequential injuries caused by the fire spreading and destroying the shop and adjoining buildings and personal property.

#### b. From removal of fence.

##### 1. In general.

One who unlawfully removes a fence is liable for the direct, proximate, and necessary consequences of its removal, but not for others.

Thus, a highway commissioner wrongfully removing a fence is not liable for damages from the owner being compelled to quit cultivating his crops in order to repair the fence, as such damage could not have been foreseen and expected as a natural and proximate consequence of its removal. *Caldwell v. Evans*, 85 Ill. 170.

And that the owners were obliged to stay at home all the time and keep their children out of school, and go out at night when hearing their dog bark, to protect the crops from cattle, is not the necessary consequence of the wrongful removal so as to make the commissioner liable therefor. *Krueger v. Le Blanc*, 62 Mich. 70, 28 N. W. 757.

And no recovery can be had for the inconvenience of keeping stock in a barn because the adjoining owner has removed part of the division fence during the period prohibited by the Kentucky statute, where his act in so keeping them up is entirely voluntary, and it does not appear that he would have been injured by the straying of his stock beyond the line. *Mene v. Horner*, 7 Ky. L. Rep. 293 (abstract of the opinion).

And one who wrongfully tears down a fence around a ranch used for dairy purposes, as a 53 L. R. A.

*Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. ed. 376; *Bishop*, Non-Contract Law, § 439.

When a person in the observance of a duty due to another has neither done nor omitted to do anything which an ordinarily careful and prudent person, under the same conditions, would not have done or omitted to do, he has not failed to use care, and is not guilty of negligence, though damages may have resulted from his action or want of action.

*Matson v. Maupin*, 75 Ala. 312; *Brown v. Congress & B. Street R. Co.* 49 Mich. 153, 13 N. W. 494; *Briggs v. Union Street R. Co.* 148 Mass. 72, 19 N. E. 19.

Only such care was required as the conditions demanded; such care as ordinary men under similar circumstances would have exercised.

*Lansing v. Stone*, 37 Barb. 15; *Pennsyl-*

result of which the cattle of other persons destroy the grass and break up the dairy business, is not liable for the loss of profits which might have been made out of cows and hogs which the owners of the ranch did not have, and which they had never made arrangements to procure. *Giacomini v. Bulkeley*, 51 Cal. 260.

And one who wrongfully removes the fence between his own pasture and the adjoining one, thus permitting his cattle to go upon the latter pasture, is not liable for the death of cattle of such adjoining owner during the following winter for lack of grass, as such damage is too remote, uncertain, and speculative. *St. Louis Cattle Co. v. Gholson* (Tex. Civ. App.) 30 S. W. 269.

See also *supra*, II. a.—*Story v. Robinson*, 32 Cal. 205.

##### 2. Loss of stock.

One unlawfully removing a fence is liable for stock escaping through the gap, and wandering away or receiving injuries.

Thus, a road overseer who unlawfully tears down a fence is liable in trespass for loss of hogs caused by its removal, as everyone is presumed in law to intend any consequence which naturally flows from the unlawful act. *Welch v. Piercy*, 29 N. C. (7 Ired. L.) 365.

And one who wrongfully removes the fence of another may be held liable in trespass for the loss of stock which escaped through the gap, as it is strictly the consequence of the trespass. *Damron v. Roach*, 4 Humph. 184. In this case the question was as to the proper remedy, and the court held that, although a second action in case might have been brought, it was not necessary, but that all the damage might be recovered in one action.

And one wrongfully removing a line fence is liable for the value of cattle that immediately escaped and were not recovered after proper diligence. *St. Louis Cattle Co. v. Gholson* (Tex. Civ. App.) 30 S. W. 269.

And in *Sayles v. Bemis*, 57 Wis. 315, 15 N. W. 432, the court held that a complaint alleging that defendant wilfully, wrongfully, and with force of arms broke and entered plaintiff's premises and took down her fence, and that by reason thereof one of plaintiff's cows strayed on defendant's premises and was drowned, states a cause of action in trespass, the allegations as to the death of the cow being inserted for the purpose of recovering the consequential damages resulting from the trespass. The court stated that they expressed no opinion as to the sufficiency of the evidence to justify a verdict for the value of the cow if the jury had

*vania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49; *Read v. Morse*, 34 Wis. 315; *Calkins v. Barger*, 44 Barb. 424; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *Hewey v. Nourse*, 54 Me. 256; *Bizzell v. Booker*, 16 Ark. 308.

And the wrongful entry does not change or enlarge the degree of care.

*Brown v. Lake*, 29 Ohio St. 64; *Fore v. Western N. C. R. Co.* 101 N. C. 526, 8 S. E. 335.

The fact that the defendant may be a trespasser, and may have committed a trespass, does not shift the proof to him, as the trespass was not the proximate cause of the injury. He might have wrongfully gone into the shop any number of times, but had he not built a fire in the forge the injury com-

plained of in the declaration would not have occurred.

*Memphis & C. R. Co. v. Reeves*, 10 Wall. 170, 19 L. ed. 909; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Quincy, A. & St. L. R. Co. v. Wellhoener*, 72 Ill. 60; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 504; *Flattes v. Chicago, R. I. & P. R. Co.* 35 Iowa, 191; *Shearm. & Redf. Neg.* §§ 26, 27; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381; 16 Am. & Eng. Enc. Law, p. 428; *Hoyt v. Jeffers*, 30 Mich. 200.

**Hooker, J.**, delivered the opinion of the court:

The plaintiffs commenced an action by declaration against the defendant to recover damages for the destruction of a blacksmith shop and other property by fire. The declaration stated that he wrongfully broke in-

found under proper instructions that defendant had unlawfully torn down the line fence, and the cow had in fact strayed through the opening and died in consequence.

### 3. Injuries to crops.

The loss of, or injury to, a crop by the removal of a fence is generally held to be such a direct and proximate consequence of the unlawful act as to render the trespasser liable, unless the owner knew of its removal and had time to repair it before the injury; and some cases hold him liable even then.

Thus, one who wrongfully removes a fence about a cultivated field is liable for the destruction of his crops growing in the field at the time, if their destruction was the direct result of such removal. *Gray v. Waterman*, 40 Ill. 522.

In trespass *vi et armis* for removing a fence the defendant is liable for loss of the crop if that was the necessary and unavoidable consequence of removing the fence. *Hardin v. Kennedy*, 2 McCord L. 277. The question at issue in this case was whether an action on the case was not the only remedy.

And one who repeatedly tears down a fence around a cultivated field, exposing the crop to the prey of cattle, is liable for the loss of the crop, as it is the proximate result of the wrongful act. *Bridgers v. Dill*, 97 N. C. 222, 1 S. E. 767.

One who wrongfully removes a line fence, permitting his cattle to go on adjoining pasture, is liable for injuries to the pasture and the value of the grass consumed. *St. Louis Cattle Co. v. Gholson* (Tex. Civ. App.) 30 S. W. 269.

And the damage to a crop resulting from the removal of a fence protecting the field is the immediate consequence of its wrongful removal so as to make the trespasser liable therefor. *Garrett v. Sewell*, 108 Ala. 521, 18 So. 737.

One having a license to enter on the land of another, who took down a gate to enable him to do so, is liable in trespass *quare clausum fregit* for injury done by his hogs on the land of such person, which entered in consequence of his failure to replace the gate. *Klassecker v. Monn*, 86 Pa. 313, 78 Am. Dec. 379.

One who takes down the fence of another and leaves it down, or puts it up negligently so that live stock enter and destroy the crops, is liable in trespass for such loss, although he has the right to enter the field and to take down the fence for that purpose. *Crawford v. Maxwell*, 3 Humph. 476.

The unlawful removal of a fence makes the trespasser liable for injury to crops by cattle 53 L. R. A.

getting in through the gaps. *Caldwell v. Evans*, 85 Ill. 170.

In *Linblom v. Ramsey*, 75 Ill. 246, the question at issue was whether the supervisor of a road district committed a trespass in tearing down a fence for the purpose of laying out a highway, as a result of which the plaintiff's crops were destroyed. The claim was made that he was not required to give any notice of his intention to open the road. The court held that notice was required, and said that if it were not so the defendant could have waited until plaintiff's crops were just ready to be harvested, and then suddenly, without notice, have torn down the fence and exposed the crops to destruction with impunity.

In *Shean v. Withers*, 12 B. Mon. 442, it was held that one who, without giving notice, threw down the fences of another at the place where they joined on a partition fence, thus permitting stock to enter and destroy his crops, was liable therefor. The defendant's liability for the loss of the crop if he did not have the right to remove the fence does not seem to have been questioned.

One who removes his part of a division fence without giving the notice to the adjoining owner required by the Illinois statute is liable for the loss of crops resulting from such removal. *Delmel v. Obert*, 20 Ill. App. 567.

And in *Richardson v. McDougall*, 11 Wend. 46, the court said, *obiter*, that if one removes a division fence without giving the three months' notice required by the New York statute he will be liable for the loss of a crop, under the provision making him liable for all damages sustained.

One who wrongfully removed part of a fence inclosing a field entirely within a larger inclosure, as a result of which stock from the latter inclosure entered the field and destroyed the crop, is liable for its loss, and cannot avoid such liability on the ground that the owner failed to repair the breach, as he is liable for all the consequences resulting directly from his acts. *Buckmaster v. Cool*, 12 Ill. 74.

The preceding case was approved and followed in *McCormick v. Tate*, 20 Ill. 334.

But where the trespass consists in the removal of a few rods of fence, the trespasser is not liable for the loss of a subsequent year's crop from want of the fence, where the owner knew of its removal. *Loker v. Damon*, 17 Pick. 284.

And one who sows a crop after the line fence protecting the field has been torn down by another cannot recover from the latter for the loss of the crop by cattle getting in, as it is his

to the shop, and started a fire in the forge, and the undisputed proof shows that he did so. The declaration purports to be in case, and, after alleging the wrongful entry and building of a fire, alleges negligence in managing it, and a consequent fire a short time after defendant left the shop. It seems to be conceded that, if this was to be treated as a count in trespass *quare clausum*, the action was barred by the statute of limitations, and the court, acting upon the theory that it was case, directed a verdict, upon the ground that no negligence was shown. The testimony shows that the defendant was a blacksmith, who sometimes worked in the shop for plaintiffs' son, who occupied the shop as plaintiffs' tenant; that on this occasion he went to the shop to sharpen some shoes, built a fire in the forge, did his work, and went away. It is in evidence that the

wind was blowing, and that about ten minutes after he went away the shop was discovered to be on fire, in the southwest corner of the building, the forge being in the northwest corner, and the flames coming out from the roof. The only fire on the floor was that which dropped from above. The forge was connected with the chimney by an old stove pipe, that went up through a ceiling of boards. The defendant stated, the day after the fire, that when he left the shop there was apparently no fire around, but there were some shavings lying around, and he did not know but a spark or piece of hot iron had dropped in the shavings, and that when he went there he found no fire in the shop. The court seems to have considered the wrongful entry as out of the case, and the defendant liable only for a want of ordinary care, after building the fire, in looking after it and

duty to use ordinary care and prudence to avoid the injury. *Hassa v. Junger*, 15 Wis. 598.

And where one builds a fence on his own land near the line, and removes part of the line fence, the adjoining owner must, within a reasonable time, build a fence to protect his crops, or he cannot hold the one removing it liable for the damage done by cattle of third persons. *Smith v. Johnson*, 76 Pa. 191.

And in *Stallcup v. Brady*, 3 Coldw. 406, the plaintiff claimed that his orchard had been damaged by a trespass in removing part of the line fence without notifying him. The court on appeal by defendant held that the damages for which recovery could be had must be the natural and proximate consequence of the trespass, and said that if the plaintiff could by ordinary diligence have prevented the injury he could only recover the actual damage resulting from the trespass.

And in trespass *quare clausum fregit* for removing a line fence no recovery can be had for injury to the plaintiff's crop done by cattle which did not belong to defendant, in consequence of such removal, where it does not appear that the fence belonged to plaintiff instead of defendant, or that a trespass was committed in removing it. *Richardson v. Milburn*, 11 Md. 340.

And where the act complained of is the destruction of the fence and the trampling of grain, no recovery can be had for injury to the grain by stock of third persons at any time after the original entry and trespass. *Berry v. San Francisco & N. P. R. Co.* 50 Cal. 435. In the argument the claim was made that the remedy for such an injury was case instead of trespass *vi et armis*.

#### c. Caused by third persons.

The trespasser has been held liable in some cases for injuries occasioned by the acts of third persons attracted to the premises by the trespasser.

Thus, an aeronaut who descends in a garden in a dangerous position a short distance from the place of his ascent is liable for the injury done by a crowd of people in breaking through the fences and treading down the vegetables and flowers, as his descent would ordinarily and naturally have that effect. *Guille v. Swan*, 10 Johns. 381, 10 Am. Dec. 234.

And in 2 Cent. L. J. 648, there is a clipping from the Law Times in which it was stated that judgment had been rendered in an action of trespass against an aeronaut whose balloon had descended on plaintiff's cornfield for damage by persons following the balloon. 53 L. R. A.

But in *Scholes v. North London R. Co.* 21 L. T. N. S. 535, the court held that where an engine ran off the track into an adjoining garden, the railroad company, although liable for all the damage done by its employees in getting the engine away, was not liable for the damages done by a crowd of spectators who were attracted to the garden by the accident.

#### III. Consequential injuries to the person.

Cases of trespass against the person are not included here, but only those involving the question of consequential injuries to the person from a trespass to property.

##### a. In general; health.

A recovery has generally been allowed for sickness or injury if it is shown to have resulted in consequence of the trespass.

Thus, one who wilfully and maliciously removes and throws away coupling pins from a railroad train with intent to injure the railroad company's property is liable for an injury to an employee of the company in his efforts to couple the cars, as such injury is a natural consequence of the trespass. *Munger v. Baker*, 65 Barb. 539.

And one who wrongfully removes the front door and windows of a house, and prevents the escape of smoke through the chimney during cold weather, is liable for the physical suffering caused thereby. *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685.

And where a landlord unlawfully broke into the tenant's close and removed the roof of her house, the loss of one of her eyes by a cold which was the direct and immediate consequence of the exposure to which she was subjected by having the roof taken off may be considered in aggravation of damages. *Hatchell v. Kimbrough*, 49 N. C. (4 Jones, L.) 163.

And in *Mcartney v. Smith* (Kan. App.) 62 Pac. 540, plaintiff and her household goods were wrongfully ejected. The court held that an instruction that it was her reasonable duty to take care of her health, and that if it was dangerous for her to stay out in the rain it was her duty to seek shelter, and that if she did not do so she took the chances to her health, is properly refused, where, after being turned out, she sought admission twice but was prevented from entering, as the injury in such case was the direct result of defendant's excluding her from that which belonged to her.

But no recovery can be had for exposure due to the removal of the roof of plaintiff's dwelling

keeping it from doing damage. The plaintiffs' counsel insist that the act was wrongful, and might be shown to be so, though it involved a trespass, and that he was liable for the consequences.

We agree with the circuit judge that there is no proof tending to show an absence of ordinary care, but there certainly is proof tending to show that the only fire on the premises came from that started by the defendant. Hence the case is reduced to the question whether trespass *quare clausum* is the only remedy for an injury resulting to real estate and personal property inadvertently destroyed by a trespasser. Defendant's act, if a trespass, consisted in breaking, entering, and building a fire in the shop. He would have been liable for that in an action of trespass. After he left, the fire burned the shop and adjoining buildings and

personal property. There is no doubt that as to the latter, *i. e.*, the personal property, the plaintiff might sue in case, whether he could recover in trespass or not. Comp. Laws, § 10,400. It is clear that he could not recover in case for the direct damage necessarily done by his trespass to the land. *Wood v. Michigan Air Line R. Co.* 81 Mich. 358, 45 N. W. 980; *Haines v. Beech*, 90 Mich. 563, 51 N. W. 644. He is not attempting to do so. No claim is made for damages for the mere breaking, entry, or use of the forge, but only for the damage done by the fire. When one trespasses on land he is liable for the direct injury to the freehold, and the consequences naturally to be expected arising therefrom, in an action of trespass. Attendant acts, such as assault and battery, slander, injury to the personal property, etc., may be shown, if alleged, by way of explain-

house, where plaintiff fails to establish the trespass alleged. *Brown v. Lake*, 29 Ohio St. 64.

And a landlord who commits a trespass in unlawfully evicting a tenant is not liable for an injury to his health resulting from exposure while going to his father's house, or from attending his family while ill. *Fillebrown v. Hoar*, 124 Mass. 580.

Nor for the discomfort to himself and family because of the unfit and unsuitable condition for occupancy of the building he subsequently moves into, where such damage is not specially pleaded, as it is not the natural or necessary consequence of the wrongful act. *Rauma v. Bailey*, 80 Minn. 336, 83 N. W. 191. The court also says that, even if such damage had been pleaded, it is not clear but that it is entirely too remote.

For injury to health in consequence of fright, see *infra*, III. c.

#### b. Mental suffering.

The mental suffering of the plaintiff is generally allowed as an element of damages against the trespasser.

Thus, where a landlord unlawfully and forcibly enters the premises, and evicts the tenant and his family together with their personal effects, he is liable for any bodily or mental suffering endured by him for injury to his pride and position, and for the sense of shame and humiliation at having his wife and family turned out into the streets. *Moyer v. Gordon*, 113 Ind. 282, 14 S. E. 476; *Richardson v. O'Brien*, 44 Ill. App. 243; *Rauma v. Bailey*, 80 Minn. 336, 83 N. W. 191.

And for the injury to his feelings because of the indignity and insult of being unlawfully turned out of his home. *Fillebrown v. Hoar*, 124 Mass. 580.

And in *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685, plaintiff alleged that defendants wrongfully and maliciously removed the front door and windows and prevented the escape of smoke through the chimney, and that the weather was cold, and because thereof plaintiff suffered severely both mentally and physically. The court held that an instruction that plaintiff could recover only such damages as she may have sustained in the temporary use and occupation of the house, and that no special damages were alleged and none could be recovered, was properly refused.

In cases of trespass where property is taken and carried away without fraud, malice, or other aggravating circumstances no recovery can be had for injury to the feelings, but there may be a recovery where the trespass is inspired

by fraud, malice, or like motives. *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387.

Where the seller of goods unlawfully removes the same, his agents having obtained entrance by untruthful statements as to the nature of their business, all the circumstances of injury, insult, invasion of the privacy, and interference with the comfort of the purchaser and his family are to be taken into consideration in estimating the damages, whether the trespass is considered involuntary or wilful. *Ives v. Humphreys*, 1 E. D. Smith, 196.

In an action against a railroad company for dumping rock and dirt on and into plaintiff's dwelling situated partly on the right of way, the company is liable for mental suffering growing out of the insults and indignities offered by its employees while committing the trespass, and for the sickness of plaintiff's wife resulting therefrom. *Ft. Worth & N. O. R. Co. v. Smith* (Tex. Civ. App.) 25 S. W. 1032.

Where the defendants at the time of committing a trespass in opening a chest containing a woman's wearing apparel used language in relation to the contents which wounded her feelings, a recovery may be had therefor, although it was not specially pleaded. *Treat v. Barber*, 7 Conn. 274.

And in trespass on the case against one permitted to enter to repair a furnace, who destroyed it instead, evidence that plaintiff's infant child, who was ill with bronchitis, had to be cared for in the kitchen which was not so convenient or suitable a place, and that plaintiff was annoyed and subjected to mental suffering and anxiety by reason thereof, is admissible. *Vogel v. McAuliffe*, 18 R. I. 791, 31 Atl. 1.

And in trespass for forcibly entering plaintiff's dwelling house under pretense of searching for stolen money, and searching such house without a warrant, the plaintiff may recover for injury to her sensibility, as it is the natural and immediate consequence of the unlawful entry and search. *Anonymous, Minor* (Ala.) 52, 12 Am. Dec. 31.

And injury to the parent's natural feelings may be taken into consideration in estimating the damages of a trespass in removing the body of a child from its burial place. *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759.

But no recovery can be had for mental anxiety, in the absence of any personal injury, due to rocks falling upon the roof of one's house caused by blasting on adjoining premises, nor for anxiety as to the safety of her child on his

ing the trespass, and in aggravation thereof, in all states when exemplary damages are recoverable, and doubtless under our own somewhat modified rule relating to exemplary damages. But in such case the amount of damages is not necessarily to be measured by the injury to the person, the reputation, or the personal property, damages for which may, instead of being sought by way of aggravation, be recovered in suitable actions. *Thayer v. Sherlock*, 4 Mich. 173; *Roberts v. Druillard*, 123 Mich. 286, 82 N. W. 49. In the former case it was held that such claims, being specifically alleged, had been recovered for as separate causes of action, and not by way of aggravation. *Tiffany*, Justice's Guide, 807. If consequential damages may be recovered in any case of trespass *quare clausum*, it seems obvious that in some they cannot, and that case should be resorted to.

way to and from school. *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303.

And in an action for the unlawful killing and wounding of plaintiff's cows defendant cannot be held liable for the mental anguish of plaintiff's wife,—especially where no claim is made therefor in the petition. *Donahoo v. Scott* (Tex. Civ. App.) 30 S. W. 385.

And in trespass by a married man for unlawful banishment of himself and wife from a town, no recovery can be had for the wife's mental anguish in being separated from her husband, nor for her feelings in being compelled to abandon a chosen residence, as such damages, if recoverable at all, can only be recovered in an action in which both of them join. *Hooper v. Haskell*, 56 Me. 251.

And in an action by the husband alone for ejecting him and his family and furniture, in which no loss by injury to his wife is alleged, an instruction that no recovery can be had for injury to "their" feelings is erroneous, as it authorizes the jury to give a compensation to the wife for the injury to her feelings independently of her husband. *Smith v. Grant*, 56 Me. 255.

#### c. Fright and its consequences.

According to the weight of authority a recovery will be allowed for fright occasioned by a trespasser, and for the consequences of such fright.

Thus, a landlord is liable for miscarriage and serious impairment of health of a tenant due to fright occasioned by the landlord making a boisterous and violent assault on two negroes in her yard and in her immediate presence, the landlord knowing of her pregnant condition. *Hill v. Kimball*, 76 Tex. 210, 7 L. R. A. 618, 13 S. W. 59.

And one who goes to the home of a pregnant woman and flourishes a whip, and makes threats in a boisterous manner, is liable for her miscarriage and sickness resulting from fright proximately occasioned thereby, which fright he must have observed by the exercise of ordinary care, even though he did not know of the condition of her health. *Brownback v. Fralley*, 78 Ill. App. 262.

And a landlord who, being acquainted with the circumstances, commits a wilful and violent trespass by beginning to tear down the house at the close of the term, while the tenant's wife, who is pregnant, is sick with heart disease, without giving a reasonable opportunity to leave the premises without danger to her life, is liable for the damages caused by her death due to fright and excitement caused by such

There is an intimation in the case of *Barry v. Peterson*, 48 Mich. 264, 12 N. W. 181, that case is the proper remedy in such instances. In that case there was a direct trespass, snow being thrown on plaintiff's land, between the houses of plaintiff and defendant, whereby plaintiff's house was injured through it melting. A recovery was had in the case. There was more reason for anticipating injury in that case than in the one before us. In *Ives v. Williams*, 53 Mich. 636, 19 N. W. 562, the propriety of declaring in case for consequential injuries is recognized. Several counts in case were joined to one in trespass. The court said that, in the absence of an allegation of consequential damages, it must be considered a count in trespass (Id., page 638, 53 Mich., and page 563, 19 N. W.), and therefore a misjoinder. Again, in *Wood v. Michigan Air*

wrongful act, and preceded by a miscarriage also due to such act, as the rule that no recovery can be had for injuries due solely to fright unaccompanied by personal injuries does not apply to cases of wilful tort. *Prelser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890.

And where an aggravated trespass was committed by thirteen men entering a close to dig a ditch inside of the inclosure, one man coming with a hoe, another with a shovel, and a third with a gun, the trespassers are liable for the sickness of the owner's wife due to fright and excitement caused by the treatment she received while attempting to get them to desist. *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848.

And a railroad company is liable for injury to mind and body of a woman, ensuing upon a nervous shock caused by negligently running its cars with such violence that they went through her fence and almost into her house, causing her to fear that they would run into it. *Yoakum v. Kroeger* (Tex. Civ. App.) 27 S. W. 953.

And where a derailed freight train was backed into a dwelling, entirely outside its right of way, in which there was a pregnant woman who was so frightened by the trespass that she suffered a miscarriage, the railroad company is liable therefore if such injury was the natural and probable consequence of the wrong committed, irrespective of whether or not the employees in charge of the train knew she was in the house, or her condition as to pregnancy. *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387.

And in trespass for breaking and entering plaintiff's house with intent to ravish his wife, the frightening of the wife may be shown in aggravation of damages. *Davenport v. Russell*, 5 Day, 145.

And in *Newell v. Whitchee*, 53 Vt. 589, 38 Am. Rep. 703, a blind girl, who taught music to defendant's daughters once a week, had a room assigned as her sleeping room. One midnight defendant entered the room and made repeated solicitations for sexual intercourse with her, which she repelled. After he went away she arose and dressed and sat up the rest of the night. She was so excited and alarmed, and her feelings so outraged, that she was made sick, and so continued for a long time. The court held that defendant's entry was a trespass, and that he was liable for her resulting sickness.

But in *Huxley v. Berg*, 1 Starkie, 98, plaintiff in trespass was permitted to show that his wife was so terrified by the breaking and entry of defendant as to be taken ill, and that she soon after died, not as a substantive ground of

*Line R. Co.* 81 Mich. 363, 45 N. W. 980, Mr. Justice Champlin appears to have recognized that, when damages are consequential, case will lie, for he said: "The injury caused by the trespass in this case was no more indirect and consequential than such as arises in every case of trespass caused by forcible entry and direct injury to the plaintiffs' possession and freehold." In the cases of *Chandler v. Allison*, 10 Mich. 480, and *Allison v. Chandler*, 11 Mich. 542, the injury was not consequential, but a direct and natural consequence to be expected. In the case before us the defendant intended no such injury, nor did he any act which can be said to have given reason for expecting the consequences. It was a fortuitous consequence of his act, entirely unforeseen. The actual trespass was of little significance compared with this consequential injury. If a wrongdoer, he would be responsible for the damage, if it resulted from the building of a fire by him, regardless of the degree of care used. Hence the propriety of setting up his wrongful entry, which, though proper in a declaration in trespass, does not necessarily impress that character upon this declaration, which expressly states that it is in case, and describes a consequential injury, following and growing out of acts constituting a trespass. The following authorities, taken from 26 Am. & Eng. Enc. Law, p. 706, will show the trend of authority upon this subject: *Gates v. Miles*, 3 Conn. 64; *Barnes v. Hurd*, 11 Mass. 57; *Waldron v. Hopper*, 1 N. J. L. 339; *Case v. Mark*, 2 Ohio, 189; *Taylor v. Rainbow*, 2 Hen. & M. 423; *Jordan v. Wyatt*, 4 Gratt. 151, 47 Am. Dec. 720; *Brascomb v. Bridges*, 1 Barn. & C. 145; *Smith v. Goodwin*, 2 Nev. & M. 114; *Frankenthal v.*

*Camp*, 55 Ill. 169; *Schuer v. Veeder*, 7 Blackf. 342; *Johnson v. Castleman*, 2 Dana, 377; *Dalton v. Favour*, 3 N. H. 485; *Gilson v. Fisk*, 8 N. H. 404; *Blin v. Campbell*, 14 Johns. 432; *Percival v. Hickey*, 18 Johns. 257, 9 Am. Dec. 210; *McAllister v. Hammond*, 6 Cow. 342; *Brennan v. Carpenter*, 1 R. I. 474; *Howard v. Tyler*, 46 Vt. 683; *Clafin v. Wilcox*, 18 Vt. 605; *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484. Most of these cases relate to trespass to persons or personal property, but the analogy is close. The case of *Jordan v. Wyatt*, 4 Gratt. 151, 47 Am. Dec. 720, contains a lengthy discussion of the distinction between direct and consequential injuries. The liability of the defendant is based upon a wrongful act, and the nature of the act, and not the consequences, determines his liability. He was engaged in an unlawful act, and therefore was liable for all of the consequences, indirect and consequential as well as direct, and there is no occasion to discuss the degree of his negligence in permitting the shop to burn, if the fire was caused by the fire he builded.

This accountability for the consequences is not affected by the form of action.

The judgment is reversed, and a new trial ordered.

Moore, Long, and Grant, JJ., concur.

Montgomery, Ch. J., dissenting:

The trespass was not committed against the plaintiff, but against his tenant. The subsequent fire was not particularly, as to the plaintiff's adjoining property, a wrong against plaintiff.

damage, but merely to show how outrageous and violent the breaking was.

And where one throws a large stone against the house of another in the presence of the latter's daughter, who runs into the house, after which another stone is thrown wilfully through one of the blinds of the room in which she is, but without knowledge of her presence in that room and without any purpose to either hit or frighten her or injure her or her property, but only that of her father, no recovery can be had against him for her fright or consequent injury to her health. *White v. Sander*, 168 Mass. 296, 47 N. E. 90.

In the following cases, while the defendant's acts were such that they may have constituted a trespass, the only claim made by plaintiff was that defendant was guilty of negligence, and no recovery for fright resulting in consequence was allowed.

Thus, in *Smith v. Postal Teleg. Cable Co.* 174 Mass. 576, 47 L. R. A. 323, 56 N. E. 380, no recovery was allowed for sickness due to fright caused by rocks being thrown upon one's house by a blast near by of which she was not warned.

And in *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657, affirming 73 Ill. App. 189, the court held that when a landlord suddenly appeared at the open door of the bedroom of a sister of the tenant's wife where she was packing goods, and with loud and angry words forbade her to move and threatened to call the constable, it did not constitute negligence which made him liable for her excitement and fright, resulting in *St. Vitus' dance*. The declaration in this case charged nothing but negligence, as 53 L. R. A.

the court expressly says, and the only question considered by the court was whether the defendant's acts constituted negligence, and whether the injury was a natural and probable consequence which should have been foreseen.

And in *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 835, the defendant, who was weak minded, in order to have some fun and without any malicious motive dressed himself in women's clothes and taking the customary way went at dusk to the home of plaintiff, who became frightened at his approach and six weeks later had a miscarriage which she attributed to the fright. The court held that the defendant was not guilty of an assault; and, treating the case as one of negligence merely, held that there could be no recovery as there was no accompanying physical injury, distinguishing those cases based on the violation of a legal right in which nominal damages would be recoverable in any event.

For right of recovery for fright generally, see note to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666, and footnote to *Smith v. Postal Teleg. Cable Co.* (Mass.) 47 L. R. A. 323.

As to recovery for causing miscarriage by fright or otherwise, see note to *Tunncliffe v. Bay Cities Consol. R. Co.* (Mich.) 32 L. R. A. 142.

#### d. Injury to reputation.

The injury to one's reputation resulting from a trespass is one for which the trespasser is liable.

Thus, in trespass for breaking and entering



plaintiff's house under a false charge that she had stolen property therein, the injury to her credit and reputation may be given in evidence in aggravation of damages. *Bracegirdle v. Oxford*, 2 Maule & S. 77.

And in trespass committed in entering plaintiff's house and searching for stolen goods the jury may consider under an allegation *alias enormis* the injury resulting to the plaintiff's reputation. *Faulkner v. Alderson*, Gilmer (Va.) 221.

And in trespass for forcibly entering plaintiff's dwelling house under pretense of searching for stolen money, and searching the house without a warrant, plaintiff may recover for injury to his reputation, as it is the natural and immediate consequence of the unlawful entry and search. *Anonymous*, Minor (Ala.) 52, 12 Am. Dec. 31.

For injury to credit and reputation as an element of damages from loss of profits, see *note* to *Wallace v. Pennsylvania R. Co.* (Pa.) 52 L. R. A. 33.

#### IV. Conclusion.

A trespasser is liable for the injuries resulting naturally, necessarily, directly and proximately in consequence of the trespass. As to whether they do so result depends upon the particular facts and circumstances of each case. It may be said, however, that where the trespass consists in the unlawful removal of a fence the trespasser is liable for the loss of stock resulting therefrom, and also for injury to crops if the owner did not know of the removal of the fence in time to repair it before the injury occurred. The trespasser has also, as a general rule, been held liable for impairment of health, mental suffering, and fright, and its consequences occasioned by the trespass.

The loss of profits resulting from the trespass, and the consequential injury to, or inability to carry on, business, and the effect of the trespass on the rental value of the premises, are not considered in this note.

Neither is the injury resulting from excavations on the land injured or on adjoining land, whether such excavations are considered as trespasses or not.

Consequential injuries resulting from mining operations, and from the cutting of trees, whether trespasses or not, are also omitted.

Neither does the note include consequential injuries resulting from the construction of a railroad, canal, telegraph line, etc., whether or not a trespass is committed in such construction.

Nor does it include the flooding of land as the result of a trespass or otherwise, or trespasses by animals, or against the person.

As to loss of profits due to a trespass, see *note* to *Wallace v. Pennsylvania R. Co.* (Pa.) 52 L. R. A. 33.

For right of recovery for fright generally, see *note* to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666, and *footnote* to *Smith v. Postal Tele. Cable Co.* (Mass.) 47 L. R. A. 323.

As to recovery for causing miscarriage by fright or otherwise, see *note* to *Tunncliffe v. Bay Cities Consol. R. Co.* (Mich.) 32 L. R. A. 142.

As to liability for flooding land, see *notes* to *Watuppa Reservoir Co. v. Fall River* (Mass.) 1 L. R. A. 467; *Rychlicki v. St. Louis* (Mo.) 4 L. R. A. 594, and *Paddock v. Somes* (Mo.) 10 L. R. A. 254.

As to liability to riparian owner for running logs in stream, see *note* to *Coyne v. Mississippi & R. River Boom Co.* (Minn.) 41 L. R. A. 494.

As to damages for injury to, or destruction of trees, see *note* to *Bailey v. Chicago, M. & St. P. R. Co.* (S. D.) 19 L. R. A. 653.

For extent of liability for permitting another's live stock to escape from pasture by failure to keep proper division fence, see *note* to *Wilder v. Stanley* (Vt.) 20 L. R. A. 479.

For liability of owner for trespass of stock, see *note* to *Bulphit v. Matthews* (Ill.) 22 L. R. A. 55.

For sufficiency of fence, see *note* to *Clarendon Land Invest. & Agency Co. v. McClelland Bros.* (Tex.) 22 L. R. A. 106.

For rule of proximate cause in case of malicious torts, see *note* to *Isham v. Dow* (Vt.) 45 L. R. A. 87. J. H. H.

## WISCONSIN SUPREME COURT.

### COUNTY OF MILWAUKEE, *Respt.*,

*vs.*  
Fred G. ISENRING *et al.*, *Appts.*

(109 Wis. 9.)

\*1. A law is "general" in the broad sense of the term if it extends to the whole state or the whole of a legislative class

\*Headnotes by MARSHALL, J.

NOTE.—For earlier cases in this series on the subject of local or private legislation, see *State ex rel. Paul v. Gloucester County Circuit Judge* (N. J. L.) 1 L. R. A. 86; *Ayars' Appeal* (Pa.) 2 L. R. A. 577, and *note*; *Ferris v. Vanier* (Dak.) 3 L. R. A. 713; *King v. State* (Tenn.) 3 L. R. A. 210; *Land, Log & Lumber Co. v. Brown* (Wis.) 3 L. R. A. 472; *Richman v. Muscatine County Supers.* (Iowa) 4 L. R. A. 445; *Reid v. Smoulder* (Pa.) 5 L. R. A. 517; *State ex rel. Stockton v. Somers Point* (N. J. L.) 6 L. R. A. 57; *Lodi Twp. v. State* (N. J. L.) 6 L. R. A. 56; *People ex rel. Barton v. Londoner* (Colo.) 6 L. R. A. 444; *Re Washington Street* (Pa.) 7 L. R. A. 193, and *note*; *Datz v. Cleveland* (N. J.) 53 L. R. A.

of localities legitimately created for the purposes of general legislation.

2. A law is "general" in the restricted sense of the term, as it is used in § 21, art. 7, of the Constitution, not only when it is general in the broad sense thereof, but also when it is of that character in the sense of being public. But if it applies only to a single subdivision of the state, as a county, town, city, or village, or a collection of such localities not constituting a legitimate class

L.) 7 L. R. A. 431; *West Chicago Park Comrs. v. McMullen* (Ill.) 10 L. R. A. 215; *State ex rel. Dempsey v. Newark* (N. J. L.) 10 L. R. A. 700; *Lankford v. Somerset County Comrs.* (Md.) 11 L. R. A. 491; *Gilson v. Rush County Comrs.* (Ind.) 11 L. R. A. 835; *Cook v. State* (Tenn.) 13 L. R. A. 183; *Edmunds v. Herbrandson* (N. D.) 14 L. R. A. 725; *State ex rel. Terre Haute v. Kolsem* (Ind.) 14 L. R. A. 566, and *note*; *Consumer's Gas Trust Co. v. Harless* (Ind.) 15 L. R. A. 505; *Hamilton County Comrs. v. Rasche Bros.* (Ohio) 19 L. R. A. 584; and *McEldowney v. Wyatt* (W. Va.) 45 L. R. A. 609.

thereof for the purposes of legislation, it is local in character. Where a law is public and general in the sense indicated, the two terms are synonymous.

3. If a law be general merely because it is public, and not in the broad sense above indicated, it is local and special, and must be tested as to its validity by § 18, art. 4, of the Constitution, and § 21, art. 7, as well; and if it belong to one of the prohibited classes of special legislation, it must be further tested by the constitutional restriction on that subject.
4. The journals of the two houses of the legislature may be referred to by courts as to the steps taken by the legislature in the passage of bills, and they are generally conclusive in that regard. They are not thus effective as to the contents of a law when such contents are called in question. In such a case the presumption is that the contents of a law, as found in the official publication thereof, are the same as when it passed the legislature, and that it was constitutionally passed. If it be challenged upon either ground, the question presented is one of law to be solved by the court in the same way that other legal questions are solved. In reaching a conclusion the court may examine the journals of the legislature as to what it did in the passage of the law; and as to the contents thereof it may go further and examine the original bill, or go to any other source of information that may be judicially considered trustworthy.
5. Whether an act specially designed to make the offices of sheriff, under sheriff, and deputy sheriff in a single county salaried offices violates § 23, art. 4, of the Constitution, in regard to there being but one system of county government affecting the whole state, and that such system shall be as uniform as practicable,—doubted, but the point is not decided.

(February 1, 1901.)

**A**PPEAL by defendants from an order of the Superior Court for Milwaukee County overruling a demurrer to the complaint in an action to recover fees which had been collected and retained by defendant as sheriff of Milwaukee County. *Reversed.*

Statement by **Marshall, J.:**

Appeal from an order of the superior court of Milwaukee county overruling a demurrer to the complaint in an action against the sheriff of Milwaukee county and his bondsmen to recover the fees and charges collected by him and his deputies for official services. The allegations contained in the complaint are sufficient to constitute a cause of action if the plaintiff is entitled to the fees and emoluments of the sheriff's office, which ordinarily go to the sheriff and his deputies. That turns on the validity of Laws 1876, chap. 364, as amended by Laws 1877, chap. 227. The first of such chapters, during its passage through the legislature, was entitled the same as it now appears in the printed laws, viz.: "An Act in Relation to Sheriff's Fees." It deals only with the manner of compensating the sheriff of Milwaukee county, providing that he shall receive a salary of \$5,000 per annum, payable quarterly out of the county treasury, § 3 L. R. A.

in lieu of the fees, costs, and charges ordinarily belonging to sheriffs by law, and that he shall charge and collect such fees, costs, and charges and pay the proceeds into the county treasury. The act of 1877 amended and revised that of 1876. It was entitled, during its passage through the legislature, the same as the published law, viz.: "An Act to Amend Chapter 364 of the Laws of 1876, Entitled 'An Act in Relation to Sheriff's Fees.'" The first section, in addition to the provisions of the original act, provides that the under sheriff and all deputy sheriffs of Milwaukee county shall collect for all official services performed by them and pay the proceeds thereof into the county treasury, requires of the sheriff quarterly reports under oath as to all such collections, and allows him and such deputies traveling expenses when in discharge of official duties outside the corporate limits of the city of Milwaukee, the same to be paid on itemized bills audited by the board of supervisors. The second section provides for the appointment of an under sheriff at a salary of \$1,400 per year and nine deputy sheriffs, each to have a salary of \$800 per year, except one to act as sheriff's clerk and have \$1,200 per year, all such salaries to be paid out of the county treasury the same as the salaries of ordinary county officers. The balance of the act, in addition to the usual concluding section, relates to auditing the accounts of the sheriff and his deputies from the 1st day of January preceding the passage of the act, so as to make it relate back to that date. The validity of such laws was challenged by the demurrer.

**Messrs. Edgar L. Wood and Quarles, Spence, & Quarles,** for appellants:

This act is a local bill or law within the meaning of the Constitution.

*Durkee v. Janesville*, 26 Wis. 700; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Phillips v. Albany*, 28 Wis. 340; *Lawson v. Milwaukee & N. W. R. Co.* 30 Wis. 597; *Yellow River Improv. Co. v. Arnold*, 46 Wis. 222, 49 N. W. 971; *Anderton v. Milwaukee*, 82 Wis. 285, 15 L. R. A. 830, 52 N. W. 95; *Ryan v. Outagamie County*, 80 Wis. 336, 50 N. W. 340; *Coutiere v. New Brunswick*, 44 N. J. L. 58; *People ex rel. Lee v. Chautauque County Supers.* 43 N. Y. 22; *Montgomery v. Com. ex rel. Robinson*, 91 Pa. 125; *Dewine v. Cook County Comrs.* 84 Ill. 590; *Com. ex rel. Fertig v. Patton*, 88 Pa. 258; *State ex rel. Harris v. Herrmann*, 75 Mo. 340.

The subject of the bill or law is not expressed in the title, and, being local, it is void.

*Durkee v. Janesville*, 26 Wis. 700; *Yellow River Improv. Co. v. Arnold*, 46 Wis. 222, 49 N. W. 971; *Anderton v. Milwaukee*, 82 Wis. 285, 15 L. R. A. 830, 52 N. W. 95; *People ex rel. Lee v. Chautauque County Supers.* 43 N. Y. 22; *Clark v. Janesville*, 10 Wis. 180; *Evans v. Sharp*, 29 Wis. 572; *Warner v. Know*, 50 Wis. 433, 7 N. W. 372; *Conner v. New York*, 5 N. Y. 292; *People ex rel. McConvill v. Hills*, 35 N. Y. 453;

*People v. O'Brien*, 38 N. Y. 193; *Re Assessment of Lands*, 60 N. Y. 407; *Re New York*, 99 N. Y. 577; *Johnston v. Spicer*, 107 N. Y. 186, 13 N. E. 753; *Astor v. Arcade R. Co.* 113 N. Y. 109, 2 L. R. A. 789, 20 N. E. 594; *Anderson v. Whatcom County*, 15 Wash. 47, 33 L. R. A. 141, 45 Pac. 665; *State ex rel. Bazille v. Sullivan*, 73 Minn. 378, 76 N. W. 223; *Simard v. Sullivan*, 71 Minn. 517, 74 N. W. 280; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380; *State ex rel. Brun v. Oftedal*, 72 Minn. 498, 75 N. W. 692; *State ex rel. Keith v. Chapel*, 63 Minn. 535, 65 N. W. 940; *Re Snyder*, 108 Mich. 48, 65 N. W. 563; *Lansing v. State Auditors*, 111 Mich. 327, 69 N. W. 723; *State ex rel. Graham v. Tibbets*, 52 Neb. 228, 71 N. W. 990; *Rea Lumber Co. v. Reed*, 107 Iowa, 111, 77 N. W. 572; *Parfitt v. Ferguson*, 159 N. Y. 111, 53 N. E. 707; *O'Mara v. Wabash R. Co.* 150 Ind. 648, 50 N. E. 821; *State v. Sholl*, 58 Kan. 507, 49 Pac. 668; *State ex rel. Norcross v. Washo County Comrs.* 22 Nev. 399, 41 Pac. 145; *Mitchell v. Colorado Mill & Elevator Co.* 12 Colo. App. 277, 55 Pac. 736; *Land Title Warranty & S. D. Co. v. Tanner*, 99 Ga. 470, 27 S. E. 727; *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 603, 34 L. R. A. 445, 37 S. W. 390; *Steenken v. State*, 88 Md. 708, 42 Atl. 212; *State, Hardy, Prosecutor, v. Orange*, 61 N. J. L. 620, 42 Atl. 581; *Lindsay v. United States Sav. & L. Asso.* 120 Ala. 156, 42 L. R. A. 783, 24 So. 171; *Northern Pacific Exp. Co. v. Metschan*, 32 C. C. A. 530, 61 U. S. App. 161, 90 Fed. 80; *Sanders v. Elmore County Comrs.* Ct. 117 Ala. 543, 23 So. 788; *State ex rel. Standish v. Nomland*, 3 N. D. 427, 57 N. W. 85; *Blair v. State*, 90 Ga. 326, 17 S. E. 96; *Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co.* 86 Va. 1, 9 S. E. 759; *Philadelphia v. Ridge Ave. R. Co.* 142 Pa. 484, 21 Atl. 982; *Henderson v. London & L. Ins. Co.* 135 Ind. 23, 20 L. R. A. 827, 34 N. E. 565; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 337.

In the case of sheriff, the salary is in lieu only of fees for service performed for the county by § 394a, leaving fees in civil actions payable to the sheriff. This is a uniform rule, applicable to the whole state, which is violated by the attempt to establish a different scheme for the single county of Milwaukee.

*State ex rel. La Valle v. Sauk County Supers.* 62 Wis. 376, 22 N. W. 572; *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 45 N. W. 526, 40 N. W. 51; *State ex rel. Peck v. Riordan*, 24 Wis. 484; *State ex rel. Keenan v. Milwaukee County Supers.* 25 Wis. 339; *State ex rel. Walsh v. Dousman*, 28 Wis. 541; *McRae v. Hogan*, 39 Wis. 529; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77.

The act in effect levies a tax upon the property of Milwaukee county, in the shape of certain fees, in both civil and criminal cases, which are prescribed by statute, and which the sheriff must collect and pay into the general fund, which presumably is much greater in amount than the salary of \$5,000. 53 L. R. A.

In this respect the act violates the rule of uniformity of taxation.

Art. 8, § 1; Art. 4, §§ 31, 32; *Knowlton v. Rock County Supers.* 9 Wis. 419; *Lumsden v. Cross*, 10 Wis. 284; *State ex rel. Sanderson v. Mann*, 76 Wis. 464, 45 N. W. 526, 46 N. W. 51; *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 2 L. R. A. 701, 41 N. W. 948; *Re Ruan Street*, 132 Pa. 257, 7 L. R. A. 193, 19 Atl. 219; *Crandon v. Forest County*, 91 Wis. 242, 64 N. W. 847; *State ex rel. Turner v. Bell*, 91 Wis. 274, 64 N. W. 845; *Chicago & N. W. R. Co. v. Forest County*, 95 Wis. 84, 70 N. W. 77.

*Mr. A. C. Umbreit*, for respondent:

Courts presume that the law was framed and passed in good faith, and not with intent to effect an unconstitutional purpose.

*Atty. Gen. v. Eau Claire*, 37 Wis. 400; *Palms v. Shawano County*, 61 Wis. 211, 21 N. W. 77; *Atkins v. Fraker*, 32 Wis. 510; *Bound v. Wisconsin C. R. Co.* 45 Wis. 543; *Ruggles v. Fond du Lac*, 53 Wis. 436, 10 N. W. 505; *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478.

Not only will courts presume the law constitutional, but its unconstitutionality must be clear and beyond all reasonable doubt before a legislative enactment will be declared void.

*Rooker v. Norton*, 1 Pinney (Wis.) 195; *State ex rel. Grundt v. Abert*, 32 Wis. 403; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Johnson v. Milwaukee*, 88 Wis. 392, 60 N. W. 270.

Long practical construction of a statute as valid and acquiesced in, and reliance on the faith of it, will outweigh any merely technical objections to its constitutionality, such as a defective title.

*Continental Improv. Co. v. Phelps*, 47 Mich. 300, 11 N. W. 167.

An act which affects the rights of all the people residing within the district over which the act is to operate is not a private and local law.

*Re Boyle*, 9 Wis. 264; *Re Bergin*, 31 Wis. 383; *State ex rel. Cothren v. Lean*, 9 Wis. 284; *Clark v. Janesville*, 10 Wis. 191; *Cathcart v. Comstock*, 56 Wis. 590, 14 N. W. 833.

An act is not a private and local law if it is one of public concern and of vital importance to all the taxpayers in the district. It is the number of people affected, not the extent of the territory over which it is to operate, that controls this question.

*State ex rel. Cothren v. Lean*, 9 Wis. 284; *State ex rel. Voight v. Hoeflinger*, 31 Wis. 257; *Cathcart v. Comstock*, 56 Wis. 590, 14 N. W. 833; *Collins v. Cowan*, 52 Wis. 634, 9 N. W. 787; *Thompson v. Milwaukee*, 69 Wis. 492, 34 N. W. 402; *Chicago & N. W. R. Co. v. Langlade County*, 56 Wis. 614, 14 N. W. 844; *Rochester v. Alfred Bank*, 13 Wis. 433, 80 Am. Dec. 746; *Mills v. Jefferson*, 20 Wis. 54; *Castello v. Landwehr*, 28 Wis. 522; *Zitske v. Goldberg*, 38 Wis. 216; *Larson v. Milwaukee & N. W. R. Co.* 30 Wis. 597; *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947; *Berliner v. Waterloo*, 14 Wis. 379.

Titles of acts should be liberally construed, and acts will be upheld if they substantively comply with this section of the Constitution, although their titles do not express their substance as fully and unequivocally as possible.

*Durkee v. Janesville*, 26 Wis. 702; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Evans v. Sharp*, 29 Wis. 564; *New York v. Colgate*, 12 N. Y. 140; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *State ex rel. Weir v. Davis County Judge*, 2 Iowa, 280.

If the act in question, while it was yet a bill before the legislature, had a proper title, then, if it was afterwards published in the session laws under a defective title, that does not render such act repugnant to the constitutional limitation.

*State v. Stillman*, 81 Wis. 124, 51 N. W. 260; *Bound v. Wisconsin C. R. Co.* 45 Wis. 543; *People ex rel. Gale v. Onondaga Supervisor*, 16 Mich. 254.

The law in question does not violate the required uniformity of county government for the following reasons:

1. The powers exercised by that act had not been conferred on county boards at that time, and consequently were within the legitimate powers of the legislature.

*Milwaukee County Supers. v. Pabst*, 45 Wis. 311; *Jensen v. Polk County Supers.* 47 Wis. 298, 2 N. W. 320.

2. The act exercised powers which did not belong to counties by virtue of their existence as such.

*State ex rel. Graef v. Forest County*, 74 Wis. 610, 43 N. W. 551; *Single v. Marathon County Supers.* 38 Wis. 363.

3. The act in question does not affect the system of county government, but rather the detailed management of public affairs in Milwaukee county.

*Chicago & N. W. R. Co. v. Langlade County*, 56 Wis. 622, 14 N. W. 844; *Forest County v. Langlade County*, 76 Wis. 609, 45 N. W. 598.

4. The act does not conflict with any general law then in force on that subject. In fact, there was no general statute then enacted on the subject.

*State ex rel. Grundt v. Abert*, 32 Wis. 403; *Jensen v. Polk County, Supers.* 47 Wis. 298, 2 N. W. 320; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

5. The act itself did not make any change in the general powers theretofore conferred upon county boards.

*State ex rel. Grundt v. Abert*, 32 Wis. 403; *Milwaukee County Supers. v. Pabst*, 45 Wis. 311.

6. The act supplied an existing necessity peculiar to Milwaukee county, and was therefore within the limitation of practical uniformity required by the Constitution.

*Cathcart v. Comstock*, 56 Wis. 590, 14 N. W. 833; *Land, Log & Lumber Co. v. Brown*, 73 Wis. 294, 3 L. R. A. 472, 40 N. W. 482.

7. The act is not an object of the system of county government, but only an incident of the general system. Absolute uniformity is not required, even in the system itself. No uniformity is required in its incidents.

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*Chicago & N. W. R. Co. v. Langlade County*, 56 Wis. 622, 14 N. W. 844; *Rock County v. Edgerton*, 90 Wis. 288, 63 N. W. 291.

Long acquiescence in the validity of the law, and public policy, demand that the order of the superior court be affirmed.

*Continental Improv. Co. v. Phelps*, 47 Mich. 299, 11 N. W. 167; *State ex rel. Banks v. McClure*, 91 Wis. 313, 64 N. W. 992.

**Marshall, J.**, delivered the opinion of the court:

Appellants' counsel insist that the act of 1876, that of 1877, and chapter 137, Laws of 1878, amending the act of 1877, are local in character, within the meaning of § 18, art. 4, of the Constitution, which provides that, "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title," and cite to our attention numerous decisions of this court to sustain that view. Counsel for respondent just as confidently contend that such acts are not local within the meaning of such constitutional provision, and cite to our attention numerous decisions of this court to sustain that view. Clearly, both contentions cannot be correct though it must be admitted that each has support in our decided cases. The cause of that confusion will appear by a review of such cases, and the right of the matter will be made too plain for reasonable controversy.

The difficulty commenced in *State ex rel. Cothren v. Lean*, 9 Wis. 279, which involved the question of whether an act changing a county seat was a general law within the meaning of § 21, art. 7, of the Constitution, which provides that, "the legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions made within the state, as may be deemed expedient. And no general law shall be in force until published." It was then contended on one side that the word "general" relates to the state at large, and on the other that it has reference to the mere public character of an act in that its effect is general as regards the people of the locality referred to therein, whether that locality include the entire state or some subdivision thereof, as a county, town, city, or village, or some collection of such subdivisions. The latter idea prevailed, Justice Cole dissenting, using language to the effect that an act cannot be public and general and at the same time local. The view thus expressed by Mr. Justice Cole has never considerably and permanently found lodgment in the jurisprudence of this state and displaced the reasoning of Mr. Justice Paine, who delivered the opinion of the court; though it has so influenced judicial action, at times, that the court temporarily stepped aside from the position firmly taken at the start. In *Clark v. Janesville*, 10 Wis. 136, which involved the character of the law incorporating the city of Janesville, as regards § 21, art. 7, of the Constitution, Justice Paine, speaking for the court, rediscussed the subject of the meaning of the

word "general," as used in statutes and constitutions, at great length and with much learning, demonstrating by reference to authorities, from Coke down to the time of writing the opinion, that the term "public," in its legal sense, and the term "general" in that sense, as used in statutes and constitutions, are synonymous, and that the fact that an act is local or special does not necessarily militate against its being public and general. The court so decided, Justice Cole, however, dissenting upon the same ground as before, with increased firmness, and giving additional reasons to support his view. That case was soon followed by several others involving the same question, in which it was affirmed without dissent. *Rochester v. Alfred Bank*, 13 Wis. 433, 80 Am. Dec. 746; *Berliner v. Waterloo*, 14 Wis. 378, and *Mills v. Jefferson*, 20 Wis. 54, are among such cases. In each of such cases the law involved was challenged under § 21, art. 7, yet the reasoning and decision in each are to the effect that an act may be local and yet be general. That naturally led to the decision in *Durkee v. Janesville*, 26 Wis. 697, opinion by Mr. Justice Cole, where an act amending the charter of the city of Janesville, a law of the same character as those held in the previous cases to be general, was decided to be local within the meaning of § 18, art. 4, and so clearly of that character as not to admit of a reasonable controversy about it. In *Castello v. Landwehr*, 28 Wis. 522, in dealing with the question of whether a law authorizing a town to purchase a bridge was a general law as regards rules of pleading, the decision was in the affirmative, referring, for support, to those cases where the word "general," as used in the Constitution, had been considered. The effect was in line with the reasoning of Mr. Justice Paine in *Clark v. Janesville*, that "general" and "public," as used in statutes and constitutions, are ordinarily synonymous; that both relate to the effect of a law upon the persons who come within its scope, and not to its scope as regards territory. *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578, followed next in order. The law there questioned related to the reassessment of taxes in the city of Madison. In harmony with *Durkee v. Janesville*, and the other cases referred to, it was said to be local, and its sufficiency was tested by § 18, art. 4, of the Constitution. In *Evans v. Sharp*, 29 Wis. 564, a law for the reassessment of certain taxes in the city of Oshkosh was held to be local. The next case of significance is *Lawson v. Milwaukee & N. W. R. Co.* 30 Wis. 597. The law there called in question affected a large portion of the state. It authorized certain towns, counties, and cities to aid in the construction of a railroad. That it was a general law within the meaning of the constitutional provision requiring such laws to be published, was not questioned. It was challenged under the constitutional restriction upon legislative power, as regards the title to local laws. Justice Cole wrote the opinion of the court. The title was held 53 L. R. A.

sufficient, but it was said, *arguendo*, that the act was not, strictly speaking, local or private within the meaning of the Constitution, citing *Clark v. Janesville*, 10 Wis. 136; *Rochester v. Alfred Bank*, 13 Wis. 433, 80 Am. Dec. 746; *Berliner v. Waterloo*, 14 Wis. 378; and *Mills v. Jefferson*, 20 Wis. 54. That observation was in harmony with the dissenting opinions to which we have referred, but out of harmony with the decisions of the court down to that time.

The next case of importance is *Zitske v. Goldberg*, 38 Wis. 217, 232. The opinion on rehearing was written by Mr. Justice Cole. In harmony with his previously expressed views on the subject, except in *Durkee v. Janesville*, to which we have adverted, he said, as regards the matter under consideration,—an act incorporating a village,—that it was not a private or local act, but a public or general law. In that, for the first time, the court adopted, seemingly, the idea that an act cannot be public and general, and at the same time local. The conflict thus created was evidently not observed by the court at the time the decision was made. The indications that way are unmistakable, so we are warranted in saying that there was no intention of overruling the previous decisions on the subject. The cases cited in the opinion, except one, relate to questions under § 21, art. 7, of the Constitution. It was overlooked that they are to the effect that the test of that provision may still require the further test as regards § 18, art. 4. *Durkee v. Janesville* was not in mind. If those considerations leave any doubt that the decision was not intended to establish a new doctrine, it is displaced by the fact that, at the same term, in *Single v. Marathon County Supers.* 38 Wis. 363, opinion by Mr. Justice Lyon, who wrote the first opinion in *Zitske v. Goldberg*, where the constitutional question was not discussed, but appears to have concurred in the second opinion by Mr. Justice Cole, a law similar to the one said in that case not to be local because it was general, was said to be local in character and was tested by the constitutional provision on that subject, citing *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; and *Evans v. Sharp*, 29 Wis. 564.

The subject does not appear to have received consideration in the court again until *Yellow River Improv. Co. v. Arnold*, 46 Wis. 214, 49 N. W. 971, was reached. There the opinion was written by Mr. Justice Taylor, who endeavored to bring all the cases theretofore decided by this court into harmony, and demonstrate that those holding that a law relating to a subdivision or collection of subdivisions of the state is "general" within the meaning of the constitutional provision relating to the requirement that general laws must be published before going into operation, were in harmony with those holding that such a law is local, and must, in order to be valid, satisfy both § 18, art. 4, and § 21, art. 7, of the Constitution. It is to be regretted that in the thorough study which the court then endeavored to give to the subject, and the collection of

cases theretofore decided, which was intended to be complete so as to firmly establish the principle announced, *Zitske v. Goldberg* was overlooked. The purpose indicated, however, is unmistakable, because the only other case in which title error had found a place in the opinions of the court (*Lawson v. Milwaukee & N. W. R. Co.* 30 Wis. 597) was cited as an instance of where a law, obviously general within the meaning of § 21, art. 7, of the Constitution, was held to be local, and the following general statement was made of the law as laid down in our decided cases: "In the case of *Castello v. Landwehr*, 28 Wis. 522, it was held that a law authorizing the town of Wrightstown to purchase a bridge and issue bonds therefor, and levy taxes to pay the same, was a general law within the decisions first above cited; yet clearly, within the decision in *Durkee v. Janesville*, it was also a local law; and the same must be the case in respect to special laws authorizing a particular town or city to issue bonds to aid in the construction of railroads or other public improvements, and to levy taxes for that purpose. Such laws are both general and local within the meaning of the Constitution. The fact that a law is a general law undoubtedly negatives the idea that it is a private law, but does not necessarily negative the idea that it is a local law within the meaning of the Constitution."

The cases subsequent to the *Yellow River Improv. Co. Case*, so far as we can discover, down to those reported in volume 56 of the Reports, follow the doctrine there established. *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372; *Harrison v. Milwaukee County Supers.* 51 Wis. 645, 8 N. W. 731. In neither of those cases is the *Zitske Case* referred to, but the *Yellow River Improv. Co. Case*, and others in harmony therewith, are cited and followed. Both opinions were written by Mr. Justice Taylor.

When the court reached *Cathcart v. Comstock*, 56 Wis. 590, 14 N. W. 833, opinion by the present chief justice, where the constitutionality of an act entitled "An Act for the Division of the County of Marathon and the Erection of the County of Lincoln" was challenged as imperfect in its title, the idea that an act cannot at the same time be local and general again obtained a foothold. The title to the act was evidently sufficient, tested by the decisions on that subject. Such might well have been, and probably was, the view of the court, but unfortunately the reason given in the opinion for sustaining the act was that it was not a local law, citing *Zitske v. Goldberg*, and *Phillips v. Albany*, 28 Wis. 340. The latter case, as we have seen, does not relate to the subject, it being merely a decision that the law under consideration was a general law under the constitutional provision on that subject. The numerous cases to which we have referred, holding that such a law as the one considered is local in character, seem to have been overlooked. This language was used: "True, the act operated in a single county, but it affected the rights of all the people

therein; besides, it was of public concern, and can in no sense be deemed a private or local law, within the meaning of that section." That decision was followed by the decision in *Chicago & N. W. R. Co. v. Langlade County*, 56 Wis. 814, 14 N. W. 844, filed at the same time. The only authority cited was the companion case, and *State v. Page*, 12 Neb. 386, 11 N. W. 495. An examination of the latter case shows that it dealt with a law which was unquestionably local in character, and the title was held sufficient. That indicates that it was in the mind of the court, in deciding the two cases, as we have heretofore suggested, that the title was sufficient to satisfy the constitutional provision with reference to local laws. The error thus committed was repeated in *Thompson v. Milwaukee*, 69 Wis. 492, 34 N. W. 402. An act amending the city charter of Milwaukee was there held not local, because it was general, referring to *Cathcart v. Comstock* and *Zitske v. Goldberg*.

Coming down to *Anderton v. Milwaukee*, 82 Wis. 279, 15 L. R. A. 830, 52 N. W. 95, opinion by the present chief justice, an act specially relating to the city of Milwaukee and amendatory of its charter,—a law of the same character as that considered in *Thompson v. Milwaukee*, 69 Wis. 492, 34 N. W. 402,—was held to be local, and void for non-compliance with the constitutional requirements as to title, only cases in harmony with that view being cited. *Durkee v. Janesville* and *Yellow River Improv. Co. v. Arnold*. The three previous cases were in effect overruled and the early doctrine re-established, and so it stands to-day.

We have now referred to nearly all of the decisions of this court touching the subject under consideration. Those omitted, it is believed, are of little or no importance. It is believed that the *Anderton Case* contains the last expression of the court where the subject was presented for decision and decided. That is in harmony with the reasoning in *Clark v. Janesville*, decided in 1859, and with all the decisions that followed except the few lapses adverted to, grounded on the error that a law cannot be general and public and at the same time local. We find but one subsequent case that is liable to again revive the error. That is *Larson v. Waite*, 103 Wis. 244, 257, *sub nom. Larson v. Chilton*, 45 L. R. A. 610, 79 N. W. 321. The validity of an act was there challenged generally. No reason was assigned. The court did not feel bound to search for reasons for invalidating the act. In the opinion it was said that there was no room for even a suspicion as to what was in the mind of counsel other than that, possibly, the act was deficient in its title. It was general in the broad sense of the term. Its effect extended to the entire state. This language was used as regards the general assignment of error: "No such prohibition is pointed out, and we know of none, unless, indeed, appellants' counsel have in mind § 18, art. 4, of the Constitution, which, however, is confined by its terms to private and local bills.

The very existence of that express requirement . . . implies the absence of any similar restriction upon public and general acts." The previous decisions of the court to the contrary were clearly not in mind. They were not intended to be overruled or discredited.

It is believed that the lengthy history above given, of the holdings of this court on the question now presented anew for decision, is necessary in order to bring all the cases together and show clearly the doctrine at first established, the departure therefrom, from time to time, and the quick returns to the right line now occupied by the court, without indications of any considerate purpose having existed to abandon it. In that it is hoped that we have demonstrated, not only what ought to be the law, but what is the law as understood here, and so intrenched it that knowledge thereof will be present in the minds of the profession and the courts whenever an occasion may arise for applying it.

What has been said, without more, might indicate that every legislative act that in any case does not extend to the whole state must be tested by § 18, art. 4, Id. We do not intend to hold but that there may be a constitutional classification of localities, and legislation affecting the entire class, that will not be affected by that restriction any more than legislation for a constitutional class of cities is affected by the inhibition of special legislation. The conclusions reached may be stated, in short, as follows: An act is "general," as contradistinguished from and inconsistent with "local," in the sense the latter term is used in § 18, art. 4, Id., only when its operation extends to the whole state, or perhaps to the whole of some class of localities therein which the legislature may constitutionally make upon the principle recognized and approved for the classification of cities for the purpose of general legislation. Mr. Binney, in his work on Restrictions upon Local and Special Legislation (vol. 3, p. 26), sums up an exhaustive and able review of the authorities that way. An act is "general" in the restricted sense in which the term is used in § 21, art. 7, of the Constitution, when of that character within the broad meaning of the term; also when it is "public" in that its effects extend to the people of a locality such as a county, city, town, or village, or a collection of such localities not forming a legislative class formed for some legitimate cause, the term "general" and the term "public" being considered in this respect synonymous. When an act is general merely because it is public, it is at the same time local and must be tested as to its validity by § 21, art. 7, Id., and § 18, art. 4, as well; and if it belongs to one of the prohibited classes of special legislation, as it well may, it must also be tested by the constitutional restriction upon that subject.

The foregoing conclusions need no support outside the decisions of this court. They are the law, too firmly established to be reasonably questioned. However, a reference

to authorities elsewhere, judicial and elementary, will show that all are in substantial harmony. See Endlich, Interpretation of Statutes, § 502, and cases cited; *Gaskin v. Meek*, 42 N. Y. 186. The following are examples of laws held in other states to be local under constitutional restrictions similar to ours: An act to amend the charter of a city (*Morford v. Unger*, 8 Iowa, 82); an act to extend the corporate powers of a town (*Netting v. Pontiac*, 56 Ill. 172); an act to change the boundaries of two counties (*Humboldt County v. Churchill County Comrs.* 6 Nev. 30); an act for the enlarging of a county (*Blood v. Mercelliott*, 53 Pa. 391); an act for the formation of a new county (*Brandon v. State*, 16 Ind. 197); an act locating a county seat (*Cutlip v. Calhoun County*, 3 W. Va. 588); an act relating to the county of New York (*People ex rel. Davies v. New York City & County Tax Comrs.* 47 N. Y. 501). In Sedgw. Stat. & Const. Law, p. 529, note, the writer summed up a review of the authorities thus: "It is settled that if the statute be either local or private, the requirement as to title applies; that is, if the act be local as to territory, no matter how public it may be in its character, it can contain but one subject, and that must be expressed in the title." To that the following examples of local laws are given, each of which will be recognized as a general law: A statute relating to a single city or county (*People ex rel. McConvill v. Hills*, 35 N. Y. 449); an act relating to the raising of money in the county of New York, for the use of the corporation of the city of New York (*People v. O'Brien*, 38 N. Y. 193); an act to improve the public health of the city of New York (*Re Paul*, 94 N. Y. 497); an act in relation to the fees of the sheriff of the city and county of New York (*Gaskin v. Meek*, 42 N. Y. 186). As indicated by the title, the act considered in the last case cited is of the same character as those here in question, as regards the subject under discussion. *Williams v. People*, 24 N. Y. 405, and some other cases, so far as holding that an act relating to the fees of the officers of a county is not local, were in effect overruled. Such cases were considered in *People v. O'Brien*, 38 N. Y. 193, where it was said, in substance, that they were not sustainable except upon the ground that the acts considered contained peculiar provisions extending their operation throughout the state. The following language was used as to the constitutional purpose in respect to titles to local acts: "The framers of the Constitution . . . must be presumed to have used the term 'local' in the sense in which it is generally understood. In this sense any law, limited to any particular locality, is local, irrespective of the population of such locality, whether great or small."

It follows from what has been said that the law under consideration must be considered as local, and be tested by the constitutional restriction applicable thereto. At this point we are favored with a concession by respondent's counsel, that neither the

title to the act of 1876, nor that of 1877, clearly expressed the object of the law it covers. He might well have gone further and admitted that neither title indicates the primary object of the law at all. The object of the first act was to compensate the sheriff of Milwaukee county for his services by a salary paid out of the county treasury in lieu of fees. The subject of fees was matter of detail. There was nothing in the act indicating, even remotely, that its primary purpose was to deal exclusively with the subject of sheriff's fees collected by the sheriff of Milwaukee county. The title to the second act is still worse, for the body of it indicates two primary purposes, one to compensate the sheriff of Milwaukee county by a salary in lieu of fees, and one to create several additional salaried county offices. Here, as before, all said about the collection and disposition of the fees is mere matter of detail. The title, at best, suggests only the details, leaving the primary object or objects entirely out of view. It is useless to endeavor to sustain such legislation by the familiar principle that the constitutional provision as to local legislation only requires that the title to a local bill, when liberally construed, shall suggest the subject thereof, and that such subject shall be single. Here the subject of the act is not suggested by the title at all. A studied attempt to evade the wise constitutional restriction is not indicated, but rather an utter failure to take any notice of it.

No doubt the constitutional provision "should be liberally construed by the courts so that its beneficial purposes will be secured without embarrassing legislation." True, any number of provisions relating to a single object, including all the necessary or reasonable details thereof, may be covered by a title in such general terms as to fairly indicate such object; but, as has been aptly said, "the unity of the object must be sought in the end which the legislature purposes to accomplish, and not in the details provided to reach that end." It is also true that the particularity to be observed in framing the title to a bill, within all reasonable bounds, is a matter of legislative discretion. *Evans v. Sharp*, 29 Wis. 564. But how do the laws in question stand by that test? The primary object indicated by the titles is sheriff's fees, generally, throughout the state of Wisconsin. The primary object covered by such titles is to take the sheriff's office of Milwaukee county out from under the general laws of the state, and make it, and all positions under and connected with it, salaried offices.

The idea, as regards this branch of the case, that it must be remembered that we are dealing with a mere technicality, cannot be indorsed. We are dealing with an important constitutional restriction upon legislative power. Courts that refer to such an objection to a law as the one here presented as technical misconceive the situation. The framers of the Constitution, in adopting § 18, art. 4, intended to guard against the danger of legislation, affecting

private or local interests, being smuggled through the legislature under misleading titles, by requiring every bill affecting such interests to be under a title likely to call attention of the lawmakers to its character, and likewise the attention of the people affected, to the end that every member of the legislature may intelligently participate in considering such bill and all objections thereto may be presented. This court very early recognized the importance of that limitation upon legislative power, and said that the evident purpose of the framers of the Constitution was that it should be given full force and effect, and that there is no justification for treating it as merely directory, or sanctioning evasions of it in any way. *Durkee v. Jancsville*, 26 Wis. 697. Attention was there called, approvingly, to the views of the New York court expressed in *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241, 253; *New York v. Colgate*, 12 N. Y. 140, 146; and *People ex rel. McConvill v. Hills*, 35 N. Y. 449,—to the effect that the constitutional requirement was designed to do away with a notorious practice of imposing upon legislators who depend upon the titles to bills for their knowledge of the contents, and of imposing upon the public as well, and that it is mandatory.

It takes very little knowledge of the course of legislation to understand how a title to a local bill, not calculated to inform the people affected of what is impending, coupled with an assurance by the person in charge that it is of a purely local character, may cover and obscure a proposition that never ought to and never would be enacted into law if accompanied by that publicity necessary to invite legitimate opposition from without the legislature, and inform the legislators of its real character; and yet with the assurance that it is purely a local bill, and has the approval of the local member or members, such dangerous and mischievous proposition may reach the office of the secretary of state as a law, in form, and the persons affected only discover its character when there is no recourse left for them except that which the wisdom of the framers of the Constitution has provided. No! a challenge of the sufficiency of a law, under the constitutional restriction as to its title, is not a technical objection to be treated lightly by the courts. It is an invocation of a positive limitation upon legislative power, which the court cannot treat lightly without being guilty of usurpation. True, in such a case the title to the act must be liberally construed, giving all reasonable leeway for the exercise of legislative discretion. True, it should not be held in sufficient if a reasonable doubt exists as to its sufficiency. But, just as true, the letter and spirit of the Constitution should be maintained in all their integrity, by holding that a title is insufficient if so defective as not to reasonably suggest the purpose of the act it covers, so that in reading the act, with the full scope of its title in mind, provisions will not be found which are clearly outside thereof. If such a discovery be made, the court



cannot give an unreasonable construction to the title to bring the body of the act within it. The title must stand or fall as it is written, and without regard to the consequences. In no other way can the purpose of the constitutional limitations be effective. *Re Paul*, 94 N. Y. 497.

But it is said, conceding that the title to each of the acts considered is by itself insufficient as we find it in the published laws, —and we assume this concession to include Laws 1878, chap. 137, amending that of 1877, not heretofore much referred to in this opinion, since if one falls all must,—that of 1876 is cured by reference to the journal of the assembly, and the titles to the other acts are cured by reference to the first. The conclusion which counsel confidently contend for could not in any event be readily adopted. Whether it is sound or not need not be discussed or decided, since we cannot agree to the premises upon which it is based. The journal of the assembly shows that during the session of the legislature of 1876 a bill was considered and passed known as "353a," entitled "A Bill to Fix a Salary for the Sheriff of Milwaukee County," and that a bill bearing the same number, entitled the same as the published law, was assented to by the assembly as being correctly enrolled and ready for the necessary authentication before passing from the control of the legislature to the governor for his approval. On that showing it is said we must say the bill as passed was correctly entitled, because the court takes judicial notice of the journals of the two houses of the legislature for the purpose of determining whether bills were actually and constitutionally passed; that is, what was done in regard to the passage of bills. *McDonald v. State*, 80 Wis. 407, 50 N. W. 185; *State ex rel. Isenring v. Polachek*, 101 Wis. 427, 77 N. W. 708. We have then this situation: The constitutional limitation upon legislative power as to the title of a bill is satisfied, if such title be perfect at the time the bill was finally acted upon. *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Binz v. Weber*, 81 Ill. 288. The presumption is that the title to the act in question, as found in the published laws, accords with its title when passed by the legislature, and that presumption must prevail till satisfactorily rebutted. The journal of the assembly shows that when the bill in question received the final legislative assent, as the correct expression of the legislative will, it bore the title now found in the published laws. Such journal further shows that the bill, during the proceedings in the legislature leading up to its enrollment, bore a different title. On such showing it is said that the published law can be impeached by such journal, and is impeached by the references therein to the bill we have mentioned, and that the court must so decide regardless of what the original bill itself shows, or any other evidence within reach of the court, because the court must take judicial notice of the contents of such journals, and cannot properly look further.

We are unable to say that the presumption  
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with which we must start in our investigation, viz., that the published title corresponds to the title of the bill at the time of its passage by the legislature, is overcome by the journal entries. The purport of the report of the committee on enrolled bills is that the bill in question, as approved by them, in its enrolled form, was a correct copy of the bill that passed the two houses of the legislature. That report was assented to. The result was duly authenticated and sent to the governor. Moreover, the scope of the rule that courts take judicial notice of the journals of the two houses of the legislature, and the effect of such journals as evidence, are misapprehended by respondent's counsel. While such journals are controlling as regards what the legislature does in respect to the passage of a bill (*People ex rel. Barnes v. Starne*, 35 Ill. 121, 85 Am. Dec. 348) they are not necessarily so as to the contents of a statute. On the latter subject courts may look to the enrolled bill, to the engrossed bill, and to any other legitimate evidence within their reach. *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Ramsey County Supers. v. Heenan*, 2 Minn. 330, Gil. 281; *Fouke v. Fleming*, 13 Md. 392; *Gardner v. The Collector*, 6 Wall. 499, *sub nom. Gardner v. Barney*, 18 L. ed. 890; *Re Duncan*, 139 U. S. 449, 456, *sub nom. Duncan v. McCall*, 35 L. ed. 219, 222, 11 Sup. Ct. Rep. 573; *Jones v. United States*, 137 U. S. 202, 216, 34 L. ed. 691, 697, 11 Sup. Ct. Rep. 80; *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959.

It must be understood that when the existence or the contents of a statute are called in question, no issue of fact is presented for a trial upon the evidence, but the court, whether one of original or appellate jurisdiction, must necessarily decide the question the same as it decides any other question of law. In *Gardner v. The Collector*, 6 Wall. 499, *sub nom. Gardner v. Barney*, 18 L. ed. 890, it is said that judges, when called upon to determine the existence or the contents of a law, may resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to the question. The same court said, in *Jones v. United States*, 137 U. S. 202, 216, 34 L. ed. 691, 697, 11 Sup. Ct. Rep. 80, speaking by Mr. Justice Gray: "In the ascertainment of any facts of which they are bound to take judicial notice, . . . the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy;" and, "upon the question of the existence of a public statute, . . . they may consult the original roll or other official records." In *Re Duncan*, 139 U. S. 449, 456, *sub nom. Duncan v. McCall*, 35 L. ed. 219, 222, 11 Sup. Ct. Rep. 573, the same court held that it might make such an investigation, though it was omitted by the state court which was first called upon to act. In *Ramsey County Supers. v. Heenan*, 2 Minn. 330, Gil. 281, it was said that the court, in solving a question regarding the constitutionality of a

law, may examine the original bill as well as the journal.

What has been said clears the way for the court to examine the original bills in question in this case, and the result of such an examination is that they are found to be entitled the same as the published laws, leaving no room to say that they were not, at the time of their passage, the same in all respects as such published laws indicate.

The rule, that practical construction of a law will be regarded by the court as controlling after long acquiescence, is invoked. That rule is familiar, and it may apply where a constitutional question is involved. *Dean v. Borchsenius*, 30 Wis. 236. But it has no application to a legislative enactment which, in neither its literal sense nor its application to the subject it affects, is ambiguous. In such a case there is no room for the operation of the rule of practical construction, or any other. The act must be taken to mean what its language obviously indicates, regardless of the length of time that a contrary view has obtained. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 265, 68 N. W. 958.

Another question is presented for decision, namely, Does the legislation in question violate § 23, art. 4, of the Constitution, requiring that there be but "one system of town and county government, which shall be as nearly uniform as practicable?" The suggestion is made that any system of county government must include offices and a method of filling them, and of compensating the incumbents for their services, and that every part of such system is as essential to the whole and the uniformity thereof as any other. There is reason in that, and yet we hesitate to say, at this time, that it is decisive. The question presented is so important, as regards its effect upon existing laws and the future exercise of legislative power, as to warrant the court in omitting to solve it except upon the fullest argument and a necessity therefor. That necessity does not exist here, because the conclusion which we have already reached upon the other branch of the case is conclusive of the appeal. Whether such legislation as is here questioned was contemplated by the framers of the Constitution, or can be sustained, under the requirement as to uniformity of county government, admits, at least, of very serious doubt. That suggestion, probably, will be sufficient to admonish those who may be responsible for further legislation to accomplish the object of that we have condemned upon another ground, and the lawmakers generally, of the importance of so shaping their work as to make it conform to all the constitutional checks upon legislative power. The mischief that may be done by want of care in that regard, resulting in laws good in form but bad in fact,—laws that may be recognized as valid for a long term of years before coming under the scrutiny of the court,—cannot be overestimated. All must understand that we live under a constitutional government. There is no absolute freedom of action in any branch of it. The 53 L. R. A.

limitations upon the legislative branch are numerous and of the highest importance. The legislature may go through the form of making any kind of a law, but unless the result stand the test of those wise limitations which wisdom dictated in our Constitution, it must fail, regardless of the consequences. All the mischiefs that flow from unconstitutional enactments lie at the doors of those who are charged with the duty to make laws. The benefits of the system which leads to that—and they are supposed to be of inestimable value—will be in great part lost by any hesitation in condemning a law as void that is manifestly so, by that branch of the government which is charged with that duty.

*The order appealed from is reversed and the cause remanded, with directions to sustain the demurrer, and for further proceedings according to law.*

Martin WALLACE, Jr., *Respt.*,  
v.

James M. PERELES, Impleaded, etc., *Appt.*

(109 Wis. 816.)

1. A conveyance by a married woman of real property which was deeded to her by her husband without consideration paid from her separate estate, and in the absence of statute changing the rule that she acquired only an equitable title by the deed, will not carry the covenants in the deed under which her husband acquired title.
2. A conveyance of real estate by one who has acquired no title and was never in possession, to another who does not take possession, will not carry the covenants in the deeds from remote grantors to subsequent purchasers from such grantee.
3. A judgment of eviction against a grantee in a suit of which a remote grantor has no notice is not prima facie evidence that the eviction was under a paramount title, in a suit against such grantor on the covenants in his deed.

(February 26, 1901.)

**A**PPEAL by defendant, James M. Pereles, from a judgment of the Circuit Court for Waupaca County in favor of plaintiff in an action brought to recover damages for breach of covenants of warranty of certain real estate. *Reversed.*

Statement by **Bardeen, J.:**

On June 27, 1879, one Andrew Argus and wife deeded the west 24 feet of lot 8, block 7, of Millard & Taft's addition to the city of New London, except the north 10 feet thereof, to defendant. On March 29, 1889, the defendant and his wife, by deed with full covenants of warranty, conveyed the entire west 24 feet of said lot 8 to Frederick Eckert. On February 10, 1891, Eckert quit-

**NOTE.**—On the question what estate will be sufficient to carry a covenant when a conveyance is made, see also *Mygatt v. Coe* (N. Y.) 11 L. R. A. 646, and 24 L. E. A. 850.

claimed said last-described tract to his wife, Minnie. Thereafter Mrs. Eckert deeded by warranty deed to Henrietta Sager, and she to the plaintiff. On June 24, 1895, plaintiff deeded to one Fred Poppe. All of said deeds included the north 10 feet of the west 24 feet of lot 8, excepted from the deed from Argus to defendant, and to which the latter had no title and no possession. In 1896 one Hannah E. Patchin commenced an action against Fred Poppe, claiming that said north 10 feet was an alley appurtenant to her property, and which was being obstructed by Poppe. Judgment in her favor was entered, and Poppe was evicted therefrom. Thereafter Poppe brought suit against plaintiff on the covenants of his deed. The suit was commenced July 19, 1897, and August 30, 1897, plaintiff served upon defendant a notice in writing of the pendency of said suit, with a copy of the pleadings and a demand to defend. The defendant made no defense, and judgment was entered in favor of Poppe and against plaintiff for \$490.95 damages and costs. Thereupon this action was commenced, based upon the covenants in his deed to Eckert, to recover from defendant the amount of said Poppe judgment. A jury was waived. In addition to the facts above stated, the court found that the deed from Eckert to his wife was based upon "a valuable consideration, or other good and sufficient consideration," and that plaintiff served due and timely notice upon defendant, and tendered him the defense of the action of Poppe against Wallace, Jr., before the time for answering had expired. Evidence was offered by defendant that he was never in possession of the disputed 10 feet. The court refused to find on that subject, and refused to find that Frederick Eckert and Minnie Eckert were, and still are, husband and wife, and that Mrs. Eckert did not pay the consideration for the deed to her out of her separate estate. Judgment was entered for plaintiff for \$554.15 damages and costs, against the defendant J. M. Pereles, from which this appeal is taken.

**Messrs. Nathan Pereles & Sons**, for appellant:

A conveyance by a husband directly to his wife passes only the equitable title to the land, leaving the legal title in the husband, and the husband is entitled to the possession of the land.

*Kinney v. Deater*, 81 Wis. 80, 51 N. W. 82; *Carpenter v. Tatro*, 36 Wis. 297; *Read v. Sang*, 21 Wis. 679; *Foots v. Carpenter*, 7 Wis. 395; *Botkin v. Earl*, 6 Wis. 393.

This court has never gone to any greater length than to hold that a voluntary conveyance from a husband to his wife was sufficient to vest in the wife the equitable title to the land.

*Wheeler & Wilson Mfg. Co. v. Monahan*, 63 Wis. 198, 23 N. W. 127; *Lamberton v. Pereles*, 87 Wis. 449, 23 L. R. A. 824, 58 N. W. 776; *Putnam v. Bicknell*, 18 Wis. 334.

Covenants real run with the legal title only, and not with the equitable title. 53 L. R. A.

*Wright v. Sperry*, 21 Wis. 336; *Carlisle v. Blamire*, 8 East, 487.

Where a plaintiff sues for breach of a covenant real, coming to him with the land, he must establish legal title to the land.

*Beardsley v. Knight*, 4 Vt. 471; *Pargeter v. Harris*, 7 Q. B. 708; *McGoodwin v. Stephenson*, 11 B. Mon. 21; *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669; *Allen v. Wooley*, 1 Blackf. 148; *Wright v. Sperry*, 21 Wis. 336; *Rawle, Covenants for Title*, 4th ed. 341-347; *White v. Whitney*, 3 Met. 81; *Mygatt v. Coe*, 142 N. Y. 78, 24 L. R. A. 850, 36 N. E. 870.

No title or possession being shown in the covenantor or his grantees, the covenants did not pass.

*Rawle, Covenants for Title*, 4th ed. 362-374; *Beddoe v. Wadsworth*, 21 Wend. 120; *Slater v. Rawson*, 1 Met. 450, 6 Met. 439; *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. 8th ed. p. 205; *Devore v. Sunderland*, 17 Ohio, 60, 49 Am. Dec. 442; *Chambers v. Smith*, 23 Mo. 174; *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Zent v. Picken*, 54 Iowa, 535, 6 N. W. 750; *Matteson v. Vaughn*, 38 Mich. 373; *Cockrell v. Proctor*, 65 Mo. 41.

Privity of estate is essential to carry covenants of warranty to subsequent grantees so as to support a right of action by them against the original covenantor, whenever evicted by a title paramount to his.

*Mygatt v. Coe*, 124 N. Y. 212, 11 L. R. A. 646, 26 N. E. 611, 142 N. Y. 78, 24 L. R. A. 850, 36 N. E. 870, 147 N. Y. 456, 42 N. E. 17, 152 N. Y. 457, 46 N. E. 949; *Meeklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68.

In order to bind a covenantor by a judgment of eviction under claim of paramount title, notice of the suit must at least be given him.

*Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191; *Saveland v. Green*, 36 Wis. 612; *Eaton v. Lyman*, 26 Wis. 61, 33 Wis. 34; *Rawle, Covenants for Title*, 4th ed. pp. 229, 230.

Until actual eviction under paramount title, the covenantee's damages are only nominal.

*Ludlow v. Gilman*, 18 Wis. 553; *Meeklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Neenan v. Halsey*, 22 Wis. 27; *Eaton v. Lyman*, 30 Wis. 41; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653; *Bardeen v. Markstrum*, 64 Wis. 613, 25 N. W. 565.

**Messrs. Guernsey & Lehr and Borbera & Beglinger** for respondent.

**Bardeen, J.**, delivered the opinion of the court:

Questions of law only are involved on this appeal. They group themselves under the following heads: (1) The conveyance from Eckert to his wife passed only an equitable title. Covenants real run only with the legal title, and cannot be enforced by her grantees against defendant. (2) Neither title nor possession being shown in defendant at the time of his conveyance, the covenants in his deed were personal to his grantee, and did not pass by a mere conveyance of the

land. (3) No eviction under paramount title having been shown, the recovery, if any, must be limited to nominal damages.

1. The evidence is undisputed that at the date of the deed from Frederick Eckert to Minnie Eckert the parties were husband and wife. Coverture once shown is presumed to continue. Jones, Ev. § 54. Under the evidence the court should have found that they were, and still are, man and wife. Prior to the passage of Laws 1895, chap. 86, an absolute conveyance of real property from the husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate. *Putnam v. Bicknell*, 18 Wis. 333; *Kinney v. Deater*, 81 Wis. 80, 51 N. W. 82. Where, however, the transaction related to her separate estate, the marriage relation was disregarded, except where the question of fraud arose, and then it was considered and more closely scrutinized on account of the great inducements and facilities afforded for the commission of fraud. *Beard v. De-dolph*, 29 Wis. 136. See *Fenelon v. Hogo-boom*, 31 Wis. 172. In *Kinney v. Deater*, 81 Wis. 80, 51 N. W. 82, the action was ejectment. The plaintiff claimed title by successive deeds after a deed from one Brown to his wife. The latter deed was a mere gift, and the court held that it gave the wife only an equitable title to the land, which would not support ejectment. In contests which have arisen involving transactions between husband and wife, a rule of great strictness has been adopted by this court as to the burden of proof. Where the rights of creditors are involved, before the wife can recover she must show by clear and satisfactory evidence that her purchase from her husband was made in good faith and for a valuable consideration, paid out of her separate estate, or by a third person for her; and the same rule applies to one who took from the wife with notice. In such case a mere recital of a valuable consideration in the conveyance from husband to wife will not support a recovery in her favor. *Horton v. Deucey*, 53 Wis. 410, 10 N. W. 599; *Gettelmann v. Gitz*, 78 Wis. 439, 47 N. W. 660; *Rozek v. Red-cinski*, 87 Wis. 525, 58 N. W. 262. In *Carpenter v. Tatro*, 36 Wis. 297, the suit was by the wife against her divorced husband upon a claim assigned to her by her second husband. She testified that she paid \$5 therefor, but did not show she had any separate estate. A judgment in her favor was reversed, and the court said: "If the plaintiff had no separate estate, the assignment and transfer of the debt by the husband to her does not vest the legal title in her. She could not receive it as a gift from him, as she might from any person other than her husband, and enforce its collection by action upon it. And until it appeared that she had a separate estate, with which she purchased the claim, the evidence of the assignment should have been excluded." If Mrs. Eckert had been evicted, and had brought an action against defendant upon the covenants in the deed, she could not have prevailed in such action, under the authorities cited, without

showing that she purchased the property out of her separate estate. In what better position are her grantees? She obtained but an equitable title to the land. That title passed to her grantees, and no one is here questioning it. Her grantees, however, are seeking to give it the force and effect of a legal title, and insist that it can only be questioned by creditors of the husband, or others wronged by the conveyance. But that is not the real question at issue. No one is seeking to impeach the actual title conveyed. The real question is whether a right of action in plaintiff can be traced through a chain of conveyances, one of which conveys only an equitable estate. Under the facts and law as stated, the legal title stopped in Mr. Eckert. In *Wright v. Sperry*, 21 Wis. 331, this court said: "It is a general principle that covenants run only with the legal title to lands and tenements. *Beardsley v. Knight*, 4 Vt. 471; *Randolph v. Kinney*, 3 Rand. (Va.) 396; *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669; *Allen v. Woolley*, 1 Blackf. 149 [*Spencer's Case*, 5 Coke, 16]; 1 Smith Lead. Cas. 8th ed. 121." This case was decided at a time when a mortgage in this state carried the fee, and it was held that, as the assignment of the several mortgages was informal, the legal title to the land did not pass to the assignee so that he could have the benefit of the covenants of warranty. The rule is somewhat ancient and technical, but it passed into the jurisprudence of this state at an early day, and has stood unchallenged ever since. The weight of authority against it is not so great that we feel impelled to depart therefrom. See *McGoodwin v. Stephenson*, 11 B. Mon. 21; *Carlisle v. Blamire*, 8 East, 487.

2. Under this head it is urged that, no title or possession having been shown in the defendant or his grantee, there was no such privity of estate as would carry the covenants to subsequent purchasers. Although the court refused so to find, the evidence is undisputed that defendant was never in possession of the north 10 feet of the west 24 feet of lot 8. His deed from Argus expressly excepted this tract, but it was included in defendant's deed to Eckert. There is no proof that Eckert ever took actual possession of the disputed tract, or that any subsequent grantee ever did until the land came to Poppe. In absence of proof, the presumption is that possession follows ownership. *Mygatt v. Ooe*, 147 N. Y. 456, 42 N. E. 17. The rule is universal that, in order to carry the covenants in a deed to subsequent grantees, there must be actual or constructive seisin. In absence of both right and possession, all the elements which constitute an estate are necessarily wanting, and the covenants contained in the grant must remain in the grantee, from the absence of everything which can carry them further. *Spencer's Case*, 5 Coke, 16, 1 Smith, Lead. Cas. 8th ed. p. 205, and cases cited. In New York the rule is thus stated: "Privity of estate is essential to carry covenants of warranty and quiet enjoyment to subsequent grantees in order to support a right of action

by them against the original covenantor when there is an eviction by paramount title." *Mygatt v. Coe*, 147 N. Y. 456, 42 N. E. 17, 152 N. Y. 457, 46 N. E. 949. In a note to *Spencer's Case*, 1 Smith, Lead. Cas. 9th ed. p. 224, it is said: "If any estate passes from the grantor to the grantee in a conveyance, it is enough to carry covenants. But if the title of the grantor wholly fails, so that no title to land passes to the grantee, with which covenants can run, the grantee can take no advantage of them." The following cases are cited to support the text: *Slater v. Rawson*, 1 Met. 450, 6 Met. 439; *Beardsley v. Knight*, 4 Vt. 471; *Devore v. Sunderland*, 17 Ohio, 52, 49 Am. Dec. 442; *Martin v. Gordon*, 24 Ga. 533; *Burtner v. Keran*, 24 Gratt. 42; *Allen v. Greene*, 19 Ala. 34. The general rule is that the covenant of a stranger to the title is personal to the covenantee, and is incapable of transmission by a mere conveyance of the land. *Mygatt v. Coe*, 152 N. Y. 457-466, 46 N. E. 949. In *Nichol v. Alexander*, 28 Wis. 118, this court held that if a grantor, by full-covenant deed of warranty, assumes to convey unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee, which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process. The rule has been reasserted and approved in subsequent cases. *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405; *McLennan v. Prentice*, 77 Wis. 124, 45 N. W. 943. We do not see how the rule would be different if the grantor conveyed lands to which he had no title, if they were in the possession of the actual owner. A cause of action arose as soon as the deed was delivered, and was not assigned or transmitted to subsequent grantees by a mere conveyance of the land. We therefore hold that where the record shows that the grantor had no title and no possession, and there is no proof that the grantee took possession, the covenants of the grantor are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land. Whether, if the defendant's grantee entered into the immediate possession of the land after delivery of the deed, that fact would be sufficient to carry the covenants, is a matter of some doubt. There are respectable authorities upon both sides of the question, but, it not being fairly in this case, we leave it for future consideration.

3. The proof regarding eviction by paramount title is as follows: Mrs. Patchin commenced an action against Poppe, claiming a paramount right to the disputed tract. No notice of this suit was given defendant until long after judgment had been rendered. Poppe then brought suit against plaintiff on the covenants of his deed. Notice of this suit, with a demand to defend, was served upon defendant forty-two days after its commencement, which the court finds was "before the time for answering had expired." This finding is excepted to, and there is no evidence in the record to support it, except

the inference arising from the fact that plaintiff's answer in that action was verified after the date of the service of notice upon defendant. This evidence is of doubtful value in respect to the question whether the notice was timely or not. But this is not a matter of importance in this case. It is conceded that defendant had no notice of the Patchin judgment until after its rendition. Certainly he was not bound by it. If otherwise entitled to recover, notice to defendant of the former action was not necessary to plaintiff's right to recover in this action. Rawle, Covenants for Title, § 124. Where, however, it is sought to bind a covenantor by notice, as said in *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191, it must be from the covenantee, in time to answer and defend, and perhaps accompanied by a request to defend. See *Eaton v. Lyman*, 26 Wis. 61, 33 Wis. 34; *Saweland v. Green*, 36 Wis. 612. The complaint in *Poppe v. Wallace, Jr.*, alleged that the latter had due notice of the Patchin suit, and was tendered its defense, and such allegation is found to be true in the findings. Hence, if defendant had appeared in that suit, he would have been met by proof of a judgment of paramount title, final and conclusive against the plaintiff. Of this judgment defendant had no notice, and he was not bound by it. In this case the only evidence of paramount title and eviction was the two judgment rolls in the cases before mentioned. As bearing upon the probative force of the Patchin judgment as against defendant, we quote the following from 2 Devlin, Deeds, § 937: "There has been some discussion, resulting in a variance of opinion, as to what effect a judgment possesses, when the covenantor has not been notified of the suit, and was not requested to defend. Of course, such a judgment cannot bind the covenantor. . . . It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was prima facie evidence of the existence of a paramount title. But the more reasonable rule, and the one sustained by authority, is that the judgment, where no notice has been given and the covenantor is not a party to the suit, is not even prima facie evidence that the eviction was founded upon an adverse and paramount title." The number of cases cited to sustain the author's conclusion would seem to indicate that it was very well grounded. At most, the judgment in the *Poppe Case* would only be binding upon defendant as to the amount of the recovery, and of that there may be some doubt. Adopting the rule that the Patchin judgment was not prima facie evidence against the defendant of the existence of a paramount title, or of eviction thereby, we find nothing in the record to support the judgment. The rule is well stated in Rawle, Covenants for Title, 4th ed. p. 150, thus: "And in all cases it must be borne in mind that, if the purchaser choose to retire before the paramount title, it is at his own risk; and in the suit against his covenantor he must assume the burden of proof, and make out the adverse title to which he has yielded with as much particu-

larity as if he were suing in ejectment, unless, of course, the adverse right of possession has been established by a judgment or decree in a suit of which the covenantor had been properly notified, in which case the burden of proof will not only be removed, but the judgment or decree will be conclusive evidence of the validity of the paramount title." So, upon all the grounds mentioned, the right of plaintiff to recover is defeated. It is but proper to say that the second and third questions herein considered do not appear to have been urged before the trial court.

*The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to enter judgment for defendant.*

On April 30, 1901, the mandate was modified so as to read as follows: The judgment is reversed, the cause is remanded with direction to enter judgment for defendant, unless the trial court, upon notice and application, in its discretion and upon such terms as may be just, grants a new trial of the action.

John P. OLSON, *Respt.*,

v.

SAWYER GOODMAN COMPANY, *Appt.*

(.....Wis.....)

An agreement between an employer and his employees that winnings of the employees at card games played with each other shall be debited and credited on the respective accounts due the employees is invalid as against public policy and the statutes forbidding gambling, so that the employer cannot refuse to pay wages earned, on the ground that the amount has already been paid to another employee to whom it has been credited because of his winnings from claimant.

(April 9, 1901.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Marinette County in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Affirmed.*

Statement by **Bardeen, J.:**

The plaintiff sues to recover \$166 for services performed in one of defendant's lumber camps. The answer admitted the performance of the labor, alleged an accounting which showed the balance due plaintiff to be \$84.52, the issuing of a time check in payment of that amount, and the subsequent payment of \$3.35. There was a tender of judgment for \$81.87. The case was tried in

**NOTE.**—For authorities in this series as to right to recover on gambling contracts generally, see *Sprague v. Warren* (Neb.) 3 L. R. A. 679, and *note*; *Harvey v. Merrill* (Mass.) 5 L. R. A. 200; *Snoddy v. American Nat. Bank* (Tenn.) 7 L. R. A. 705; *Jackson v. City Nat. Bank* (Ind.) 9 L. R. A. 657; and *White v. Wilson* (Ky.) 37 L. R. A. 197.

As to recovery for goods sold to aid gambling, see *note* to *Graves v. Johnson* (Mass.) 16 L. R. A. 836.

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justice court, and taken to the circuit court on plaintiff's appeal. A jury was waived, and the case was tried by the court. On May 17, 1898, the court filed a written decision in favor of plaintiff. The defendant requested certain findings which were refused. Exception was filed to the court's decision and to the refusal of the court to find as requested. A judgment was directed for plaintiff for the sum of \$136.67 and costs, which was duly entered, and from which this appeal is taken by defendant.

**Messrs. Quinlan & Daily**, for appellant:

In the absence of special statutory provision, one who lends money to become the absolute property of the borrower, at his own disposal, to be repaid by the borrower, can enforce such repayment even though such lender knows that such borrower intends to make use of the borrowed property in gambling.

14 Am. & Eng. Enc. Law, 2d ed. p. 641; *White v. Yarbrough*, 16 Ala. 109; *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. 22; *Longnecker v. Shields*, 1 Colo. App. 264, 28 Pac. 659; *Jackson v. City Nat. Bank*, 125 Ind. 347, 9 L. R. A. 657, 25 N. E. 430; *Plank v. Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; *Osgood v. Wespelling*, 72 Mo. App. 45; *Scott v. Duffy*, 14 Pa. 18; *Waugh v. Beck*, 114 Pa. 422, 60 Am. Rep. 354; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569.

Where the loss is already incurred, any person other than the winner, who advances money or other property to the loser to enable him to pay the loss, may recover such advance in the absence of a special statute.

14 Am. & Eng. Enc. Law, 2d ed. p. 642; *Faikney v. Reynous*, 4 Burr. 2069; *Ex parte Pyke*, 38 L. R. 8 Ch. Div. 754, 47 L. J. Bankr. 100, 38 L. T. N. S. 923, 26 Week. Rep. 806, 25 Moak, Eng. Rep. 647; *Hill v. Fox*, 4 Hurlst. & N. 359, 5 Jur. N. S. 964, 7 Week. Rep. 263; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450; *English v. Young*, 10 B. Mon. 41; *White v. Wilson* (Ky.) 37 S. W. 677; *Wyman v. Fiske*, 3 Allen, 238, 80 Am. Dec. 66; *Ballard v. Green*, 118 N. C. 390, 24 S. E. 777; *Owen v. Davis*, 1 Bail. L. 315; *Mooring v. Stanton*, 1 N. C. (Martin, pt. 1) 52; *Jones v. Sevier*, 1 Litt. (Ky.) 51, 13 Am. Dec. 218.

If goods staked are to be purchased from some party outside of the gambling contract, to be paid for by the loser and to be owned and enjoyed by the winner, and the loser, after the game, instructs the party from whom the goods are to be purchased to deliver the same to the winner, or assents to their being delivered to the winner, then the party furnishing the goods may recover for the amount of goods furnished.

*White v. Yarbrough*, 16 Ala. 109; *David v. Ransom*, 1 G. Greene, 383.

The principal may, in general, recover his own property or its value from a third person where it has been transferred or disposed of by an agent contrary to his instructions or duty.

1 Am. & Eng. Enc. Law, 2d ed. p. 1172; *Warner v. Martin*, 11 How. 224, 13 L. ed. 673; *Hill v. Coolidge*, 33 Ark. 626; *Thatcher v. Kaucher*, 2 Colo. 698; *Bertholf v. Quinlan*, 68 Ill. 297; *Holton v. Smith*, 7 N. H. 446; *Purnham v. Holt*, 14 N. H. 367; *Nixon v. Brown*, 57 N. H. 34; *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 58 N. Y. 73, 17 Am. Rep. 208; *Western Transp. Co. v. Marshall*, 37 Barb. 509; *Meiggs v. Meiggs*, 15 Hun. 453; *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541; *Edwards v. Dooley*, 120 N. Y. 540, 24 N. E. 827; *MoMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601.

Where an agent as a party to a gambling transaction loses his principal's money therein, the principal, in those jurisdictions permitting money lost on a wager to be recovered by the loser from the winner, may recover from the latter the amount so lost.

1 Am. & Eng. Enc. Law, p. 1177; *Mason v. Waite*, 17 Mass. 560; *Cassidiere v. Beers*, 2 Keyes, 198; *Allen v. Watson*, 2 Hill L. 319.

The fact of the liability of the agent to the principal for his wrongful act is no defense to the principal's action against the third party.

*Bertholf v. Quinlan*, 68 Ill. 297.

*Mr. James H. McGillan*, for respondent:

Brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them, cannot recover it.

*Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 22 N. E. 49.

When one is privy to the unlawful designs of the parties, and brings them together, and furthers their unlawful purpose, he is *particeps criminis*, and cannot recover for services rendered or losses incurred on behalf of either in forwarding the transaction.

*Irwin v. William*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203.

A counterclaim cannot be sustained to recover money which the defendant alleges in his pleadings to have been advanced by him and used with his concurrence to carry on a gambling transaction.

*Higgins v. McCrca*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557.

Whenever the elements of a wagering contract are found to enter into a transaction, it is condemned as illegal.

*Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

Money knowingly lent to be staked on the event of a horse race cannot be recovered back.

*Ruckman v. Bryan*, 3 Denio, 340; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132.

*Bardeen, J.*, delivered the opinion of the court:

It is admitted that the plaintiff worked one hundred and sixty-six days for the defendant at \$1 per day. It is also admitted 53 L. R. A.

by plaintiff that during that time he personally received goods and supplies from the company amounting to \$12.53, and that the defendant paid his railroad fare home, and for other expenses amounting to \$3.35. The defendant claims to be entitled to an additional credit of \$65.40, arising out of the following circumstances: The defendant kept a supply department in its camp, under the charge of one Riley, who was also defendant's timekeeper and bookkeeper. A number of the men amused themselves playing poker. A banker kept account of the game, and at the end of each game he would report who had lost and won, and the amount. There was no money in the camp with which these balances could be liquidated, so it was agreed between the players that the debts should be paid from the camp store; that is, the winner could go to the store and get goods to the amount he had won, and have it charged to the loser. Instead of drawing goods at the end of each game and squaring accounts, the banker, in the presence of each player, would report the debts and credits to Riley, who kept a private memorandum thereof. If at any time a party who had credit on this account wanted anything, Riley would give it to him from the company's goods, and charge it to some person against whom there was a debt; and, if the amount drawn was greater than the debt against any one loser, it would be distributed among several, and would then be entered on the company's books as goods obtained by the several losers. This arrangement was made between the men and Riley before the games commenced in the fall, and was also known to the foreman of the camp. During the winter there was charged against plaintiff on store account \$81.38. Of this amount, \$12.53 was taken by plaintiff for his personal use, and \$7.40 was delivered to winners on the personal order of plaintiff. The remainder was for goods turned over to the various winners pursuant to the original agreement at various times during the winter, and without any express direction from plaintiff. Riley was one of the gamblers, and, as agent for the defendant, assented to the arrangements before stated. The effect of this agreement was that defendant, by Riley, stood as banker for each man to the amount of wages earned, and agreed to turn the same over, or such portion as was lost, to the winners at the games. This was to be done pursuant to the arrangement made between the men and Riley before the games were commenced. The trial court held that this agreement was illegal and void, as being promotive of gambling, and gave no authority to Riley to deliver goods to winners and charge them to the loser; that, when the men were present and got the goods themselves, they were properly chargeable to them, regardless of what they did with them. Upon this theory the plaintiff was held chargeable with the goods to the amount of \$7.40, which were turned over to winners in his presence and under his direction. The decision of the trial court seems to have been founded upon a correct appre-

ciation of our statutes condemning gambling, and all agreements and transactions based thereon or growing out of the same. These statutes are sufficiently referred to and discussed by the present Chief Justice in the opinion written in *Stoddard v. Burt*, 75 Wis. 107, 43 N. W. 737. Note also *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055. The whole scheme was illegal, void, and contrary to the statutes and to public policy as well. The plan of operations was known to defendant's foreman, and carried on with his knowledge and acquiescence. Except for the agreement as to delivery of goods and the plan of shifting credits, it is not at all likely that the games would have been continued. We are entirely satisfied with the conclusion of the trial court, and must therefore affirm the judgment. The court found that plaintiff's wages amounted to \$166, and that his total debts were \$23.33, and directed judgment for \$136.67,—a mistake of \$6 against plaintiff. Judgment was entered as directed, and the mistake, not being prejudicial to defendant, affords no ground for complaint on its part.

*The judgment is affirmed.*

Anna BAUM, *Respt.*,  
v.  
Simon H. BAUM *et al.*, *Appts.*

(.....Wis.....)

An oral agreement between husband and wife to separate and live apart, upon consideration that he supports her and the children and absolutely assigns to her insurance policies on his life, is void as against public policy, so that she cannot enforce the assignment of the policies.

(February 1, 1901.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to establish title to certain life insurance policies. *Reversed.*

Statement by Bardeen, J.:

A demurrer to the complaint on the ground that the plaintiff has no legal capacity to sue, and that it does not state facts sufficient to constitute a cause of action, was overruled. The complaint is quite lengthy, and contains very much irrelevant and redundant matter. Excluding the rubbish, the alleged cause of action may be briefly stated as follows: Plaintiff and defendant are husband and wife, and have three children under age. For more than two years

NOTE.—As to validity of separation agreements between husband and wife, see earlier cases in this series as follows: *Winn v. Sanford* (Mass.) 1 L. R. A. 512, and note; *Clark v. Foodick* (N. Y.) 6 L. R. A. 132, and note; *Galusha v. Galusha* (N. Y.) 6 L. R. A. 487, and note; *Blank v. Nohl* (Mo.) 18 L. R. A. 350; and *Henderson v. Henderson* (Or.) 48 L. R. A. 766.

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prior to September, 1897, defendant treated the plaintiff in a cruel and inhuman manner, and neglected to provide for his family, and plaintiff had determined to begin an action for divorce. About the 1st of September, 1897, the plaintiff and defendant agreed to live separate and apart, and the defendant thereupon agreed to contribute sufficient money to support his family, and to make an absolute and unconditional assignment to plaintiff of two policies of insurance on his life in the Northwestern Mutual Life Insurance Company, which policies were clear of all claims except a loan of \$835 from the company to the defendant. Defendant also agreed to pay the premiums on said policies and keep them in force. Relying upon said agreements, plaintiff refrained from commencing an action for divorce. The policies of insurance were held by the company as security. About October, 1897, the plaintiff was informed by defendant and by an agent of the company that assignments had been executed. Defendant failed to contribute money to support his family and pay the premiums on said policies. Plaintiff fearing that defendant would not pay the interest on his loan, and supposing that the assignment to her of said policies was absolute, in February, 1899, raised the money and paid the loan to the company, then amounting to \$1,029.93. The policies and assignments were delivered to her, and then she learned that defendant had reserved the power to make choice of any tontine options granted under the conditions of said policies, and personally to receive the benefits therefrom, without the consent of the assignee; and, in case of the latter's death before said policies became due, the proceeds were to become payable to defendant's representatives or assigns. Upon receiving this information she notified the company of the interest she claimed in the policies under her agreement with her husband. Thereafter she demanded of the defendant that he carry out his said agreement and make an absolute and unconditional assignment of said policies, which he has refused to do. She paid premiums on said policies amounting to \$78.90. She brings this action against her husband and the insurance company, and asks that said assignments be adjudged to be absolute and to vest the beneficial interest in said policies in her, and that the company be required to pay her all sums due or to become due to her. The defendants have appealed.

*Messrs. Turner, Pease, & Turner*, for appellants:

Voluntary agreements for separation between husband and wife are void.

*Evans v. Evans*, 93 Ky. 510, 20 S. W. 605; *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84; *Morgan v. Potter*, 17 Hun, 403; *Goodwin v. Goodwin*, 4 Day, 343; *Pillow v. Wade*, 31 Ark. 678; *Van Order v. Van Order*, 8 Hun, 315; *Kelley v. Case*, 18 Hun, 472; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Gilbert v. Gilbert*, 5 Misc. 555, 26 N. Y. Supp. 30;



*Switzer v. Switzer*, 26 Gratt. 574; *Oollins v. Collins*, 62 N. C. (Phill. Eq.) 153, 93 Am. Dec. 606; *Beach v. Beach*, 2 Hill, 260, 38 Am. Dec. 584; *Buttlar v. Buttlar*, 57 N. J. Eq. 645, 38 Atl. 300, 42 Atl. 755; *Miller v. Miller*, 1 N. J. Eq. 391; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926; *Rolette v. Rolette*, 1 Pinney (Wis.) 370, 40 Am. Dec. 782.

A contract between husband and wife pending divorce proceedings is void.

*Speck v. Dausman*, 7 Mo. App. 165; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Belden v. Munger*, 5 Minn. 211, Gil. 129, 80 Am. Dec. 407; *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345.

A mutual agreement between husband and wife as to their property, by which each releases everything to the other, is void.

*Leach v. Leach*, 65 Wis. 284, 26 N. W. 754; *Wilber v. Wilber*, 52 Wis. 298, 9 N. W. 163; *Le Saulnier v. Krueger*, 85 Wis. 214, 54 N. W. 774; *Munger v. Perkins*, 62 Wis. 504, 22 N. W. 511; *Elmendorf v. Lockwood*, 57 N. Y. 322; *Morton v. Noble*, 57 Ill. 176, 11 Am. Rep. 7; *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473.

Marriage is more than a mere civil contract; it is a matter of state concern; and, when the relation is created, it cannot be dissolved by agreement of parties.

*Beach*, Modern Law of Contracts, 1544; *Whitney v. Whitney*, 15 Misc. 72, 36 N. Y. Supp. 891; *Hungerford v. Hungerford*, 16 App. Div. 614, 44 N. Y. Supp. 975; *Poillon v. Poillon*, 29 Misc. 666, 61 N. Y. Supp. 582; *Simpson v. Simpson*, 4 Dana, 140; *Stokes v. Anderson*, 118 Ind. 533, 4 L. R. A. 313, 21 N. E. 331; *Everhart v. Puckett*, 73 Ind. 409; *Henderson v. Henderson*, 37 Or. 141, 48 L. R. A. 766, 60 Pac. 597, 61 Pac. 136; *Friedman v. Bierman*, 43 Hun, 387.

Nothing in our statutes will permit a husband and wife to make a valid contract of separation, unless such a contract contains certain elements which are entirely lacking in the case at bar.

*Helm v. Franciscus*, 2 Bland, Ch. 544, 20 Am. Dec. 402; *Switzer v. Switzer*, 26 Gratt. 574; *Jenne v. Marble*, 37 Mich. 319; *Poillon v. Poillon*, 49 App. Div. 341, 63 N. Y. Supp. 301; *Wilson v. Wilson*, 1 H. L. Cas. 538.

There is a lack of consideration in that the contract (1) does not release the wife's inchoate right of dower and distribution; (2) there is no indemnity by either husband or wife to release each other from any obligation.

*Switzer v. Switzer*, 26 Gratt. 574; *Parham v. Parham*, 6 Humph. 296; *Dillinger's Appeal*, 35 Pa. 361; *Cropsey v. McKinney*, 30 Barb. 47; *Poillon v. Poillon*, 29 Misc. 666, 61 N. Y. Supp. 582; *Greenleaf v. Blake-man*, 25 Misc. 564, 56 N. Y. Supp. 76; *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 367; *Bowers v. Hutchinson*, 67 Ark. 15, 53 S. W. 399; *Foster v. Foster*, 5 Hun, 557; *Mahon v. Smith*, 60 How. Pr. 385; *M'Ken-nan v. Phillips*, 6 Whart. 571, 37 Am. Dec. 438; *Marlow v. Marlow*, 77 Ill. 633; *Reed* 53 L. R. A.

*v. Gannon*, 3 Daly, 416; *Walker v. Walker*, 9 Wall. 743, *sub nom. Walker v. Beal*, 19 L. ed. 814; *Fow v. Davis*, 113 Mass. 255, 18 Am. Rep. 476; *Griffin v. Banks*, 37 N. Y. 621; *Carson v. Murray*, 3 Paige, 483; *Heyer v. Burger*, Hoffm. Ch. 1.

Courts of equity will not enforce mere voluntary agreements unsupported by any consideration, either in favor of the wife against the husband, or in his favor against the wife.

*Reade v. Livingston*, 3 Johns. Ch. 481. 8 Am. Dec. 520; 2 Story, Eq. 986-1337; *Houghton v. Milburn*, 54 Wis. 554, 11 N. W. 517, 12 N. W. 23; *Lippy v. Masonheim-mer*, 9 Md. 310; *Galusha v. Galusha*, 138 N. Y. 272, 33 N. E. 1062; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Head v. Head*, 3 Atk. 547; *Seeling v. Crawley*, 2 Vern. 386; *Angier v. Angier*, Gilb. Eq. Rep. 152; *Worrall v. Jacob*, 3 Meriv. 268; *Stephens v. Olive*, 2 Bro. Ch. 90; *Hobbs v. Hull*, 1 Cox, Ch. Cas. 445; *More v. Freeman*, Bunbury, 205; *Bate-man v. Ross*, 1 Dow, P. C. 235; *Ros v. Wil-loughby*, 10 Price, 2; *Nunn v. Wilsmore*, 8 T. R. 521; *Elworthy v. Bird*, 2 Sim. & Stu. 372; *Logan v. Birkett*, 1 Myl. & K. 220; *Clough v. Lambert*, 10 Sim. 174; *Wellesley v. Wellesley*, 10 Sim. 256; *Frampton v. Frampton*, 4 Beav. 287; *Jones v. Waite*, 9 Clark & F. 101.

The contract is void because the husband contracted to do something which in law he was bound to do.

*Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271; *Fuller v. Lambert*, 78 Me. 325, 5 Atl. 183; *Simpson v. Simpson*, 4 Dana, 140; *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 464, 42 N. W. 641; *Copeland v. Boaz*, 9 Baxt. 223, 40 Am. Rep. 89.

The contract before the court is not an agreement complete, an executed contract, but an executory contract, and will not be upheld by the courts.

*Whitney v. Whitney*, 15 Misc. 72, 36 N. Y. Supp. 891; *Poillon v. Poillon*, 29 Misc. 666, 61 N. Y. Supp. 582; *Rolette v. Rolette*, 1 Pinney (Wis.) 370, 40 Am. Dec. 782; *Houghton v. Milburn*, 54 Wis. 554, 11 N. W. 517, 12 N. W. 23; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Hughes v. Cumming*, 36 App. Div. 302, 55 N. Y. Supp. 256; *Hungerford v. Hungerford*, 16 App. Div. 612, 44 N. Y. Supp. 973; 1 Bishop, Marr. & Div. 619, §§ 635-637; *Tallinger v. Mandeville*, 48 Hun, 152, Affirmed in 113 N. Y. 427, 21 N. E. 125; *Gilbert v. Gilbert*, 5 Misc. 555, 26 N. Y. Supp. 30; *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500; *Galusha v. Galusha*, 116 N. Y. 635, 6 L. R. A. 487, 22 N. E. 1114; *Hend-erson v. Henderson*, 37 Or. 141, 48 L. R. A. 766, 60 Pac. 597, 61 Pac. 136; *Roll v. Roll*, 51 Minn. 353, 53 N. W. 716.

This contract is void under § 2321, it be-ing an oral agreement, which should have been in writing.

*Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84; *Beach*, Modern Law of Contracts, 901.

Messrs. **Bloodgood, Kemper, & Bloodgood** for respondent.

Bardeen, J., delivered the opinion of the court: used the following language: "The deed herein set forth is not a deed for the separation of the plaintiff and his wife, and which, as such, would have been obnoxious to many of the authorities cited by the counsel for the complainant, but is a deed for the separate maintenance of the wife, made and entered into many years after the separation had taken place." The ultimate conclusion was that deeds of this kind were allowable, and would be sustained by the court. This decision simply goes to the extent of holding that after a separation has taken place the court will uphold a written agreement of separation, and for the wife's support, when made through the intervention of a trustee.

Counsel for the respondent have relieved us of any doubt as to the ultimate purpose of this action. In their brief they say: "This is an action to reform a contract already made so that it will express the true meaning and intent of the parties, which, by mistake and inadvertence, it failed to do." The contract set out in the complaint is an oral one between wife and husband, to live separate and apart. The wife agrees to nothing beyond the mere fact of separation. As a part of said agreement, the husband agrees to contribute money for the support of his wife and children. This he was legally bound to do without any agreement. Another part of the husband's agreement was to make an absolute and unconditional assignment of certain insurance policies on his life. This, it appears, he has failed to do, and it is this part of the agreement which is sought to be enforced in this action. Although not distinctly so alleged, the plain inference is that the parties were then living together as man and wife. The question is fairly presented for the first time in this court whether, under the circumstances stated, an oral contract between husband and wife, without the intervention of a trustee, to separate and live apart, will be enforced. An attempt is made to separate the agreement to assign the insurance policies from the other branches of the contract; the theory being that because Rev. Stat. 1898, § 2347, permits a husband to assign a policy of insurance to his wife, the imperfect execution of such assignment may be enforced in a suit by the wife. This statute, however, has no application to the question. We must go back to the original contract. On the one side, the wife's only agreement is to separate and live apart from her husband. In consideration thereof the husband agrees to contribute to her support and the support of their children, and to assign the insurance policies by an absolute assignment. He fails to carry out this agreement. Will it be enforced? In opposition to its enforcement it is said that it is without consideration and is void as against public policy. No similar question has been decisively considered by this court. The nearest approach to it is the case of *Rolette v. Rolette*, 1 Pinney (Wis.) 370, 40 Am. Dec. 782, which was an action brought by the husband against his wife and the trustee mutually chosen, to set aside the deed of separation, and a bond and mortgage to secure it given by the husband to the trustee. The latter contained provisions requiring the husband to pay the wife an annuity quarterly. The husband claimed that the deed, bond, and mortgage were without any sufficient consideration, and were void as being contrary to the policy of the law in relation to marriage, and against the interest, order, and happiness of society. The complaint showed that the parties had been living apart for some time when the deed and other papers were executed. In discussing the situation the court

When we come to consider the literature on this subject and review the multitude of cases in which it has been considered, we are struck at once with the lack of harmony of opinion, and with the diversity of decisions. This may be accounted for in a measure by the want of uniformity in the laws regulating the marriage status. In England the unwritten law did not permit the courts to dissolve a marriage or separate the parties on their consent, or by confession of one of them. An act of Parliament carefully pointed out for what causes separations might judicially be permitted. Yet, by what Mr. Bishop terms as "one of the most marvelous judicial somersaults ever witnessed in any country," the English courts now permit the parties to mutually agree to a separation either identical with or differing from the judicial one, as they may prefer, proceeding on a cause which the law allows or forbids, or on no cause, and will enforce specific performance. 1 Bishop, *Marr. & Div.* §§ 1263, 1264. The binding nature of this sort of bargain seems to have been placed upon the ground that the law gave the wife the power to bring, to defend, and to settle divorce suits, and therefore she can make an agreement whereby such a suit is avoided. This seems to be in utter defiance of the law which has existed from the earliest times, forbidding the courts from upholding or sanctioning separation, *in pais* or in court, except upon proof of grounds legally defined and declared sufficient. This change of law is justified upon the ground that public opinion had changed as to the question of public policy involved, and which was by the judges considered a sufficient justification for them to change the law. *Beant v. Wood*, L. R. 12 Ch. Div. 605-620. In this country such a complete overturning of settled rules can never be justified, except in obedience to legislative enactment. Our ideas of "public policy" are such as may be gathered from the Constitution and the laws, and the course of administration and decision. When the will of the people has become crystallized into legislative enactment, and a given subject has been surrounded by regulations, limitations, and restrictions, the courts are bound to consider them as indicating a definite policy, and to yield obedience thereto. In the practical administration of justice the

expressed will of the people overrides and controls the individual opinions of judges, and finds expression in decisions in harmony therewith. Any other course would be revolutionary and in opposition to the spirit of our form of government. In the different states the laws regulating the marriage status are so diverse that, before giving credit or weight to a judicial decision thereunder, it becomes quite essential to ascertain the legislative policy which finds expression in the laws enacted. Hence the citation of decisions from another state is of no helpful value unless it can be said that its legal policy is in harmony with our own. In England in former times, and in most of the states, as well as our own, the doctrine is recognized that there are always three parties to a marriage contract,—the husband, the wife, and the state. The reason is that the state has a special interest in each individual marriage, and permits its dissolution only in those circumstances and cases wherein it deems the public interest will not be thereby impaired. 1 Bishop, Marr. & Div. § 72. By reason of this special interest, stringent laws have been enacted, prescribing the terms and conditions upon which a marriage may be consummated, and regulating with equal strictness the means and grounds of its dissolution. Prima facie, therefore, each particular marriage is beneficial to the public, each divorce prejudicial. From this arises the rule of law that agreements promotive of marriage are valid, and those in aid of separation and divorce are void. There can never be a divorce by agreement or consent of parties. Without dissent, the courts unite in condemning all applications for a dissolution of a marriage where there is a suggestion of collusion. In harmony with the idea that circumstances might arise during cohabitation rendering it unfit or impossible for the parties to continue together in the close relation of man and wife, the legislature has seen fit to mention certain grounds upon which a separation from bed and board may be adjudged. With the wisdom of this legislation we are not concerned. We must accept it as the will of the people, and administer it according to its spirit and letter. The fact that such legislation is to be found on our statute books is a strong reason for saying that it was the legislative purpose that only such separation shall be recognized as has received judicial sanction. It being universally conceded that an absolute divorce will not be granted upon consent or agreement of the parties, there would seem to be equally as strong reason for holding that an agreement for separation, which is the equivalent of a limited divorce, should not be recognized. In other words, it is for the courts, and not the parties, to determine whether proper grounds for a separation exist or not. To uphold such agreements substitutes the will of the parties for the judgment of the judicial tribunal established by law to decide such questions. We need not turn to other states for precedents. The 53 L. R. A.

question turns upon the legal policy of this state, as evidenced by legislative enactments. An agreement for voluntary separation is distinctly against such policy, and for that reason must be held to be absolutely void. The agreement in question was oral, and but partially executed. The usual form of such bargains is by a deed between the husband, the wife, and a third person, acting as her trustee. 1 Bishop, Marr. & Div. § 1286. We need not inquire whether under our statute the intervention of a trustee is necessary or not. Admitting, as has been held in some jurisdictions (*Dutton v. Dutton*, 30 Ind. 452), that a parol agreement fully executed would be recognized in equity, still that rule does not apply here. This action is to enforce the specific performance of a portion of the original agreement,—an agreement having no consideration, so far as the husband is concerned, further than a present covenant on the part of the wife to separate. Such an agreement, we must hold, is contrary to the legal policy of this state, and will not be enforced. It implied a direct renunciation of stipulated duties,—a dereliction of those mutual offices which the parties are not at liberty to desert by agreement between themselves. It substituted the will of the parties for the judgment of the court, and involved the assumption of a false character in both parties, contrary to the marriage contract and subversive of the interests of society. The reason given by the chancellor in *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84, meets our approval, when applied to the case before us. When an agreement has been made after separation in such a way that it may be enforced, as in the *Rolette Case*, the law tolerates it, but will not regard it with favor.

The assertion that this is a suit regarding the separate property of the wife cannot be recognized. It affirmatively appears in the complaint that she had no property, but was dependent upon her own exertions and the help of relations. It is to make these insurance policies a part of her separate property that this suit is brought. To do so she must revert to the original contract, which, as we have seen, has no binding force.

*The order of the Circuit Court is reversed, and the cause is remanded, with directions to sustain the demurrer, and for further proceedings according to law:*

Frank J. ALBRECHT, *Respt.*,  
v.

CHICAGO & NORTHWESTERN RAIL-  
WAY COMPANY, *Appt.*

(108 Wis. 530.)

**A locomotive fireman who, after com-**

NOTE.—As to rights of servant who continues work on faith of master's promise to remove a specific cause of danger, see *Illinois Steel Co. v. Mann* (Ill.) 40 L. R. A. 781, and note.

plaining of the absence of a shield on the glass indicating the oil supply for the cylinder, the presence of which is necessary for his safety, and receiving the engineer's promise to fix it, leaves the terminal station where the shield can be procured, and proceeds on a trip, knowing that the promise has not been and cannot be fulfilled until the return, assumes the risk of injury from its absence.

(January 8, 1901.)

**A**PPEAL by defendant from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

Statement by **Marshall, J.:**

Action for personal injuries. The wrong complained of was negligence of the defendant in failing to furnish plaintiff a reasonably safe place to work. Plaintiff was a locomotive fireman. The defect in his working place was absence of a metallic shield commonly placed in front of the indicator glass on the appliance for supplying the steam cylinders of the engine with oil. The appliance was located conspicuously in the engine cab so that the occupants thereof could see by observation, at any time when the indicator glass was exposed to view, whether it was supplied with oil and whether oil was regularly and properly flowing from the magazine to the steam cylinders. The mechanism of the appliance, the connections between it and the steam boiler, its location and operation, so far as relates to this case, were substantially as follows: There was a cylinder about 5 inches in diameter and 6 inches high, on top of which was a small expansion chamber about 11 inches high, with a connection between the two. In the bottom of the cylinder was a connection about 2 inches in length furnished with a stopcock, so that when the device, by means of such connection, was attached to the boiler, steam could be made to pass through such connection to the cylinder or not, it being governed by the stopcock. The passage of steam into the cylinder was necessary to the operation of the device. The steam created a pressure there-in equal to the pressure in the boiler. In front of the cylinder near the top was an aperture for charging such cylinder with oil, the aperture being closed by a plug. At the sides of the cylinder were two glass tubes, each about  $\frac{1}{2}$  inch in diameter and  $1\frac{1}{2}$  inches long, connected with the cylinder substantially in the manner water indicator glasses are connected with a steam boiler. Such glass tubes were protected from being broken by force from without, and in case of their being broken by force from within, the flying of glass and other substances imperiling the personal safety of the occupants of the cab was prevented, by shields, completely encircling them, consisting of metallic strips about  $\frac{1}{4}$  of an

inch wide, placed about  $\frac{1}{4}$  of an inch apart and  $\frac{1}{2}$  inch from the glass. When the device was in operation oil passed from the cylinder or oil magazine through the side indicator glasses in drops in reaching the steam cylinders. By observing the side glasses one could readily see whether the device was operating properly. In front of the oil magazine was located a glass tube about 4 inches long and  $\frac{1}{2}$  inch in diameter, attached to and connected with the cylinder in the same manner as a steam boiler indicator glass, its purpose being to enable an observer to see whether the cylinder was supplied with oil and the amount thereof, as before stated. There was commonly placed in front of the glass a metallic plate held in place by slots into which the ends were inserted, the plate being bent so that when in position with the concave side towards the glass it would pass in front thereof about one-half way around on each side and be about  $\frac{1}{2}$  of an inch from the glass. The purpose of the shield was to protect the glass from force from without, and, in case of its bursting from any cause, to prevent pieces thereof or other substances thereby released from imperiling the personal safety of the occupants of the cab. There was no way of observing the glass, to determine whether the device was supplied with oil, without removing the shield by the hand. A simple movement only was necessary for that purpose. It required but an instant to remove the shield and replace it after taking an observation. The entire length of the device was about 14 inches. It was attached to the boiler at the top and just in front of the cylinder head, the point of attachment being about 1 foot above the head of a person of plaintiff's height as he stood upright on the cab floor.

On the occasion of plaintiff's injury there was no shield on the large indicator glass. The glass was well recognized as a part liable to break at any time, and liable to stand use for a long period of time without breaking, though the probability of its breaking with dangerous consequences to the occupants of the cab in case of a shield not being in place was such that such a protection was recognized as required by reasonable prudence. Plaintiff was fully acquainted with the dangers mentioned. His knowledge in that regard was exceptionally great. He had had some eight years' experience as fireman before receiving his injury, during which time he had known of several explosions of lubricator glasses, on one of which occasions he received a personal injury. The stock of shields to draw from in case of need was usually kept in the storeroom at the roundhouse, and the only way the engineer had of getting one was by a written requisition. The course of business in handling a locomotive was for the engineer in charge to turn it over to the roundhouse foreman at the end of his trip with a report of its condition, and for such foreman to turn it over to the en-

gineer next in order to take it out in proper condition for service. On the occasion material to this case the locomotive was taken out with plaintiff as the fireman. There was no shield on the indicator glass, and had not been for several days. He knew about 5 o'clock in the afternoon that he was going on the trip, and the locomotive to be used, being informed thereof by the roundhouse foreman. He had never before made a trip on that particular engine. He saw it at the time of receiving notice from the roundhouse foreman as aforesaid, and performed some duties in and around the same in respect to putting it in order for the trip, such as filling the lamps and looking after the supply of oil. About 7:15 p. m. he boarded the engine and found the engineer there. He filled the pump lubricator and did his duties in respect to making ready for the trip. About 8 o'clock, as the engine was backed out of the roundhouse, plaintiff observed that the front indicator shield, before mentioned, was not in place, and informed the engineer of that fact. Immediately thereafter the plaintiff looked in his seat box to find a shield, and failing in that he remarked to the engineer, "You must get a shield for this lubricator," to which the engineer replied, "All right, I will get one." By reason of some delay in the railway service the engine did not proceed on its trip till about two hours after the conversation related occurred, during which time plaintiff was in and out of the cab and performed his duties in keeping up the fire and keeping the engine ready to start as soon as orders were received to do so. The engineer, in the meantime, was out of the cab some, his whereabouts not being all of the time known to plaintiff. The engine during all of the time was located a considerable distance from the roundhouse, and the engineer had little opportunity to obtain a shield without his movements in that regard being brought to plaintiff's attention. Plaintiff testified that after the conversation with the engineer he paid no further attention to whether the promise to obtain a shield was kept or whether there was a shield on the indicator glass. There was evidence to the effect that the engineer had no authority to hire or discharge his fireman. There was no evidence as to the duty being intrusted to the engineer to see that the shield was kept on the lubricator glass. Plaintiff had proceeded on his trip about 50 miles, and arrived at Kewaskum station before the injury occurred. At such station, while waiting for a train to pass, about 1 o'clock a. m., plaintiff was standing beside his seat box eating his lunch, when the lubricator glass burst and flying pieces of glass struck him in the face causing him to involuntarily move backward and fall out of the cab to the ground, striking on his back, thereby receiving severe injuries. Plaintiff admitted on the trial that he had previously testified under oath that he knew all the time the condition of the lubricator, and that such testimony was true. There was

also evidence tending to establish or establishing what has been related, and there was other evidence upon which it was claimed by plaintiff's counsel that the failure to have the shield on the lubricator glass rendered plaintiff's position in the cab unreasonably dangerous; that he submitted to such danger relying on the promise of the engineer, made at the time the engine left the roundhouse, to supply a shield for the glass; and that up to the time of the accident he was ignorant of the engineer's failure to keep such promise.

At the close of the evidence counsel moved the court for the direction of a verdict, which motion was denied. The case was then, under instructions from the court, submitted to the jury for a special verdict, with substantially the following result:

(1) Plaintiff was injured by an explosion of the lubricator on defendant's engine December 24, 1897.

(2) The glass was not protected by a shield at the time of the accident.

(3) The defendant was guilty of a want of ordinary care in omitting to have the shield in place.

(4) When plaintiff left the roundhouse he informed the engineer of the absence of the shield.

(5) Thereupon the engineer promised to procure a shield.

(6) Such promise was not performed.

(7) Plaintiff did not know when he started on his trip that no shield had been placed on the lubricator.

(8) He continued his work relying on the engineer's promise.

(9) His continuance, relying upon the engineer's promise, was not for a longer time than an ordinarily prudent person would expect the engineer would need to keep his promise in.

(10) The danger to be apprehended from the absence of the shield was not so obvious, great, immediate, and constant that a person of ordinary care, under the circumstances, would not have subjected himself to it.

(11) A person of ordinary care, possessing the knowledge of plaintiff of the danger to be apprehended from an unprotected lubricator glass, would have remained on the engine under the circumstances.

(12) Plaintiff's liver was displaced as a natural and direct result of the accident.

(13) Plaintiff is suffering from a spinal-cord injury as a direct result of the accident.

(14) The absence of a shield upon the lubricator glass was the proximate cause of plaintiff's injury.

(15) Plaintiff's damages are measured by \$8,000.

Judgment was rendered in plaintiff's favor in accordance with the verdict, exceptions being saved to rulings on evidence and other rulings upon which the errors assigned on this appeal and discussed in the opinion are based.

**Mr. Edward M. Hyser**, for appellant:

The class of cases to which liability attaches upon failure to fulfil a promise to repair defects seems to be those in which the servant through inexperience is not fully aware of the danger, or its imminence or extent, and is therefore justified in relying upon the promise of the master.

The class to which liability does not attach seems to be made up of those cases where the servant, with ample experience, knowledge of the machinery, full knowledge of the danger, the extent of it, and the imminence of it, continues to operate the dangerous machinery, expecting to so operate it for some length of time, after a promise of the master to repair.

The case at bar falls within the second class here alluded to.

*Showalter v. Fairbanks, M. & Co.* 88 Wis. 376, 60 N. W. 257; *Marsh v. Chickering*, 101 N. Y. 396; *Corcoran v. Milwaukee Gas-light Co.* 81 Wis. 191, 51 N. E. 328; *Borden v. Daisy Roller Mill Co.* 98 Wis. 407, 74 N. W. 91; *Hazen v. West Superior Lumber Co.* 91 Wis. 203, 64 N. W. 857; *Erdman v. Illinois Steel Co.* 95 Wis. 6, 69 N. W. 903; *Schultz v. C. C. Thompson Lumber Co.* 91 Wis. 626, 65 N. W. 498; *Dougherty v. West Superior Iron & Steel Co.* 88 Wis. 343, 60 N. W. 274; *Holt v. Chicago, M. & St. P. R. Co.* 94 Wis. 596, 69 N. W. 352.

The promise of the engineer was not the promise of the company.

To hold that a servant to whom is assigned no duty which the master owes to a co-servant may make a promise to perform a duty which the master owes to that co-servant, and to make such promise the basis of liability, would result in complete confusion.

*Ehmcke v. Porter*, 45 Minn. 338, 47 N. W. 1066; *Brabbitts v. Chicago & N. W. R. Co.* 38 Wis. 289; *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 226, 11 N. W. 529; *Dwyer v. American Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Cadden v. American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800; *Hartford v. Northern P. R. Co.* 91 Wis. 374, 64 N. W. 1033; *Klochinski v. Shores Lumber Co.* 93 Wis. 417, 67 N. W. 934.

The plaintiff in this case and the engineer under whom he was working at the time of his injury were fellow servants.

**Messrs. Fish, Cary, Upham, & Black** also for appellant.

**Messrs. Quarles, Spence, & Quarles**, for respondent:

Assumption of risk is a branch of contributory negligence, and is governed by the principles applicable to that subject.

*Darcey v. Farmers' Lumber Co.* 87 Wis. 245, 58 N. W. 382.

In view of the fact that the engine had started on her trip out of the round house before the discovery of the defect, and in view of the immediate pressing duties then required of the fireman to prepare the engine for her trip, it would be a question of fact whether plaintiff was guilty of negli-

gence in remaining at his post, even though he made no protest.

*Mason & O. R. Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265.

Whether plaintiff was justified in relying on the promise to repair is ordinarily a question of fact for the jury.

*Hough v. Texas & P. R. Co.* 100 U. S. 225, 25 L. ed. 617; *Ferriss v. Berlin Mach. Works*, 90 Wis. 541, 63 N. W. 234; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *New Jersey & N. Y. R. Co. v. Young*, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723.

A workman might in common prudence be required to leave a ditch or work of that kind to avoid a peril which, as a fireman on a locomotive, he ought to assume in view of the importance of the service and the gravity of the consequences of deserting his engine, and perhaps endangering lives and property.

*Thompson v. Hermann*, 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579.

It was a question for the jury to determine whether the defect was such that a man of ordinary prudence and intelligence would not have remained upon a locomotive as a fireman after knowledge of it. That the plaintiff knew of the defect in the appliance was not under the circumstances, and as a matter of law, absolutely conclusive of negligence on his part, even though there had been no assurance from the defendant that it should be repaired.

*New Jersey & N. Y. R. Co. v. Young*, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 724; *Lehigh Valley Coal Co. v. Warrek*, 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038; *Union Mfg. Co. v. Morrissey*, 40 Ohio St. 148, 43 Am. Rep. 669; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337; *Greene v. Minneapolis & St. L. R. Co.* 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378.

The promise of the engineer bound the company.

The defect that caused the injury was not in the nature of a repair. It was the absence of an appendage which the rules of the master required to be used.

If the engineer had the authority to cause a shield to be placed upon the lubricator, then his promise to the plaintiff to have this done must be given the same effect as a like promise made by the defendant itself.

*Homestake Min. Co. v. Fullerton*, 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 923; *Dells Lumber Co. v. Erickson*, 25 C. C. A. 397, 46 U. S. App. 697, 80 Fed. 257; *Brabbitts v. Chicago & N. W. R. Co.* 38 Wis. 298; *Bessemer v. Chicago & N. W. R. Co.* 45 Wis. 477; *Heine v. Chicago & N. W. R. Co.* 58 Wis. 530, 17 N. W. 420; *Belair v. Chicago & N. W. R. Co.* 43 Iowa, 662; *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 215, 21 S. W. 326; *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561; *Cad*

*den v. American Steel Barge Co.* 88 Wis. 419, 60 N. W. 800.

Marshall, J., delivered the opinion of the court:

It is rightly contended by appellant's counsel, and conceded by counsel for respondent, that unless as a matter of law, on the evidence, the engineer stood towards the respondent in the master's place, charged with its duty to furnish him a reasonably safe place in which to perform his work, as regards the guarding of the lubricator glass, and there was reasonable ground on the evidence for the finding that he submitted himself to the risk which resulted in his injury upon the faith of the engineer's promise to perform that duty, and was not guilty of any want of ordinary care in so doing, the judgment is wrong. The jury did not find whether the engineer and respondent were fellow servants in respect to the matter stated. Perhaps no finding was necessary. Probably it should be said that the evidence bearing on the subject is undisputed, and that the inferences that may reasonably be drawn therefrom are not conflicting. Yet, just how the learned court reached the conclusion that the relation existed, requisite to charge defendant with the engineer's promise, does not clearly appear.

Generally speaking, all trainmen, from engineer to the humblest employee, are fellow servants and only such. *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 226, 11 N. W. 529; *Heine v. Chicago & N. W. R. Co.* 58 Wis. 525, 17 N. W. 420; *Fowler v. Chicago & N. W. R. Co.* 61 Wis. 159, 21 N. W. 40; *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908; *South Florida R. Co. v. Price*, 32 Fla. 46, 13 So. 638; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Clifford v. Old Colony R. Co.* 141 Mass. 564, 6 N. E. 751; *Elliott, Railroads*, § 1336. To take the situation in question out of that general rule requires evidence to the effect that the furnishing of the guard for the lubricator glass was not only the duty of the master,—a duty distinct from those minor details of business which may be left to servants, as such, to attend to,—but that the master intrusted such duty to the engineer. Where the evidence is to that effect, as before indicated, does not clearly appear. It may be that the idea of the trial judge was that since the engineer was superior in grade of service to his fireman, the relation of master and servant existed between them. But that is not the test, as is abundantly shown by the adjudications of this court above cited. Mere rank has nothing to do with the question. The test is the nature of the act in which the persons are engaged. *Cadden v. American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800; *Dwyer v. American Exp. Co.* 82 Wis. 307, 52 N. W. 304; *McMahon v. Ida Min. Co.* 95 Wis. 308, 70 N. W. 478. Under that rule a foreman, or other person superior in authority and responsible to another as master, and the men under him,

so far as relates to the work in which they are jointly engaged, though in different capacities and though such foreman or other person has authority to hire and discharge such men, are fellow servants. But we will not pursue this subject further or decide this branch of this case. Some attention has been given to it so the case will not be referred to hereafter as holding that in such a situation as the one in question the promisor must be regarded as standing in the place of the master.

We may now proceed to the next and vital point in the case on the assumption, for the purposes of the decision, that it was actionable negligence for defendant to leave the lubricator glass unguarded; that the duty to attend to that matter was intrusted to the engineer; that as the engine left the engine house respondent objected to continuing in defendant's service unless it was attended to, and that the engineer then promised to do so.

Now it is claimed by counsel for appellant, and conceded by respondent's counsel, as is the law, that if an employee objects to continuing in the service of his master because of some danger attending the same which it is the duty of the latter to remedy, he may, relying upon the master's promise to perform that duty, remain in such service for such reasonable length of time as may be required for that purpose, if the danger be not so obvious and immediate that from his standpoint it should be remedied at once; yet when such reasonable time shall have expired and the servant knows, or by the exercise of ordinary care ought to know, that the danger still exists, if he remains in the service and subjects himself to such danger he is chargeable with that form of contributory negligence known as assumption of the risk and is remediless for any injury that thereafter happens to him thereby.

When did the time expire within which the engineer should, in all reason, have redeemed his promise to place a guard upon the lubricator glass? The trial court seems to have determined from the undisputed evidence, as a matter of law, that it expired when the engine left the Milwaukee depot to go on the trip. That is clearly shown by the way the special verdict was framed. It contains findings favorable to respondent in regard to whether the engineer placed a shield upon the lubricator glass before the engine started on the trip and whether respondent knew when such trip commenced that the glass was still unguarded, and the case was made to turn on such findings. However, strangely enough, the jury also found that plaintiff did not continue in defendant's employment longer than was reasonable for a person of ordinary care and prudence, under the circumstances, to expect that the engineer would procure the shield and place it upon the lubricator. That finding, with the others referred to, seems to convey very inconsistent ideas. Together they say a reasonable time to procure the shield and place it upon the lubricator expired when

the engineer started out on his trip, yet respondent, as a person of ordinary care and prudence, may reasonably have expected the time for remedying the danger complained of had not fully expired when the injury happened, some three hours after the engine left Milwaukee.

That the promise should have been redeemed before the engine left Milwaukee, and that respondent so expected if he had any expectation that the lubricator glass would be guarded for the trip he was about to make, is too clear for reasonable controversy. There was no need for submitting that question to the jury, nor any other question bearing on the subject. The evidence was all one way that respondent had no personal interest in the condition of the lubricator glass for the trip he was about to enter upon. He had never before been out with that engine, and of course did not know that he would be called upon to do so again. The place to procure the shield was at the roundhouse in the city of Milwaukee, which the engine was leaving when the promise was made, and to which it did not thereafter return. A few moments after the promise was made, and without any absences of the engineer to give respondent ground to believe that he had made a trip back to the roundhouse, the engine moved to the vicinity of the Milwaukee depot, a considerable distance away, and there it remained nearly two hours before the start on the trip was made, during which time the engineer remained with it to the respondent's knowledge, and the latter was in the engine cab attending to his duty of keeping up steam, which duty required him to often look at the steam gauge located a little under the lubricator glass. If respondent expected the shield to be placed on the glass before going out on the trip, and we think the circumstances all indicate that he did not, when the opportunity for doing so no longer existed, obviously, the time for redeeming the promise had expired.

The verdict of the jury, to the effect that the time for removing the danger complained of had not expired when the accident occurred, is certainly without any evidence to support it. That finding is the only one directly on the subject of when the period covered by the promise expired, though, as before indicated, the way the verdict as a whole was framed shows that the trial court's view was, as the fact is, that such period can by no stretch of reason be extended into the time when the engineer no longer possessed the means of redeeming his promise before leaving the city of Milwaukee on the trip.

The conclusion from the foregoing is that, by going out on the trip under the circumstances, respondent assumed the risk of the condition of the lubricator, if he knew or ought to have known that the engineer had failed to keep his promise. The jury said he did not know that fact when the trip commenced, and that he proceeded relying on the promise. It is impossible, in our view, to find any reasonable ground in the evi-

dence for those findings; they are contrary to all reasonable probabilities and contrary to the evidence of respondent. He regarded the absence of the shield as rendering his working place exceedingly dangerous. He knew that such absence was liable to result at any instant, and without any warning whatever to enable him to avoid it, in inflicting upon him a serious bodily injury. Every reasonable probability supports the idea that his attention was naturally drawn, or should have been, to the condition of the lubricator, many times before he left Milwaukee. True, on principle he had a right to assume that the engineer's promise would be kept, but he could not continue to so assume when he had the evidence to the contrary right before him. If the defect had been located where it would not naturally have come under his observation, the presumption mentioned would excuse ignorance to a certain extent of the true situation; but it was not so located. The difficulty was in his immediate surroundings, at a point where he could not fail to observe it by reasonable attention to such surroundings. We may well say that it would have been very difficult, if not well-nigh impossible, for him to have worked in and about the engine cab two hours without observing the absence of the shield if he had tried to avoid seeing it. Much of the time he was where he could easily have reached the lubricator glass with his hand. It was many times within the range of his vision as he was about his work. It was not over 2 or 3 feet in front of him as he stood facing the boiler in the act of looking at the steam gauge or performing other duties, where he must necessarily have stood on many occasions, and it was only a little more than 1 foot above the level of his eyes. The idea that respondent worked within a few feet of the lubricator for two hours before leaving Milwaukee, yet did not observe that the glass remained unguarded, since the unguarded condition was deemed by him to be exceedingly dangerous, is so improbable that the wonder is how it could have found a place in the verdict or been approved by the trial court. The salutary limitation upon the power of a jury should not be forgotten, while, at the same time, such power should be firmly maintained to its full limit. As to what is the truth as established by evidence, within the realms of reasonable probability, in contemplation of law the judgment of a jury is well-nigh infallible, and when approved by the trial judge is so. If they were permitted to go beyond that, the best system human wisdom has yet devised for discovering the truth would be sadly deficient indeed.

If respondent had testified that he looked at the lubricator and did not observe the absence of the shield, or, without having affirmatively testified that he so looked, had testified that he did not know of the absence of the shield at any time after the engineer's promise was made, the situation would not be changed. The finding of the jury would still be against all reasonable



probabilities. But he did not so testify. His testimony is rather to the effect that he did know the true situation all the time up to the instant of the injury. He seems to have appreciated, in giving his testimony, the extreme improbability of a person circumstanced as he was being ignorant of those things which were almost before his eyes; so he contented himself in saying that he did not pay any attention to the condition of the lubricator. Counsel for defendant tried patiently, by a long and fair cross-examination, the record of which occupies many pages of the printed case, to obtain a direct answer from respondent as to whether he knew when the engine left Milwaukee that there was no shield upon the lubricator glass; and the trial judge participated to the same end, endeavoring by repeating the counsel's question and striking out nonresponsive answers and commanding the witness to answer responsively; still he persisted in saying that he did not pay any attention to the matter. After the many evasive answers referred to, the witness's attention was called to his examination under oath on a former occasion, and he then admitted that the following questions were there propounded to him and that he gave the following answers thereto:

Q. Do you swear that you did not see whether or not there was a shield on when your engine left the city of Milwaukee that night?

A. After I spoke to the engineer about the shield I paid no further attention to it. I knew that there was no shield on there. If there was I would have seen it.

Q. You knew when you started out from Milwaukee that there was no shield on the lubricator, did you?

A. Yes, I knew all the while there was no shield on the lubricator. If there had been one I would have seen the shield.

Q. You still swear that you knew there was no shield on it when your engine started from Milwaukee?

A. No; there was no shield on there. If there had been a shield on I would have known it. I paid no more attention to it.

That was followed by questions as to whether the witness still adhered to his previous statements, as follows:

Q. Do you remember that testimony?

A. Yes.

Q. And that is true, is it?

A. Yes.

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His answer, repeated many times, in terms or effect that he did not pay any attention to the lubricator after notifying the engineer of the absence of the shield, was entirely consistent with his knowing as a fact, when he left Milwaukee, that the shield was not in place. One cannot read his testimony as a whole and come to any other reasonable conclusion than that, from the physical situation, he must have been fully informed as to the absence of the shield, and that such testimony contains a full confession to that effect. The court should have so decided on the motion to direct a verdict for defendant, and failing in that should have so decided on the motions made on behalf of appellant after verdict, including the motion for judgment in its favor.

When the time expired for the engineer to redeem his promise, under the circumstances indicated, respondent was no longer protected thereby in his right to hold defendant responsible for the consequences of the danger, if it be conceded that the promise had that effect at all. In proceeding thereafter in defendant's service, he voluntarily assumed the risk of which he had complained, as a part of his contract of employment, and is remediless for what followed. That is very unfortunate; but the law must not be turned aside from the definite lines upon which it has been established in order to fit the necessities of a party in a particular case. That cannot be done for the benefit of one person without committing a great wrong upon another. Neither can juries, as before indicated, be permitted to find one way to recompense an unfortunate person for his injury, when all reasonable probabilities are the other way. *Badger v. Janesville Cotton Mills*, 95 Wis. 599, 70 N. W. 687; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Lee v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 330, 80 N. W. 644; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467. Courts must not overstep those wise limitations upon remedies for misfortunes, however serious they may be, to award compensation therefor. They fall within the maxim, *Damnum absque injuria*.

The judgment of the Superior Court is reversed and the cause remanded for a new trial.

Bardeen, J., took no part.

## UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

C. E. LACKEY, *Plff. in Err.*,

v.

UNITED STATES.

(46 C. C. A. 189, 107 Fed. 114.)

**Congress having no power to punish the intimidation of voters at purely state elections, where the conduct is not grounded upon race, color, or previous condition of servitude, U. S. Rev. Stat. § 5507, which provides for the punishment of everyone who prevents another from exercising the right of suffrage to whom the right is guaranteed by the 15th Amendment, is void in its application to state elections, since it includes within its operation offenses not grounded upon race, color, or previous condition of servitude.**

(February 12, 1901.)

**ERROR** to the District Court of the United States for the District of Kentucky

NOTE.—Federal control of elections.

I. *Existence, sources, and extent of power.*a. *Existence.*b. *Sources.*c. *Extent.*1. *Congressional elections.*2. *Other elections.*3. *Requiring state officers to obey state laws.*II. *Under article I, United States Constitution.*III. *Under article II, United States Constitution.*IV. *Under 14th Amendment.*V. *Under 15th Amendment.*VI. *Summary of present statutes.*I. *Existence, sources, and extent of power.*a. *Existence.*

In **LACKEY v. UNITED STATES** it is held that, in respect to state elections, the power of Congress is dependent upon the 15th Amendment to the United States Constitution alone, and that Rev. Stat. § 5507, providing that a person who prevents, hinders, controls, or intimidates another by means of bribery or threats in the exercise of the right of suffrage, "to whom that right is guaranteed by the 15th Amendment to the United States Constitution," shall be punished, etc., is void as to state elections, as including within its operation offenses not grounded upon race, color, or previous condition of servitude. This decision is sustained as to the invalidity of this section by **United States v. Amsden**, 10 Biss. 283, 6 Fed. 819.

The right or privilege of voting is a right or privilege arising under the Constitution of each state, and not under the Constitution of the United States, and such privilege cannot be controlled by Congress except to the extent of prohibiting discrimination on account of race, color, or previous condition of servitude.

The power to regulate suffrage in the state, and to determine who shall or who shall not be a voter, belongs exclusively to the state itself. The Constitution of the United States confers no authority upon Congress to prescribe the qualifications of electors within the several states that compose the Federal Union. **Huber v. Rely**, 53 Pa. 112; **Gougar v. Timberlake**, 148 Ind. 38, 37 L. R. A. 644, 46 N. E. 839; **Minor v. Happersett**, 21 Wall. 162, 22 L. ed. 627; **Bloomer v. Todd**, 3 Wash. Terr. 599, 1 L. R. A. 111, 19 Pac. 185; **United States v. Reese**, 92 53 L. R. A.

to review a judgment convicting defendant of violating the statute against interfering with voters at an election. *Reversed.*

Statement by **Lurton, J.**:

The plaintiff in error has been convicted under an indictment based upon § 5507 of the Revised Statutes of the United States. The indictment contained two counts, the first of which charged, in substance, that certain "negroes, colored men, men of African descent, and not white men," being citizens of Kentucky and of the United States, and qualified voters under the laws of Kentucky and of the United States, were unlawfully and feloniously "and on account of their race, color, and previous condition of servitude," intimidated and prevented from exercising their lawful right of suffrage at a certain state election held in the state of

U. S. 214, 23 L. ed. 563; **United States v. Cruikshank**, 92 U. S. 542, 23 L. ed. 588; **United States v. Crosby**, 1 Hughes, 448, Fed. Cas. No. 14,893; **Kinneen v. Wells**, 144 Mass. 497, 59 Am. Rep. 105; **United States v. Anthony**, 11 Blatchf. 200, Fed. Cas. No. 14,459; **Spencer v. Board of Registration**, 1 MacArth. 189, 29 Am. Rep. 582; **Spragins v. Houghton**, 3 Ill. 377; **Anthony v. Halderman**, 7 Kan. 50; **Van Valkenburg v. Brown**, 43 Cal. 43, 18 Am. Rep. 136; **Sproule v. Fredericks**, 69 Miss. 898, 11 So. 472; **Stone v. Smith**, 159 Mass. 415, 34 N. E. 521.

The elective franchise is the subject of exclusive regulation by the state, limited only by the 15th Amendment to the Constitution. **Washington v. State**, 75 Ala. 584, 51 Am. Rep. 479.

Congress has no power to regulate elections in regard to state officers, although such elections may be held at the same time as a congressional election. *Es parte Perkins*, 29 Fed. 900.

But Congress may protect the right of suffrage where it is denied on account of race, color, etc. **United States v. Mason** (Mass.) Fed. Cas. No. 15,734, and **United States v. Schumann**, cited in 1 Hughes, 538; *Es parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

In this last case it was said: "While it is quite true, as was said by this court in **United States v. Reese**, 92 U. S. 214, 23 L. ed. 563, that this article [art. 15 of the Constitution] gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that, under some circumstances, it may operate as the immediate source of a right to vote."

And Congress has the power to regulate the time, place, and manner of choosing representatives in Congress. **United States v. Goldman**, 3 Woods. 187, Fed. Cas. No. 15,225; *Re Massey*, 45 Fed. 629; *Es parte Perkins*, 29 Fed. 900; **United States v. O'Connor**, 31 Fed. 449; **United States v. McBooley**, 29 Fed. 897; **United States v. Munford**, 16 Fed. 223; **Huber v. Rely**, 53 Pa. 112; **United States v. Quinn**, 8 Blatchf. 48, Fed. Cas. No. 16,110; *Re Engle*, 1 Hughes, 502, Fed. Cas. No. 4,488; **United States v. Vigil**, 7 N. M. 296, 34 Pac. 580.

And Congress has supervisory power over the elections for Congress. *Es parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

And it has the power to interfere in regard to registration of voters at a congressional election. *Es parte Gelsaler*, 9 Biss. 497, 4 Fed. 188.

Kentucky on November 7, 1899, for the election of state, county, and municipal officers, "by means of bribery, and by bribing them," the said citizens and voters of African descent. The second count is identical with the first, save that it omits the averments that the intimidation and bribery were "on account of race, color, or previous condition of servitude." The district attorney dismissed the first count, and went to trial upon the second count, and secured a conviction thereunder.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

*Mr. George W. Saulsberry*, with *Mr. Isaac T. Woodson*, for plaintiff in error:

The offense charged is not within the letter or the spirit of the 15th Amendment of the Constitution of the United States. It is not an offense against the laws of the

United States to prevent, by violence or otherwise, a citizen, white or black, from voting at a state election.

*United States v. Amsden*, 10 Biss. 283, 6 Fed. 823; *United States v. Reese*, 92 U. S. 220, 23 L. ed. 565; *Baldwin v. Franks*, 120 U. S. 686, 30 L. ed. 768, 7 Sup. Ct. Rep. 656, 763; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *United States v. Cruikshank*, 92 U. S. 556, 23 L. ed. 592; *Ex parte Virginia*, 100 U. S. 340, 25 L. ed. 677; *Virginia v. Rives*, 100 U. S. 313, *sub nom. Ex parte Virginia*, 25 L. ed. 607; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Logan v. United States*, 144 U. S. 294, 36 L. ed. 439, 12 Sup. Ct. Rep. 617; *United States v. Munford*, 16 Fed. 230; *Claybrook v. Owensboro*, 16 Fed. 301; *Kiernan v. Multnomah County*, 95 Fed. 849; *Scott v. McNeal*, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct.

Congress has the power to determine the time of choosing electors for President, and the day on which they shall give their vote. *Re Green*, 134 U. S. 377, *sub nom. Fitzgerald v. Green*, 33 L. ed. 951, 10 Sup. Ct. Rep. 586.

And Congress has the power to regulate national elections. *Re Supervisors Appointment*, 52 Fed. 254.

And where the state law fixing the day for the meeting of presidential electors conflicts with the act of Congress in that respect, the state law must necessarily give way. *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 889, 13 Sup. Ct. Rep. 3. In this case it was held that striking out the day for meeting which had already been otherwise determined by the act of Congress could be done, and that act remains complete in itself, and the state law yields only to the extent of the collision.

There is no doubt of the power of Congress to interfere in the protection of voters at Federal elections, and that power existed before the adoption of either of the recent amendments to the Constitution. It is a power necessary to the existence of Congress. *United States v. Crosby*, 1 Hughes, 448, Fed. Cas. No. 14,898.

And where it was objected that deputy marshals, authorized by the act of Congress (enforcement acts May 31, 1870, and February 28, 1871), to be created and to attend the elections, are authorized to keep the peace, and that this is a duty which belongs to the state authorities alone, it was held that the government of the United States may, by means of physical force, exercise, through its agents, on every foot of American soil, the powers and functions which belong to it; and this involves the power to command obedience to its laws, and to keep the peace to that extent. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717. (This act was repealed February 8, 1894.)

U. S. Rev. Stat. § 5511 (repealed February 8, 1894), provided that if in any election for Congress any person attempts to vote in the name of another person, or repeats his vote, or votes at an improper place, or unlawfully secures an opportunity to vote, or by threat or bribery prevents any qualified voter of any state or territory from freely exercising the right of suffrage, or induces any officer to receive an illegal vote, or to alter the result, he shall be punished.

U. S. Rev. Stat. § 5440 (amended act May 17, 1879, 21 Stat. at L. 4, chap. 8), provided a penalty for a conspiracy to commit an offense against the United States, and § 5511, *supra*, conferred authority to punish conspiracy in an election for Congress by proceedings in the Federal courts. *Re Coy*, 127 U. S. 731, 32 L. ed. 53 L. R. A.

274, 8 Sup. Ct. Rep. 1263, Affirming 81 Fed. 794. In this case it was also held that Congress has authority to protect the poll books containing a vote for a member of Congress from falsification, although the purpose of the falsifier may be to affect only the return of the state officer found in the same poll books.

In *United States v. Cahill*, 8 McCrary, 200, 9 Fed. 80, it was held that an indictment for preventing a voter from voting, under U. S. Rev. Stat. § 5511, must charge that the offense was an interference, "at a congressional election," with a voter qualified to vote and offering to vote for a representative in Congress." The court said: "It is clear that no Federal statute can interfere with voters except at an election for representatives in Congress, and then only as to their protection in voting for a representative in Congress."

Where an arrest was made by a United States marshal for an apparent offense, under U. S. Rev. Stat. § 5511, of illegal voting, and the marshal was arrested by a policeman, who was prosecuted under U. S. Rev. Stat. § 5522, providing a penalty for obstructing a marshal in the discharge of his duty, it was said: "Upon the occasion in question this statute of the United States was the paramount law, binding upon policemen and all other persons." *United States v. Conway*, 18 Blatchf. 569, 6 Fed. 49.

U. S. Rev. Stat. § 5512 (repealed February 8, 1894), provided that if, at any registration of voters for an election for Congress, any person attempts to register in the name of another person, or fraudulently attempts to register, or to unlawfully register for himself or any other person, or prevents any person having the right to register from exercising such right, or induces an officer to illegally register or interfere, or to violate any duty imposed by law, he shall be punished, etc. (act February 28, 1871, chap. 99, § 1, 16 Stat. at L. p. 433; act May 31, 1870, chap. 114, § 20, 16 Stat. at L. p. 145). This section was held to be constitutional. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Clarke*, 100 U. S. 399, 25 L. ed. 715; *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 8 Sup. Ct. Rep. 1.

The act of Congress of May 31, 1870, § 20 (repealed February 8, 1894), provided that if at any registration of voters for an election for representatives or delegates in Congress any person shall fraudulently register, etc., he shall be punished, providing that any registration made under the laws of any state or territory for any state or other election at which such representative or delegate in Congress shall be chosen shall be deemed to be a registration.

Rep. 1108; *Brown v. Munford*, 16 Fed. 175; *United States v. Morrissey*, 32 Fed. 150; *United States v. Belvin*, 46 Fed. 381; *United States v. Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897; *United States v. Coy*, 32 Fed. 543; *Ex parte Perkins*, 29 Fed. 900; *United States v. Sanges*, 48 Fed. 84; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 185.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the Constitution or laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states.

Cooley, Const. Lim. ¶ 173.

This was held to be constitutional. Congress has the power to regulate the time, places, and manner of holding such elections, and such statute did not infringe the Constitution in providing that the electors shall have the qualifications requisite for electors of the most numerous branches of the state legislature. It was further held that the prescription of the mode of ascertaining qualifications of an elector was no infringement of that clause that declares what shall constitute the requisite qualifications. *United States v. Quinn*, 8 Blatchf. 48, Fed. Cas. No. 16,110. In this case the court said: "The power to make a regulation that shall secure to every man entitled to vote a safe and convenient exercise of his privilege involves the power to see to it that no one who is not entitled to vote shall be permitted to exercise that right."

U. S. Rev. Stat. § 5515 (repealed February 8, 1894), provided that every person at an election at which any representative in Congress is voted for, whether such officer of election be created by any law of the United States, or state, territorial, district, or municipal law, who neglects to perform any duty in regard to such election required by any law of the United States or of any state or territory, or who violates any duty with intent to affect any such election, or who fraudulently makes any false certificate of the result, or withholds or destroys any certificate of record required by law respecting the election of any such representative, or who neglects to make return of the certificate, or who aids any person to do any act by this or any of the preceding sections made a crime, or who omits to do any duty made a crime, shall be punished, etc.

In *United States v. Bader*, 4 Woods, 189, 16 Fed. 117, which was an indictment under U. S. Rev. Stat. § 5515, for doing an act unauthorized by law with intent to affect an election at which a representative in Congress was to be elected, this section was held valid. It was said that Congress has the power to prohibit and punish an act done by officers of an election for representatives in Congress that is unauthorized and committed with intent to affect the election. This indictment was for keeping an improper list of voters.

In a criminal proceeding under U. S. Rev. Stat. § 5515, for refusing to make a certificate at an election for a member of Congress in the territory of New Mexico, it was held that the act of Congress controlled notwithstanding the prosecution was in a territorial court, and it was not within the power of a territorial legislature to change or alter the offense simply because the Congress of the United States had 53 L. R. A.

While the 15th Amendment prohibited discrimination against voters on account of race, color, etc., it gave to the colored man no higher right or protection as to suffrage than it gave to any other race or color.

*Twitchell v. Pennsylvania*, 7 Wall. 325, 19 L. ed. 224; *United States v. Cruikshank*, 92 U. S. 551, 23 L. ed. 591.

It is for the several states to determine by their own laws how their own officers shall be elected, who may or may not vote for such officers, and what acts of commission or omission respecting the exercise of the elective franchise in the election of such officers shall be criminal.

*United States v. Seaman*, 23 Blatchf. 216, 23 Fed. 883; *United States v. Cahill*, 3 McCray, 200, 9 Fed. 82.

Messrs. R. D. Hill and W. C. P. Breckenridge for defendant in error.

seen fit to provide that in the territories the courts thereof shall take jurisdiction and try offenses against the laws of the United States. *United States v. Vigil*, 7 N. M. 296, 34 Pac. 530. The point made in this case was that the two offenses in the indictment, being felonies under the territorial law, could not be joined in the same indictment.

Congress may protect a voter in making his choice and afterwards expressing that choice at the polls. *United States v. Goldman*, 3 Woods, 187, Fed. Cas. No. 15,225.

The Federal court has the sole jurisdiction of a complaint for perjury in testifying before a notary public of a state, upon a contested election of a member of the house of representatives of the United States, and a state court has no jurisdiction in such a case, as the officer before whom the oath is taken performs the functions solely under the authority conferred upon him by Congress, and in a matter concerning the government of the United States. *Re Loney*, 134 U. S. 372, *sub nom.* *Thomas v. Loney*, 33 L. ed. 949, 10 Sup. Ct. Rep. 584.

In *Minor v. Happersett*, 21 Wall. 163, 22 L. ed. 627, it was said that Congress had never interfered with the qualifications of voters at a congressional election.

Under U. S. Rev. Stat. §§ 2011-2020 (repealed in 1894), providing for the appointment of supervisors of elections, and § 2021, providing for the appointment of a deputy marshal at elections where representatives or delegates in Congress are to be chosen, Brewer, J., said that a marshal has no power to demand admittance into the election room, but may preserve order and take into custody, with or without process, any person committing any act prohibited by the Federal statutes, and may interfere to keep the peace if crowds come to drive away voters; but cannot arrest a judge for wrongfully refusing a vote. A marshal cannot arrest a voter in the act of voting, or say that he shall not vote. *Re Deputy Marshals*, 22 Fed. 153. In this case § 2020 was held to be constitutional.

#### b. Sources.

The exercise of the power of Congress to control elections is entirely derivative from the Federal Constitution, under the following provisions: Article 1, § 4, providing that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but Congress may at any time by law make or alter such regulations except as to the places of choosing senators, art. 2, § 1, cl. 4, providing that Congress may determine the time of

Lorton, Circuit Judge, delivered the opinion of the court:

"There was evidence tending to show that the plaintiff in error 'prevented' a number of voters 'of African descent' from voting at a purely state election, at which they were qualified to vote under the law of Kentucky, by promising them that if they would go away from the polls without voting, and stay away until after the polls had been closed, he would pay each of them the sum of \$5. The only count upon which the plaintiff in error was tried contained no averment that these colored voters were 'prevented' from exercising the right of suffrage 'on account of race, color, or previous condition of servitude,' nor was any such discrimination made an element of the offense by any ruling or charge of the court below. Neither was it averred in the indictment, nor shown in the proof, that these colored

citizens and voters were prevented, hindered, or controlled in the exercise of their right of suffrage at any election at which either presidential electors or congressmen were to be voted for. Nor was it averred or pretended that there was any law of the state of Kentucky which either denied or abridged the right of suffrage on 'account of race, color, or previous condition of servitude,' or that the plaintiff in error, in preventing these colored voters from exercising the right of suffrage, was acting in any official character whatever. Is it, then, an offense against the United States, if a private citizen prevents a colored citizen and qualified voter from voting at a purely state election, where his conduct is not grounded upon 'race, color, or previous condition of servitude?' The indictment is based upon § 5507 of the Revised Statutes of the United States, which reads as fol-

choosing the (presidential) electors, and the day on which they shall give their votes, which day shall be the same throughout the United States; art. 4, § 3, cl. 2, providing that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States: art. 15, § 1, providing that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude, and § 2, providing that Congress shall have power to enforce this article by appropriate legislation.

The power of Congress to legislate at all in regard to congressional elections is derived from article 1 of the Constitution. The power to legislate in regard to presidential elections arises from article 2. The power in regard to territorial elections comes from article 4, § 3.

The power of Congress to legislate at all upon the question of voting at state elections rests upon the 15th Amendment. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Given*, Fed. Cas. No. 15,210; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *United States v. Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897, Affirmed in 92 U. S. 542, 23 L. ed. 588.

#### c. Extent.

##### 1. Congressional elections.

Congress has the paramount power to regulate the time and manner of holding elections for members of Congress, and to prevent fraudulent voting for members of Congress at such elections in the several states. *United States v. Quinn*, 8 Blatchf. 48, Fed. Cas. No. 16,110; *United States v. McBozley*, 29 Fed. 897; *Re Supervisors' Appointment*, 52 Fed. 254; *Ex parte Gelsasser*, 9 Bias, 497, 4 Fed. 186, *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

And also in the territories. *United States v. Vigil*, 7 N. M. 296, 34 Pac. 530.

And may provide for punishment of persons who obstruct the free exercise of voting at such elections. *United States v. Belvin*, 46 Fed. 381; *Re Coy*, 127 U. S. 781, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263, Affirming 31 Fed. 794; *United States v. Conway*, 18 Blatchf. 569, 6 Fed. 49; *United States v. Bader*, 4 Woods, 189, 16 Fed. 116; *Ex parte Clarke*, 100 U. S. 399, 25 L. ed. 715.

Congress has the power to make all regulations in regard to Federal elections. *Brown v. Munford*, 16 Fed. 175.

And where congressional and local elections are held at the same time and place, and mixed § 3 L. R. A.

ballots are cast, Congress has unquestionably the paramount, and when it sees fit to exercise it the exclusive, power to regulate such elections. Congress must in the first instance determine for itself what regulations are necessary or expedient, and it is not in the province of the courts to restrict or annul any enactment on the subject on the ground that it is not within the powers of Congress, unless it is clear that in no event and under no circumstances can the offense affect the election for representatives in Congress. *United States v. McBozley*, 29 Fed. 897.

And the power of Congress in regard to elections for representatives in Congress is paramount and may be exercised at any time and to any extent which it deems expedient, and so far as it is exercised, and no farther, the regulations affected supersede those of the state which are inconsistent therewith. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717. In this case it was held that Congress has supervisory power over the election of representatives for Congress, and may make new statutory regulations to add, alter, or modify the regulations made by the state; and it is not necessary that Congress should assume exclusive control, but it may adopt the machinery of the state.

In *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788, it was said that in *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, the constitutionality of U. S. Rev. Stat. § 2012, authorizing the appointment of supervisors of election, was sustained, saying: "The point was there made that the United States circuit courts had not the power to appoint supervisors of election, on the ground that the duties of such courts were judicial, while the supervisors of election were officers whose duties were executive in their character. It was held, however, that Congress had the power to vest the appointment of the supervisors in question in the circuit courts."

This section is constitutional. *United States v. Gale*, 109 U. S. 65, 27 L. ed. 867, 8 Sup. Ct. Rep. 1.

In *Re Supervisors' Appointment*, 52 Fed. 254, it was held that supervisors of congressional elections should be appointed under U. S. Rev. Stat. §§ 2011; 2012, providing for such supervisors, a proper application having been made; that the power of Congress over national elections was no longer in question, as the Federal law required uniformity in the prerequisites of the right to vote as affecting a citizen otherwise entitled to vote at a national election; that inconsistent registration enactments, making different prerequisites and denying equal oppor-

lows: "Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising, the right of suffrage, to whom that right is guaranteed by the 15th Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

This section comes from the enforcement act of May 31, 1870 (16 Stat. at L. 141, chap. 114), and is the 5th section of that act, carried into the revision without alteration. This section provides for the punishment of those who obstruct the free exercise of the elective franchise, without distinction between elections where presidential

electors or members of Congress are to be chosen and those which are only for the election of state or municipal officers. It is also very clear that it is not limited to offenses grounded upon race, color, or previous condition of servitude. The only limitation of the provision is that the offenses shall be in respect of the exercise of the right of suffrage by a class of voters described as those "to whom that right is guaranteed by the 15th Amendment to the Constitution of the United States." It is a well-settled rule of constitutional construction that the Congress has power to protect the exercise of every right created by, arising under, or dependent upon the Constitution of the United States, and may provide for the enforcement of every such right, privilege, or immunity by such legislation as may be reasonably adapted to that end. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed.

tunities to perform them, were contrary to the Federal statutes, and nugatory. These sections (2011, 2012) were repealed in 1894.

The United States has the undoubted right to interfere in all cases where there is a registration of voters for the election of members of Congress, and where that interference occurs under the authority of a statute of the United States there can be no law which is paramount to it. *Ex parte Geisler*, 9 Biss. 497, 4 Fed. 188.

U. S. Rev. Stat. § 5506, provided that every person who unlawfully obstructs or confederates with others to obstruct, any citizen from doing any act required to qualify him to vote, or from voting at any election in any state, territory, district, county, city, parish, township, school district, municipal or other territorial subdivision, shall be fined, etc. (act May 31, 1870, chap. 114, § 4, 16 Stat. at L. p. 141). This section was repealed February 8, 1894.

In *Brown v. Munford*, 16 Fed. 175, the court said that U. S. Rev. Stat. § 5506, now stands as a distinct section. "That although it may not refer in terms to Federal elections, yet it is a necessary implication of law that it does refer to them, Congress having general powers of legislation in respect to such elections, and the courts being bound to give effect to the section in respect to all elections over which Congress possesses general powers. The very same question is presented by the demurrer in this case in respect to § 2205." This was an action against a state officer who refused to assess the complainant, thereby preventing him from paying capitation tax, and from voting.

This section was held valid as applied to congressional elections. *United States v. Belvin*, 46 Fed. 381. In this case, referring to the *Reese Case*, 92 U. S. 214, 23 L. ed. 563, which held that the act of May, 1870, was identical with U. S. Rev. Stat. § 5506, and was not applicable to municipal elections because it was not limited to cases in regard to race, color, or previous condition of servitude, the court said: "But it is a plain *non sequitur* to contend that, because an act of Congress has no constitutional warrant in relation to a state election, therefore it has no such warrant when applied to a congressional election. The argument on this subject is fully elaborated in the case of *United States v. Munford* [16 Fed. 223], and need not be repeated here. In the case of *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, another section of the enforcement act of 1870 was brought in review, which was pronounced unconstitutional on grounds analogous to those alleged in *Reese's Case*. The cases of *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601, and of *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763, cited by the defense in the cases at bar, turned upon the constitutionality of the 2d section of the act of Congress of April 20, 1871, nearly identical with which is § 5519 of the United States Revised Statutes. That section is egregiously and palpably unconstitutional on its face. But neither in its origin nor its history has it any relation to or analogy with § 5506 of the Revised Statutes, under which the indictments at bar are brought. It cannot be reasonably contended that, because it was beyond the competency of Congress to pass one law, it was therefore beyond its power to pass another law unlike the first in purport and purpose. The decisions in the case of *Harris* and of *Baldwin v. Franks* do not, therefore, rule those we now have under consideration."

## 2. Other elections.

In *LACEY v. UNITED STATES* it is held that U. S. Rev. Stat. § 5507, providing that every person who prevents, hinders, controls, or intimidates another from exercising the right of suffrage, to whom that right is guaranteed by the 15th Amendment to the Constitution, by bribery or threats, shall be punished, etc., is void as applied to state elections because it includes within its operation offenses not grounded upon race, color, or previous condition of servitude. This case is an indictment for bribing citizens and voters of African descent at a state election. It is held that the 15th Amendment has no effect other than to forbid discrimination on account of race, color, or previous condition of servitude. The court says: "The indictment in the case at bar did not aver the bribery to have been because of color, etc., and, if it had, it would have added an element not named in the statute."

This case followed *United States v. Amaden*, 10 Biss. 283, 6 Fed. 819, which held that the language of the Revised Statutes, "to whom the right of suffrage is secured or guaranteed by the 15th Amendment," was not authorized by the 15th Amendment on the ground that the right of suffrage was not guaranteed by that amendment. In that case it was also held that the section was not limited in its operation to persons who claim to act under prohibited legislation, but provides for the punishment of individuals acting for themselves irrespective of state law and in states where there is no prohibited legislation. The *LACEY CASE* did not consider it necessary to discuss the proposition

274, 4 Sup. Ct. Rep. 152; *Re Neagle*, 135 U. S. 1, *sub nom. Cunningham v. Neagle*, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Logan v. United States*, 144 U. S. 203, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 959. Examples of rights arising under or dependent upon the Constitution and laws of the United States are found in the cases cited above. Thus, the right to vote for a member of Congress was, in *Ex parte Yarbrough*, held to be a right arising under the Constitution of the United States. In *United States v. Cruikshank*, 92 U. S. 542, 553, 23 L. ed. 588, 591, it was said that the right to petition Congress for a redress of grievances is a right secured to citizens of the United States by the Constitution. In *Logan v. United States*, cited above, it was held that the right of a prisoner in the lawful custody of an officer of the United

States to be protected against assault and murder is a right arising under and dependent upon the Constitution. In *Re Quarles*, cited above, it was held that it is the right of every private citizen to inform a marshal of the United States of a violation of the revenue laws of the United States, and a right secured by the Constitution, and that a conspiracy to injure, oppress, threaten, or intimidate in the free exercise of this right, or because of having exercised it, is punishable under § 5508 of the Revised Statutes. So, in the *Case of Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658, it was held that the right of every judicial or executive officer of the United States to be protected from lawless violence while in the exercise of the duties and functions of his office is a right arising under the Constitution, and that it is the duty of the United States to afford such protection. In *Ex*

"as to whether the power of Congress to legislate in respect to purely state elections is not also limited to prohibitions of discrimination by the United States and by the states and their officers or others claiming to act under color of laws within the prohibition of the amendment."

And Congress has not the power to interfere in elections not Federal, where there is no discrimination as to race, color, or previous condition of servitude. *Harrison v. Hadley*, 2 Dill. 229, Fed. Cas. No. 6,137; *LACEY v. UNITED STATES*; *United States v. Amsden*, 10 Biss. 283, 6 Fed. 319; *United States v. Nicholson*, 3 Woods, 215, Fed. Cas. No. 15,877 (see subd. 6, *Under the 15th Amendment*).

And Federal courts have not original jurisdiction to protect or enforce every right or privilege secured to a citizen by the Federal Constitution and acts of Congress, where such jurisdiction is not expressly conferred by Congress. *Harrison v. Hadley*, 2 Dill. 229, Fed. Cas. No. 6,137.

The Federal court will not enjoin registration for a city election, for gerrymandering the district or prescribing qualifications oppressive to the colored people, as the remedy is by quo warranto, or if citizens are deprived of their right to vote under the 14th or 15th Amendment to the United States Constitution, there is ample remedy by indictment and otherwise, under act of Congress of May 1, 1870 (16 Stat. at L. 140, February 28, 1871, 16 Stat. at L. 432). *Holmes v. Oldham*, 1 Hughes, 76, Fed. Cas. No. 6,643.

In *United States v. Amsden*, 10 Biss. 283, 6 Fed. 319, it was said that Congress may forbid the enforcement of all laws which abridge the right of citizens to vote on account of their race.

The power of Congress to legislate at all upon the question of voting at state elections rests upon the 15th Amendment to the Constitution, and it is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude that Congress can interfere and provide for its punishment. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563. This was under act of Congress of May 31, 1870 (16 Stat. at L. 140, § 3), which provided that whenever, under the Constitution or laws of any state, any act is required to be done by any citizen as a prerequisite to voting, the offer of such citizen shall be a performance of such act if he is wrongfully prevented by the person charged with the duty of receiving such performance, and provided a penalty for the person preventing, and § 4, which provided for the punishment of any person who shall by force, bribery, etc., delay or obstruct any citizen from qualifying as a voter. It was held, in a prose-  
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cution for refusing to receive a vote of a citizen of African descent at a state election, that these sections were void because not limited to discrimination on account of race, color, or previous condition of servitude. In this case the court said: "Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the states and the people."

In *United States v. Belvin*, 46 Fed. 381, in distinguishing the *Reese* Case the court said that no constitutional statute could be passed by Congress relating to state and municipal elections, except for the express purpose of protecting voters from being hindered or prevented from voting on account of their race, color, and former slavery, and the act of May, 1870, contained no such limitation, and was therefore held to be inapplicable to a municipal election.

And, in *United States v. Munford*, 16 Fed. 223, it was said that in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, § 5506 was held to be in excess of the power of Congress as applied to municipal elections, as the section said nothing of race, color, or previous condition of servitude; but that if the offense had been at a Federal election the statute would have been upheld.

After § 5506 had been declared unconstitutional in the *Reese* Case it was re-enacted, leaving out the objectionable part. *United States v. Munford*, 16 Fed. 223. This section was repealed February 8, 1894.

Congress may impose as a penalty the forfeiture of citizenship of the United States for a criminal offense, and if the Constitution of a state allows only citizens of the United States to vote, Congress may thus affect the number of voters. *Huber v. Rely*, 53 Pa. 112. In this case it was said that "Congress is indeed empowered to make regulations for the time, place, and manner of holding elections for senators and representatives, or to alter those made by the legislature of a state (except those in relation to the places of choosing senators), but here its power stops."

The Idaho act of February 8, 1885, prescribing a non-polygamous oath to electors, is within the powers of Congress, notwithstanding the Federal constitutional provision prohibiting Congress from making a law affecting the free exercise of religion. *Wooley v. Watkins*, 2 Idaho, 555, 22 Pac. 102.

And in ordaining government for the territory

*parte Yarbrough* the conviction was upon an indictment based upon § 5508, Rev. Stat. which provides for the punishment of those who conspire "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The conspiracy charged was that the defendants conspired to intimidate a citizen of African descent in the exercise of his right to vote for a member of Congress, and that they did this on account of his race, color, or previous condition of servitude. The conviction was sustained upon the ground that the right to vote for a member of Congress depended upon the Constitution of the United States, and was therefore a right secured thereby, which it was the duty of Congress to protect. Upon this subject, the court, speak-

ing by Justice Miller, said: "But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. Its language is: 'The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.' Art. 1, § 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those eo

les and the people who inhabit them, all the discretion which belongs to the legislative power is vested in Congress, and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular territory, and the qualification of those who shall administer it. It rests with Congress to say whether in a given case any of the people resident in the territory shall participate in the election of its officers or the making of its laws, and it may therefore take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it. *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

### 3. Requiring state officers to obey state laws.

Congress has the constitutional power to enact a law for punishing a state officer of elections for a violation of his duty under a state statute in reference to an election of a representative for Congress. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Clarke*, 100 U. S. 401, 25 L. ed. 715; *Re Coy*, 127 U. S. 752, 32 L. ed. 278, 8 Sup. Ct. Rep. 1263, Affirming 31 Fed. 794; *United States v. Kelsey*, 42 Fed. 883; *Brown v. Munford*, 16 Fed. 175.

The power, under the Constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation and proper return and counting of the votes cast thereat, and in fact whatever is necessary to an honest and fair certification of such an action, cannot be questioned. *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263, Affirming 31 Fed. 794.

Congress has the power to compel compliance with a state law by a state officer in matters affecting congressional elections. For this purpose U. S. Rev. Stat. § 5515, was passed, providing that every officer of an election at which any representative or delegate in Congress is voted for, who neglects or refuses to perform any duty required of him by any law of the United States, or of any state or territory thereof, shall be punished, etc.

In a prosecution under this statute it was said: "The United States does not concern itself with other elections, nor with the violation of the state laws as such in any election; but whenever a member of Congress is to be elected, this act of Congress steps in to protect the people of the whole United States against the evil effects of fraudulent elections by punishing those who hold the election for every violation of duty in the performance of their func-

tions; or, to put it another way, Congress seeks by this statute to guard the election of members of Congress against any possible unfairness by compelling, under its pains and penalties, everyone concerned in holding the election to a strict and scrupulous observance of every duty devolved upon him while so engaged." *United States v. Jackson*, 25 Fed. 548.

In *Ex parte Clarke*, 100 U. S. 399, 25 L. ed. 715, where a state officer at an election of a representative of Congress was convicted in the Federal court, under U. S. Rev. Stat. § 5515, for a violation of the law of Ohio in allowing the ballot boxes to be broken open, it was held that Congress had power to pass the law under which the conviction was had, and the cause of commitment was lawful and sufficient. This section was repealed February 8, 1894.

And in a prosecution for an unlawful registration at an election for Congress, it was held that Congress has the power to impose penalties for violating state election laws in case of an election held pursuant to such laws for the election of representatives in Congress. *United States v. O'Connor*, 31 Fed. 449.

Where there was an election for members of Congress an application was made to the court for a *subpoena duces tecum* for the poll books and ballots, on the ground that there was a false return of the votes cast, and that the matter should be laid before the grand jury. It was held that Arkansas election laws, § 2694, requiring the judges of the election to inclose the ballots in an envelope and prohibiting their being opened in case of a contested election, would not prevent the Federal court from examining the ballots, under U. S. Rev. Stat. § 5515, prescribing a penalty against any officer of an election for representatives in Congress who shall be guilty of misconduct in regard to the election, or who makes a false certificate, or withholds any certificate, or neglects to do his duty. It was held that the law of the United States in regard to the election of members of Congress was paramount. *Re Massey*, 45 Fed. 629. In this case it was said: "It is not contended by the able counsel who represent the respondent and the state of Arkansas but that the general government has the right, under the Constitution, to pass laws regulating the manner of holding elections for members of Congress in the several states, nor that, in the holding of elections under said laws, the election officers appointed under the state laws become officers of the general government, as well as of the state, and that they are amenable to the government for violations of said laws; so that it would seem that the only question that need be passed upon is whether the laws of the United States



*nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state."

The judgment of the court was also rested, in part, upon the broader ground that the Congress had the general implied "power to protect the elections on which its existence depends from violence and corruption." But all that is said in that case upon this aspect of the question was said of elections at

which electors or congressmen are to be chosen, and of the direct interest of the United States in securing such elections from violence, corruption, and fraud. But whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the 2d and 4th sections of article 1 of the Constitution, or arises out of the implied power to protect such elections against violence and fraud because they are Federal elections so far as Federal officials are thereby directly chosen, it is very obvious that, whether such power be attributed to either the one or the other source, it furnishes no reason for any interference at a purely state election. This we do not understand to be controverted by the able counsel who have argued this case. But, whether conceded or not, it remains as true now as it was when the Supreme Court,

so passed are paramount if they are in conflict with any state law."

Congress has the power to impose a punishment for the violation of state laws in regard to elections for representatives in Congress. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717. In this case the court said: "The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose, and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations."

But the mere fact that a representative in Congress is voted for in an election of state and county officers does not give Congress power to regulate such elections in matters which have nothing to do with the elections of such representatives, and can have no influence on it. *Ex parte Perkins*, 20 Fed. 900. In this case it was held that the violation by an officer of a state election, at which election a representative in Congress is also voted for, of any duty imposed upon him by state or Federal statutes, which solely concerns the election of any state or local officer, is not an offense punishable by the United States, and U. S. Rev. Stat. §§ 5511-5515, making it an offense against the United States for any officer at such election to violate any duty so imposed upon him, does not refer to an offense so committed.

And in *United States v. Nicholson*, 3 Woods, 215, Fed. Cas. No. 15,877, which was a prosecution under U. S. Rev. Stat. § 5515, of state commissioners of election appointed under the state law to conduct an election for members of Congress and state officers, charging that they prevented a fair election for a member of Congress by using three ballot boxes at the polls, the court instructed "that Congress has no power to punish a state officer for a violation of a state law, if it only affects the election of state, parish, or ward officers, and that § 5515 of the Revised Statutes of the United States does not undertake to punish state officers for a violation of state law, so far as such violation only affects the election, or the result of the election, of state, municipal, or parish officers."

Congress may make nonperformance of duties imposed by state laws on state officers an offense against the United States, where discrimination is made against a voter on account of his race, color, etc. *United States v. Given*, Fed. Cas. No. 15,210.

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## II. Under article 1, United States Constitution.

In *LACKEY V. UNITED STATES* it was said: "But whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the 2d and 4th sections of article 1 of the Constitution, or arises out of the implied power to protect such elections against violence and fraud because they are Federal elections so far as Federal officials are thereby directly chosen, it is very obvious that whether such power be attributed to either the one or the other source it furnishes no reason for any interference at a purely state election."

Under Const. art. 1, § 4, providing that Congress has power to make regulations as to the time and manner of holding elections for representatives in Congress, or to alter such regulations as the state prescribes, Congress can require state officers of election, at which representatives in Congress are to be voted for, to perform the duties required by the state statutes, and to make the failure a criminal offense, and could enact U. S. Rev. Stat. §§ 5515, 5511, to that effect. *Re Coy*, 31 Fed. 794. Affirmed in 127 U. S. 752, 32 L. ed. 278, 8 Sup. Ct. Rep. 1263.

And under this section of the Constitution Congress has ample power to legislate for the protection of elections for Congress, whether such elections be for representatives alone, or in conjunction with the election of state and county officers. *Ex parte Perkins*, 20 Fed. 900.

U. S. Const. art. 1, § 1, 4, in regard to elections of representatives in Congress and adopting the qualifications of electors prescribed by the states, and authorizing Congress to regulate the manner of holding such elections, are intended to place the election of representatives in the ultimate power of Congress, so as to secure at all times the house of representatives, first, by preventing obstructive legislation by the states, and, second, securing to the voters the protection of the general government. *United States v. Goldman*, 3 Woods, 187, Fed. Cas. No. 15,225.

This article does not confer rights or privileges upon the individual citizen, but is a clause framed to secure the existence of the government itself. It authorizes Congress to regulate the time, place, and manner of choosing representatives in Congress.

And under U. S. Const. art. 1, § 4, Congress has the right, for the preservation of the national existence, to establish such regulations respecting the manner of conducting an election for representatives in Congress as will prevent and remove all obstructions. *Re Engle*, 1 Hughes, 502, Fed. Cas. No. 4,488.

in *United States v. Reese*, 92 U. S. 214, 218, 23 L. ed. 563, 564, said that the power of Congress to legislate at all upon the subject of state elections depends upon the 15th Amendment to the Constitution. If, therefore, § 5507 of the Revised Statutes is not legislation authorized by that amendment, it must fall. That amendment is in these words:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

That amendment does not confer a right of suffrage upon any one, nor does it secure or guarantee any right of suffrage to any class of citizens. It has no other force or effect than to forbid discrimination by the United States and by the states "on account

of race, color, or previous condition of servitude." This precise question arose in *United States v. Reese*, 92 U. S. 215, 23 L. ed. 563, where the constitutionality of the 3d and 4th sections of the act of May 31, 1870, was involved. Those sections were parts of the original enforcement act, from which § 5507 of the Revised Statutes comes; it having been the 5th section of that act. Those sections, like the 5th section, were broad enough to cover unlawful obstructions to the exercise of the elective franchise whether committed at state elections or elections where electors or members of Congress were to be chosen; and, like the 5th section, were not limited to discriminations "on account of race, color, or previous condition of servitude." The 3d section of the act there involved provided that an offer to perform any act made by law a prerequisite to voting was equivalent to performance,

In *Minor v. Happersett*, 21 Wall. 163, 22 L. ed. 627, it was said that under U. S. Const. art. 1, § 4, providing that Congress may at any time by law make or alter the regulations prescribed in each state for holding elections for senators and representatives, except as to the place of choosing senators, "It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the state laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the state in this particular is certainly supreme until Congress acts."

Under this article Congress has authority to regulate Federal elections. *United States v. Munford*, 16 Fed. 223. In this case it was said that it was claimed that U. S. Rev. Stat. § 5506, has been declared unconstitutional in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, and this was under the same section of the original act of May 30, 1870, as that under which this information is filed, with the exception that after the *Reese* Case Congress re-enacted that section leaving out of it the words which in the *Case of Reese* had been considered to bring it under the 15th Amendment, and made it a general law within the power of Congress to enact, not by virtue of the 15th Amendment, but by virtue of the power under U. S. Const. art. 1, § 4; that the *Case of Reese* did not arise at a congressional election, and all claims to support the indictment not arising out of the 15th Amendment were abandoned.

It was further said that in the *Reese* Case, § 5506 was not appropriate legislation to enforce the 15th Amendment, as that section said nothing of race, color, or previous condition of servitude; that it was a municipal election, and therefore not within the power of Congress, under U. S. Const. art. 1, § 4, which gives power to Congress over Federal elections; that had the same crime been committed at a Federal election the court would have found the authority for § 5506, under art. 1, § 4, above recited.

### III. Under article 2, United States Constitution.

U. S. Const. art. 2, § 1, cl. 2, provides that each state shall appoint in such manner as the legislature thereof shall direct a number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress. Clause 3 provides that Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States. Under this clause, the act of Congress of February 3, 1837

(24 Stat. at L. 373, chap. 90), providing for a meeting of the electors of each state on the second Monday in January next following their appointment, was held to be a valid exercise of the power of Congress, and controlled notwithstanding a state law fixed the third Wednesday in December as the day of meeting. *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3. In this case it was held that Congress can determine the time of choosing electors and the day on which they are to give their votes, which is required to be the same throughout the United States, but otherwise the power and jurisdiction of the state is exclusive, with the exception as to the number of electors and the ineligibility of certain persons.

In *Re Green*, 134 U. S. 377, *sub nom.* *Fitzgerald v. Green*, 33 L. ed. 951, 10 Sup. Ct. Rep. 586, holding that the state court had jurisdiction of an indictment for illegal voting for electors of President, it was said: "The only rights and duties expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the Senate in the presence of the two houses of Congress, and the votes shall then be counted. Const. art. 2, § 1, Amendments, art. 12."

### IV. Under 14th Amendment.

In *Stone v. Smith*, 159 Mass. 415, 34 N. E. 521, it was said: "It is settled that the right to vote is not one of the privileges or immunities of citizens of the United States, within the meaning of article 14 of the Amendments to the Constitution of the United States."

### V. Under 15th Amendment.

The 15th Amendment to the United States Constitution provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation."

In the case of *Lackey v. United States* it is held that the 15th Amendment "does not confer a right of suffrage . . . to any class of citizens. . . . If the right conferred, secured, or guaranteed by the 15th Amendment is not the right of suffrage, but the right of exemption from discrimination in the exercise of

where performance was wrongfully denied by the officer executing the law; and the 4th section prescribed penalties for unlawfully hindering, obstructing, or preventing any citizen from doing any act required to be done to qualify him to vote. The 5th section continues the protection extended to voters by providing for the punishment of those who should by intimidation or bribery prevent any person from exercising the elective franchise "to whom the right of suffrage is secured or guaranteed by the 15th Amendment of the Constitution of the United States." Certain inspectors of a municipal election in the state of Kentucky were indicted for refusing to receive and count at said election the vote of one Garner, a citizen of the United States of African descent. The indictment was based upon the 3d and 4th sections. The contention there,

as here, was that the 15th Amendment had created a class of voters which it was the duty of Congress to protect in the exercise of the elective franchise, and that it was competent for Congress to provide for the punishment of every obstruction to the exercise of that right as a right arising under or dependent upon the Constitution of the United States. To this contention the court said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected. The 15th Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States,

the elective franchise on account of race, color, etc., then the legislation which Congress is authorized to enact in respect to voting at state elections by that amendment must be limited to acts which prevent or punish the discrimination therein forbidden." This case then holds that Rev. Stat. § 5507, providing punishment for persons obstructing the "right of suffrage guaranteed by the 15th Amendment," is void as to state elections.

The only power that Congress has in regard to elections other than national is under the 15th Amendment to the Constitution, and the inclination of the courts seems to be to declare void any legislation by Congress to regulate or protect the rights of voters at state or municipal elections that is not strictly limited in terms to discrimination on account of race, color, or previous condition of servitude.

There will still be room for further litigation over any new legislation, as the right to punish individuals not acting under any statute who obstruct negro voters at state elections is a more serious question, and was not decided in *LACEY V. UNITED STATES*, but in the *Amsden Case* was held to be another ground for holding the Federal statute void.

U. S. Rev. Stat. § 5507 (act of Congress May 31, 1870, § 5; 16 Stat. at L. 140, chap. 114), providing punishment for those who prevent the right of suffrage of persons to whom that right is guaranteed by the 15th Amendment to the Constitution of the United States, is held unconstitutional as applied to state elections, as it is not limited to discrimination on account of race, color, etc. *United States v. Amsden*, 10 Biss. 283, 6 Fed. 819.

This case is followed and approved in *LACEY V. UNITED STATES*.

In *United States v. Amsden*, 10 Biss. 283, 6 Fed. 819. It was said: "In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, it is held that the 15th Amendment does not confer the right of suffrage, but it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude: that the power of Congress to legislate at all upon the subject of voting at state elections rests upon this amendment, and can be exercised by prescribing punishment only when the wrongful refusal to receive the vote of a qualified elector is because of his race, etc., and that the 3d and 4th sections of the enforcement act are unauthorized by the 15th Amendment, and void, because they are not confined in their operation to unlawful discrimination on account of race, etc."

The cases in which the circuit courts have

jurisdiction in actions in regard to elections are limited to those in which it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude. The jurisdiction of the United States circuit court is only given to the extent of determining the right of the parties to such office by reason of the denial of the right guaranteed by the 15th Amendment to the United States Constitution. *Johnson v. Jumel*, 3 Woods, 69, Fed. Cas. No. 7,392. In this case it was held that the act of Congress of May 31, 1870, § 23 (16 Stat. at L. 146, chap. 114, Rev. Stat. § 2012), providing for a suit by any person who is deprived of his election or office by reason of the denial to any citizen of the right to vote on account of race, color, or previous condition of servitude, did not apply to a case where a person claimed that he was elected by a majority of the votes cast, and after the election he was forcibly deprived of his office. It was claimed that a large number of voters were excluded on account of race, color, and previous condition of servitude. In this case the court further said that if, after an election has been held and the result reached or declared, without discrimination from any cause, the person elected is deprived of his office, the statute closes the doorway upon the jurisdiction of the Federal court.

The 15th Amendment, authorizing legislation by Congress, does not affect state constitutions or state legislation in regard to elections and qualification of the electors, or control of state elections, where there is no attempted discrimination on account of race, color, or previous condition of servitude. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Crosby*, 1 Hughes, 448 Fed. Cas. No. 14,893; *Harrison v. Hadley*, 2 Dill. 229, Fed. Cas. No. 6,137; *Anthony v. Halderman*, 7 Kan. 50; *Van Valkenburg v. Brown*, 43 Cal. 43, 18 Am. Rep. 136; *Washington v. State*, 75 Ala. 584, 51 Am. Rep. 480; *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472.

The right of a citizen to vote depends upon the law of the state in which he resides, and is not granted to him by the Constitution of the United States; nor is such right guaranteed to him by that instrument. All that is guaranteed is that he shall not be deprived of suffrage by reason of his race, color, or previous condition of servitude. *United States v. Crosby*, 1 Hughes, 448, Fed. Cas. No. 14,893.

The Federal court has no jurisdiction in an action for defrauding a party out of an office to which he has been elected, where the fraud was perpetrated without reference to "race

however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress. That right is exemption from discrimination in the exer-

cise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the 2d section of the amendment, Congress may enforce by 'appropriate legislation.' This leads us to inquire whether the act now under consideration is 'appropriate legislation' for that purpose. The power of Congress to legislate at all upon the subject of voting at state elections rests upon this amendment. The effect of article I, § 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color, or pre-

color, or previous condition of servitude" under the act of Congress (enforcement act) approved May 31, 1870 (16 Stat. at L. 140, chap. 114), amended February 28, 1871 (16 Stat. at L. 433, chap. 99). This act provides that all citizens of the United States, who shall be qualified to vote at any election in any state, territory, etc., shall be entitled to vote at all such elections without distinction of race, color, or previous condition of servitude, and provides a civil action for damages, and a criminal prosecution against the guilty party, and confers jurisdiction on the United States courts. *Harrison v. Hadley*, 2 Dill. 229, Fed. Cas. No. 6,137.

And the 15th Amendment to the Federal Constitution does not give the colored man the right to vote independent of the restrictions and qualifications, such as age and residence, imposed by the state Constitution upon the white man. *Anthony v. Halderman*, 7 Kan. 50.

The power of the state to determine who may vote is not controlled by the 15th Amendment. The 15th Amendment took away the authority of the state to discriminate against citizens of the United States on account of race, color, or previous condition of servitude; but the power of exclusion upon all other grounds, including that of sex, remains intact. *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

In *Washington v. State*, 75 Ala. 584, 51 Am. Rep. 480, holding that a state Constitution disqualifying certain criminals from voting was not *ex post facto*, it was held that the election franchise is a privilege rather than a right, and is the subject of exclusive regulation by the state, limited only by the provisions of the 15th Amendment to the Federal Constitution, prohibiting discrimination on account of race, color, or previous condition of servitude.

There is no limitation of the right of the state to prescribe qualifications for suffrage except those in the Constitution of the United States prohibiting discrimination on account of race, color, or previous condition of servitude, and the right of the state is not affected by the act of Congress of February 23, 1870, readmitting Mississippi to representation in Congress, and assuming to make it conditional upon the states preserving the then existing qualifications for suffrage. *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472.

The 15th Amendment authorizes legislation by Congress to prevent discrimination against a voter on account of his race, color, or previous condition of servitude. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 8; *United States v. 53 L. R. A.*

*Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897, affirmed in 92 U. S. 542, 22 L. ed. 588; *United States v. Given*, Fed. Cas. No. 15,210, 15,211; *Cully v. Baltimore & O. R. Co.* 1 Hughes, 536, Fed. Cas. No. 3,466; *Kellogg v. Warmouth*, Fed. Cas. No. 7,667.

And the 15th Amendment to the United States Constitution does *proprio vigore* substantially confer on the negro the right to vote. Congress has the power to protect and enforce that right, under U. S. Rev. Stat. § 5508, providing that if two or more persons conspire to intimidate any citizen in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States, he shall be punished, etc., and § 5520, providing that if two or more persons conspire to prevent any citizen entitled to vote from giving his support in favor of an election for an elector for President or vice president or a member of Congress, they shall be punished. These sections are constitutional and valid. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152. In this case *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627, to the effect that "the Constitution of the United States does not confer the right of suffrage upon anyone," was explained, as there the court was combating the argument that the right was conferred upon all citizens, and therefore upon women as well as men.

The adoption of the 15th Amendment rendered inoperative any provision in an existing Constitution of the state whereby the right of suffrage was limited to the white race. *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567.

The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination guaranteed by the 15th Amendment to the United States Constitution comes from the United States. The right to vote has not been granted or secured by the Constitution of the United States, but exemption from discrimination has been. *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 8; *United States v. Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897, affirmed in 92 U. S. 542, 22 L. ed. 588.

In the latter case an indictment was held bad because it did not show deprivation of the right to vote on account of race, color, or previous condition of servitude.

The 15th Amendment to the Constitution of the United States not only gave the right to participate with others in voting on equal terms, without any discrimination on account of race, color, or previous condition of servitude, but the power was expressly conferred on Congress to enforce the articles conferring the right. The 2d section of the 15th article, ordaining that

vious condition of servitude that Congress can interfere, and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized."

Examining the sections there involved, the court held that neither section was confined in its operation to unlawful discriminations on account of race, color, or previous condition of servitude. "If Congress had the power," said the court, "to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose." Having held that Congress was only authorized to interfere with the voting at a state election when the wrongful refusal to receive and count a vote is because of race, color, or previous condition of serv-

itude, the court held that the two sections there involved were beyond the limit authorized by the 15th Amendment.

In *United States v. Cruikshank*, 92 U. S. 542, 555, 556, 23 L. ed. 588, 592, 593, two of the counts of the indictment were for hindering and preventing the citizens named, who were described as being of African descent, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the state of Louisiana, or by the people of and in the parish of Grant aforesaid." These counts, as well as all the other counts of the indictment, were based upon the 6th section of the act of May 31, 1870, now § 5508 of the Revised Statutes. Concerning these particular counts, the court said: "In *Minor v. Happersett*, 21 Wall. 178, 22 L. ed. 631, we decided that the Constitution of the

"the Congress shall have power to enforce this article by appropriate legislation," was adopted for a purpose. The enactment of Congress of May 31, 1870 (16 Stat. at L. 140, chap. 114, § 2), providing that it shall be the duty of any state officer to give all citizens an equal opportunity to become qualified to vote without distinction of race, color, or previous condition of servitude, does not impose any new duties upon any state officer. Where state laws have imposed duties Congress may make the nonperformance of those duties an offense against the United States, and may punish it accordingly. This is not invading the state domain. *United States v. Given*, Fed. Cas. 15,210, 15,211.

In *Cully v. Baltimore & O. R. Co.* 1 Hughes, 536, Fed. Cas. No. 3,466, it was said: "There were two cases with regard to the 15th Amendment, or right of suffrage: The cases of *United States v. Mason*, from Kent county, and *United States v. Schumenant*, in Anne Arundel county. I held in those cases that while the right of suffrage had not been granted by the 15th Amendment, yet there had been granted a right not to be discriminated against, and the learned pleader of this court, with his usual caution, had embraced in these indictments the fact that they were rejected because they were colored people, and on account of their race, color, and previous condition of servitude, and I held, therefore, that while the Congress could not give the right of suffrage they could protect it. I held, although the section looked to hostile legislation by the states, yet that under the last clause of the section, which gave them the right to enforce it by appropriate legislation, while they could not act criminally upon the state, they could punish those persons who denied to them the right to be protected against discrimination, the article in the Constitution of the United States guaranteeing protection to the citizens in that regard."

Congress may confer jurisdiction on Federal courts to preserve evidence in order to prosecute a suit at law, where a large number of voters are deprived of their right to vote on account of race, color, or previous condition of servitude. The enforcement act of Congress (16 Stat. at L. 140 and 433), to enforce the provisions of the 15th Amendment to the United States Constitution, is constitutional and valid. Federal circuit courts have jurisdiction of a bill to preserve evidence to enable the prosecution of a suit at law, where a large number of voters are deprived of their right to vote on account of race, color, or previous condition of servitude. *Kellogg v. Warmouth*, Fed. Cas. No. 7,667. 53 L. R. A.

#### VI. Summary of present statutes.

The United States Revised Statutes, title *Elective franchise*, §§ 2002-2031 inclusive, contained what is known as the "enforcement act." All of these sections were repealed February 8, 1894, except §§ 2003, 2004.

Section 2003 prohibits any United States army or naval officer from prescribing the qualifications of any voter. Section 2004 is to the effect that citizens qualified to vote shall be allowed to vote at all elections without distinction being made as to race, color, or previous condition of servitude.

The Revised Statutes, chap. 7,—title *Crimes against the elective franchise and civil rights of citizens*,—embraces §§ 5506-5532. Of these the main part was repealed February 8, 1894, viz., §§ 5506, 5511-5515, 5520-5523.

Of those remaining, § 5507, providing punishment against those who obstruct the right of suffrage guaranteed by the 15th Amendment, is declared unconstitutional as to state elections in *LACKEY V. UNITED STATES* and *United States v. Amaden*, 6 Fed. 819.

The punitive clause of § 5507 merely refers to the punishments prescribed in the preceding section, which was repealed in 1894.

Section 5508 is a similar one, providing for conspiracy. This was upheld as to congressional elections, taken in connection with § 5520. The latter is now repealed. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

Section 5509 provides for punishment of other crimes committed at the same time. Section 5510 provides against depriving persons of their rights by color of law, customs, etc., on account of race, color, and previous condition of servitude. Section 5516 provides against obstruction of process in civil-rights cases. Section 5517 provides against a marshal refusing process in civil-rights cases. Section 5518 provides against a conspiracy to prevent taking office. Section 5519 provides against conspiracy to deprive persons of equal protection. This was held unconstitutional in *United States v. Harris*, 108 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

It seems there is little left of sound legislation on which to base any control at present by Congress over elections. About all that can be claimed for Federal control, if *LACKEY V. UNITED STATES* stands, are §§ 5507-5510, and these will not apply except in Federal elections. It seems that if interference by individuals with the right of negro suffrage is made at state elections redress will have to be sought in the state court.

United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the states. In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, we hold that the 15th Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been. Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it was not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance."

Similar views as to the limitation upon the powers of Congress in respect of the legislation authorized by the 15th Amendment are expressed in *United States v. Harris*, 108 U. S. 629, 637, 27 L. ed. 290, 293, 1 Sup. Ct. Rep. 601.

But it is said that the law upon which the indictment at bar is based escapes the vice of the law condemned in *United States v. Reese*, 92 U. S. 214, 218, 23 L. ed. 563, 564, by the fact that its operation is confined to offenses obstructive to the exercise of the elective franchise by a class of voters described in the law as "those to whom the right of suffrage is secured and guaranteed by the 15th Amendment." "This class," counsel say, "is constituted solely of citizens of African descent, and the operation of the law limited to offenses denying or abridging this right of suffrage." But this argument is based upon a misapprehension of the vice in those portions of the enforcement act commented upon in *United States v. Reese*. If the right conferred, secured, or guaranteed by the 15th Amendment is not the right of suffrage, but the right of exemption from discrimination in the exercise of the elective franchise on account of race, color, etc., then the legislation which Congress is authorized to enact in respect of voting at state elections by that amendment must be limited to acts which prevent or punish the discrimination therein forbidden. Every wrongful obstruction of the suffrage of the black man at a state election is not

on account of race, color, etc. Unless he is hindered or prevented from the free exercise of the elective franchise on account of his race, color, etc., there has not been a denial or abridgment of the right of suffrage within the prohibitions of the amendment. Both *United States v. Reese* and *United States v. Cruikshank* were decided upon the ground that discrimination on account of color, race, etc., is essential to the commission of any offense against the United States at a state election. In *Ex parte Yarbrough*, cited above, this limitation was held not to apply at elections where congressmen were to be chosen, because the right to vote for congressmen is a right secured by and dependent upon the Constitution of the United States, the office being created and the qualification of voters being determined by that instrument.

The vice of the 5th section, now § 5507 of the Revised Statutes, is precisely the vice of the 3d and 4th sections of the same act. It is not limited in its operation to congressional or presidential elections, nor to offenses grounded upon race, color, or previous condition of servitude. Reading the section in connection with the other parts of the act from which it was taken, it is too obvious for discussion that Congress intended that it should have operation in all elections, and should not be limited to obstructions to the free exercise of the elective franchise based upon race, etc. Indeed, this is the very meaning attached to the act by the court below. The indictment in the case at bar did not aver the bribery to have been because of color, etc., and, if it had, it would have added an element not named in the statute. The same conclusion, in respect to the invalidity of this section, was reached by Judge Gresham, in *United States v. Amsden*, 10 Biss. 283, 6 Fed. 819. Without considering the further question as to whether the power of Congress to legislate in respect to purely state elections is not also limited to prohibitions of discrimination by the United States, and by the states and their officers or others, claiming to act under color of laws within the prohibition of the amendment, we are content to hold that § 5507 is void, as including within its operation offenses not grounded upon race, color, or previous condition of servitude, and therefore in excess of the power of Congress in respect of state elections; its powers in respect to such elections being dependent upon the 15th Amendment alone.

A number of errors in respect to the charge delivered and to charges refused have been assigned. Inasmuch as we have unanimously reached the conclusion that the law under which the indictment was found is repugnant to the Constitution, it becomes unnecessary to consider the mere details of the trial.

*Judgment reversed*, with directions to sustain the demurrer to the indictment, and discharge the plaintiff in error without day.

Petition for certiorari to remove case to Supreme Court of the United States denied.

## CALIFORNIA SUPREME COURT.

L. C. POPE, *Appt.*,  
v.

FARMERS' UNION & MILLING COMPANY, *Resp.*

(130 Cal. 139.)

The destruction by an incendiary fire of wheat stored in a warehouse under a contract calling for its redelivery, "damage by the elements excepted," does not excuse the warehouseman from his obligation, since the exception of damage by the elements is equivalent to an exception of damages by the act of God.

(September 28, 1900.)

NOTE.—What constitutes damages "by the elements" within the meaning of contracts with stipulations referring thereto.

- I. What constitutes damage by the elements generally.
- II. As applied to covenants in leases.
- III. As applied to contracts by carriers.
- IV. Other miscellaneous contracts.
- V. Conclusion.

I. What constitutes damage by the elements generally.

Anciently it was supposed that there were four elements of material things,—earth, air, fire and water; and when it came to be known that this classification had no scientific basis, the term had found a place in common speech and in law which it still retains. *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686, *dictum*.

But the terms "elements" and "damage by the elements," as used in contracts and leases, are somewhat uncertain and indefinite expressions, and very little aid will be derived from resorting to any technical or scientific discussion of the meaning of the word "elements." We should rather look to see whether the word has received any fixed or accepted meaning in the language of such contracts. *Harris v. Corlies*, *Chapman & Drake*, 40 Minn. 106, 2 L. R. A. 349, 41 N. W. 940.

In the popular acceptance of the phrase, injuries by the elements are such injuries as result from the operation of the most common destructive forces of nature against which property needs to be protected. *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686, *dictum*.

"Elements," as used in a covenant against liability in case of damage by the elements, are the means by which God acts; and damages by the elements, and damages by the act of God, are convertible expressions in law. *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115; *POPE V. FARMERS' UNION & MILL CO.*

Thus, fire is one of the elements, and is within the meaning of an exception in a covenant to repair all damages by the elements, whether it comes from spontaneous combustion, from the crater of a volcano, from the clouds, or from accident. *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686.

And so is an injury by wind or flood. *Ibid.*, *dictum*.

And injuries to buildings by wind, rain, frost, and heat are spoken of as injuries by the elements, and all ordinary decay from natural causes is classed in the same category. *Ibid.*

The rule has been laid down, however, and

APPEAL by plaintiff from a judgment of the Superior Court for San Joaquin County in favor of defendant in an action brought to recover the value of wheat stored by plaintiff with defendant and destroyed by fire. *Reversed*.

The facts are stated in the opinion.

Mr. J. G. Swinnerton, for appellant:

The answer does not allege any damage by the elements. This term means the same thing as act of God.

*Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115; *Chidester v. Consolidated Ditch Co.* 59 Cal. 202; *Fay v. Pacific Improv. Co.* 93 Cal. 253, 16 L. R. A. 188, 26 Pac. 1099, 28 Pac.

would appear to be sustained by a large majority of the cases set forth in this note as well as by *POPE V. FARMERS' UNION & MILL CO.*, that before an act can be considered the act of the elements within the meaning of a stipulation exonerating one from liability therefor, it must appear that no human agency intervened; for, if it did, the elements cannot be regarded as the cause, but only as the means. *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115.

See also *Myers v. Hussenbuth*, 32 Misc. 717, 65 N. Y. Supp. 1026, *infra*, II., and cases set forth *infra*, III.

But a departure from this rule was sought to be made, apparently with little success, in *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686, in which it was held that damage by fire is damage by the elements within the meaning of a contract exempting from liability therefor, though human agency may have been used in some remote manner in producing the fire which finally caused the injury, where no negligence can be imputed.

In the above case *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115, *supra*, was distinguished upon the ground that in that case damages by the elements or acts of Providence were excepted; and it was criticized by *Sherwood, J.*, so far as it held act of God and damages by the elements to be convertible expressions, saying: God not only himself uses the elements, but also permits man to use them in the ordinary affairs of life. And that in that case, had not the embankment creating the reservoir been injured through some human agency, the defendant's case would have fallen within the exception; but in that case the defendant had no more control or power over the human agency setting the destructive element in motion than he would have had over the operation of nature producing the same result, and that therefore the tenant should be held liable in the one case no more than in the other.

So, in *Harris v. Corlies*, *Chapman & Drake*, 40 Minn. 106, 2 L. R. A. 349, 41 N. W. 940, it was said that fire is one of the elements in the same sense as water and wind are such; but that, inasmuch as fires, not from lightning, are usually caused by the intervention of human agencies, there might be a question whether such damages were caused by the elements. But the court declined to enter into a discussion as to the effect of the intervention of human agencies.

II. As applied to covenants in leases.

A usual covenant in leases is one to surrender the leased premises at the expiration of the term in as good condition as at the commencement, ordinary wear and damages by the elements ex-

943; Civil Code, § 1511; *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1, 32 Pac. 705; *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 441.

**Messrs. Woods & Levinsky and Nicol & Orr**, for respondent:

Under a fair construction of the receipt in connection with the statute of 1877-78, and more particularly with § 9 thereof, it is clear that the respondent did not cut itself off from the operation and protection of that statute, or that it was intended by the receipt that the respondent should become an insurer of the goods against all loss

cepted; and it is in cases involving covenants of this kind that questions with regard to what constitutes damage by the elements most frequently arise, and the rule above given, that the damage must have occurred through some of the instrumentalities by which God acts unaffected by human agency, is generally applicable.

Thus, a lessee of a building covenanting to keep the building in repair, damage by the elements excepted, could not be held responsible if the building were destroyed by a flood or tornado. *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686, *dictum*.

And a lessee of a planing mill and box factory covenanting to keep the premises in good repair, and at the expiration of the term deliver them in like condition as when taken, reasonable use and wear thereof and damages by the elements excepted, is not liable under such covenant for an injury to the premises while in his possession, caused by fire occurring without his fault. *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686.

But see, as to injury arising from human agency, though not the fault of the tenant, *supra*, I. and *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115, *infra*.

In *Van Wormer v. Crane*, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686, *supra*, cases holding that one who covenants unconditionally to repair or surrender premises in good repair is liable for the destruction of buildings not rebuilt by him, though it may have occurred by fire or other accident, are distinguished upon the ground that this is not a case of a covenant unconditionally to repair, but one in which the lessees have taken care to make an exception which is probably supposed to be important.

So, the estate of the lessors of a hotel, under a lease in which the lessee agreed to take the property in the condition in which it then was, and not ask the lessors for any money or outlay for repair during the continuance of the lease except for such damages as might be caused by the elements, and to put a designated sum in repairs on said premises in part consideration for the lease, is not bound for work and labor upon such premises in repairing the same upon the order of the lessee; and the person performing such labor and furnishing the materials would not be entitled to a mechanic's lien therefor. *Schrage v. Miller*, 44 Neb. 818, 62 N. W. 1091.

But an injury to demised premises by a torrent of water overflowing and sweeping through them, which was produced by an accumulation of waters from unusual rains, which were collected in a natural reservoir in the vicinity of the premises upon lands of a third person, and separated from the demised premises by other lands of third persons, which were prevented from overflowing in ordinary seasons by a natural embankment, which embankment had been interfered with by some person unknown to the 53 L. R. A.

except that occasioned by the elements, to wit, superhuman force or acts of God.

The statute requires the receipt, and the statute becomes a part of the receipt, and by § 9 thereof a warehouseman is exempt from damages occasioned by fire, provided reasonable care and vigilance is exercised to protect and preserve the property.

One may waive the benefit of a statute in his favor. The waiver, however, must be clearly and unequivocally expressed, for the presumption is that no one will so waive.

2 Herman, Estoppel & Res Judicata, § 825.

A construction placed upon the terms of

tenant, without his knowledge or consent, whereby it gave way, is not an injury by the elements or the act of Providence within the meaning of an exception of such damages from the operation of a covenant in a lease to repair; but is an injury caused by the act of some stranger, which would not serve to relieve the tenant from his obligation. *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115.

An injury, to constitute damage by the elements, however, must have resulted from something extraordinary and unexpected, and not in the ordinary course of nature.

Thus, a stipulation in a lease to return the property to the lessor in as good order as now, ordinary wear and tear and damage by fire, wind, and water excepted, means, when taken in connection with a further stipulation by the lessee to make all necessary repairs at her own expense, extraordinary damages by fire, wind, and water, and does not include damages arising from the fact that the roof was decayed and the house thereby endangered. *Wadde'l v. De-Jet*, 76 Miss. 104, 23 So. 437.

And a lease of the first story and basement of a brick building for a term of years, providing that if at any time during the term the demised premises shall be rendered partially untenable by fire or the elements, but so that the business carried on therein can be successfully conducted while the same are being repaired, the lessor shall repair them as soon as practicable, and the fair value of the use thereof shall be paid during the period of repair instead of the rent, refers only to some sudden, unusual, or unexpected action of the elements occurring during the term, such as floods, tornadoes, and the like,—to extraordinary disasters not anticipated by either party, the efficient cause of which originated after the term began, and which either destroyed the building or left it in a materially or essentially worse condition than when it was leased; and not to injuries which were but the natural and ordinary operation of the laws of nature, the efficient cause of which existed at the date of the demise, such as the percolation and oozing of water through and under the walls of the basement from the interior of the building, so as to render the basement so damp and wet as to be unhealthy and untenable. *Harris v. Corlies*, *Chapman & Drake*, 40 Minn. 106, 2 L. R. A. 349, 41 N. W. 940.

So, the Connecticut act of 1869, providing that lessees or occupants of any building which shall have been, or be, without fault or neglect on their part, so destroyed or injured by the elements or any other cause as to be untenable or unfit for occupancy, shall not be bound to pay rent from such destruction and injury unless otherwise expressly provided by written agreement between the parties; and that the lessee may in such case surrender the premises to the lessor,—applies only to cases where the building shall become untenable by reason of some



a contract by one of the parties thereto against his own interest is binding upon him.

*Crown Coal & Tow. Co. v. Yoch Coal Min. Co.* 57 Ill. App. 666.

Mr. R. L. Beardslee also for respondent.

Henshaw, J., delivered the opinion of the court:

Plaintiff sued to recover from defendant the value of certain wheat deposited under the terms of the following written contract:

Stockton, Cal., July 31, 1897.  
Received of Mrs. L. C. Pope, in the Eureka

sudden and unexpected calamity; as, where it is wholly or partially destroyed by fire, water, or by a mob or other like cause; and is designed to relieve the tenant of the burden of paying rent after it has become impossible for him to use and occupy the premises leased; and does not apply to mere decay of the premises though they thereby become untenable. *Hatch v. Stamper*, 42 Conn. 28.

In *Myers v. Hussenbuth*, 32 Misc. 717, 65 N. Y. Supp. 1026, however, it was said that there is an implied covenant in every hiring that the tenant will surrender the premises at the end of the term in as good condition as they were in at the commencement of the term, reasonable wear and tear and damages by the elements excepted; and that such obligation is not confined to cases of ordinary or gradual decay, but extends to accidental injuries. But the question in the case was as to whether or not a tenant was liable for waste committed by strangers over whom he had no control.

Likewise, to constitute damage by the elements within an exception in a lease, the injury must have been the direct and proximate result of the action of the elements, and not a remote or indirect consequence thereof.

Thus, a covenant in a lease of a basement and first and second floors of a four-story building, to repair all damages done to the premises during the lessee's occupancy, or pay for the same, the usual wear and tear and providential destruction or destruction by fire excepted, applies to a total destruction of the premises, or an injury which would permanently unfit them for occupation and require a rebuilding, as distinguished from a repairing, and does not apply to an injury by fire which burned the roof off but did not extend below the top floor, so as to warrant the tenant in declining to pay rent for the balance of the term, though the windows were broken and water ran in. *Spalding v. Munford*, 37 Mo. App. 281.

And an owner of premises leased to a tenant for an unexpired term, the tenant having covenanted to surrender at the end of his term in good condition, reasonable wear and damages by the elements excepted can only recover against an adjoining owner for an injury to a party wall situated upon the line between the two lots for an injury to the structure itself. He cannot recover anything on account of the enjoyment of his premises having been made less beneficial to the tenant thereby, though it is alleged to have been caused by unavoidable accident. *Eno v. Del Vecchio*, 4 Duer, 53.

And the rule has been laid down in a late New Jersey case that a provision in a lease that all repairs are to be made and paid for by the lessee is limited and qualified by another provision therein, that the lessee shall peaceably deliver up the premises demised at the end of the term in the same good order and condition that

warehouse, situated on Levee street, Stockton, the following described merchandise, which we agree to deliver (damage by the elements excepted) upon the surrender of this certificate and payment of charges, twenty-seven hundred seventy-six sacks wheat, weighing three hundred eighty-three thousand one hundred forty-six pounds. Rates of storage, seventy-five cents per ton for the season ending June 1, 1898. 2,776 sacks wheat, weighing 383,146. Room 6, pile No. 67. Mark: "L. C. P."

The complaint alleged a demand upon the defendant for the return of the wheat, and its failure to comply therewith. The an-

he received them, reasonable wear and tear and damage by accidental fire alone excepted, so that the tenant would not be required to make repairs made necessary by reasonable wear and tear, or by accidental fire. *Allen v. Fisher* (N. J. Err. & App.) 49 Atl. 477.

And that under a lease containing such covenants the lessor remains liable to make repairs made necessary by accidental fire, under 1 N. J. Gen. Stat. p. 1923, § 35, providing that whenever any building erected on leased land shall be injured by fire without the fault of the lessee, the landlord shall repair the same, or, in default thereof, the rent shall cease. *Ibid.*

But in New York the rule is that a lessee of premises, covenanting to keep them in good repair and do all necessary repairs on the buildings thereon, is not excused from repairing because the defects making repairs necessary were produced by the elements and corrosion of time, by another condition in the lease to quit and surrender the premises in as good state and condition as reasonable wear and tear thereof would permit, damages by the elements excepted, since the two covenants are entirely distinct and designed for different purposes, and differ entirely as to the time to which they are applicable. *Kling v. Dress*, 5 Robt. 521.

And a covenant in a lease upon the part of the lessee to surrender in as good condition as reasonable use would permit, damages by the elements excepted, did not relieve him from the obligation to make repairs under a covenant to do all repairs, where the leased premises consisted of an old building fitted to the purpose of his occupancy, in which he placed goods of great weight, by reason of which the floor settled, and the floors and roof settled still more afterwards in consequence of a snow storm. *McMann v. Autenreith*, 17 Hun, 168.

And a tenant of a store having a plate-glass front which was cracked a few inches by the act of a stranger, and which crack gradually elongated until it nearly crossed the glass, is liable for damages for the repair of such glass under a covenant in the lease to make all necessary repairs, whether the elongation was caused by wind, weather, or wagons passing, and notwithstanding the fact that the lease contained a stipulation to surrender the premises at the expiration of the term in as good state and condition as at the commencement, reasonable use and wear thereof, and damage by the elements, excepted. *Cohn v. Hill*, 9 Misc. 326, 30 N. Y. Supp. 209.

But while no cases upon this question from other states have been found, it is thought that the following cases, though not construing the expression "damage by the elements," and perhaps not, therefore, proper to be considered in this note, are inconsistent with the New York rule, and inferentially support that of New Jersey.

answer of defendant did not deny the existence of the contract, but pleaded that, through no negligence upon its part, the major portion of the wheat was destroyed by fire, and the rest of it so badly damaged as to be of small value, and offered to restore to plaintiff the damaged wheat in its possession, and the value of such portion of the damaged wheat as it had already sold. Under these pleadings, a trial was had before a jury. The plaintiff rested her case without the introduction of any evidence. The evidence for the defense, which was admitted without any objection by plaintiff, showed that the warehouse was destroyed

by fire, and that the fire was of incendiary origin. The court instructed the jury, generally, that plaintiff could not recover if it were not shown that defendant was negligent. Verdict passed for defendant, judgment in its favor followed the verdict, and from that judgment, and from an order denying her a new trial, plaintiff appeals.

By its written contract, defendant promised absolutely to return the wheat to plaintiff upon surrender of the certificate, "damage by the elements excepted." "Damage by the elements" is the equivalent of the phrase "act of God." *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Chidester v.*

Thus, in *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 440, it was held that a clause or covenant in a lease upon the part of a tenant to deliver up the leased premises at the expiration of the term in as good order and condition as now, reasonable use, wear, and tear excepted, does not impose a liability upon the lessee to repair or restore the premises in case of injury by fire, or by the elements or other unavoidable accident, even in the absence of an express covenant.

So, *Gutteridge v. Munyard*, 7 Car. & P. 129, 1 Moody & R. 334, holds that a covenant in a lease to repair and yield up the premises in good repair, reasonable use and wear and tear thereof in the meantime excepted, where the demised building is a very old one, does not mean that it shall be restored to an improved state, nor that the consequences of the elements shall be averted, though there is no exception as to the damages by the elements. The duty of the tenant is to keep it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care.

It is for the court, in an action for arrears of rent in a lease, to interpret a clause of the lease containing a covenant upon the part of the lessee to repair all damages done to the premises during the lease, or pay for the same, the usual wear and tear and providential destruction or destruction by fire excepted, and to determine whether there was any substantial evidence tending to show a state of facts within it. *Spalding v. Munford*, 37 Mo. App. 281.

While some of the above cases do not construe exceptions from liability for damages by the elements, they are included in the note because they do construe covenants against liability for damage by fire, water, winds, storms, etc., upon the theory that such covenants are the same in effect though expressed in different language.

### III. As applied to contracts by carriers.

Carriers are not held liable for injuries by the act of God or of the public enemy. "Damage by the elements" and "injury by act of God" being synonymous, therefore there is little occasion for exceptions and restrictions in their contracts as to liability for damage by the elements. They have frequently seen fit, however, to insert exceptions with reference to fires, heat, cold, winds, storms, etc., which have been held to constitute the elements and be the instrumentalities of God's action, and while these stipulations seem to have been given a somewhat broader construction than stipulations as to exemption from liability for damage by the elements in leases, cases construing them have been included in this note when the injury complained of was in fact an injury by the elements as distinguished from injuries from perils of the sea, or those forming some other well-defined class of exceptions frequently or usually made.

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With reference to cases of this class, as in cases with reference to exceptions in leases, where the injury was inevitable and done solely by the action of the elements, the carrier is relieved from responsibility.

Thus a detention and delay in handling the lighter during the process of unloading a vessel, caused by continued increasing cold resulting in an accumulation of ice and freezing of loose ice within the docks, necessarily delaying the necessary changes in the position of the lighter in order to receive the goods, is a detention by frost within the meaning of a provision in the charter party relieving the vessel from liability for damage for delay caused by frosts, etc. *Aalholm v. A Cargo of Iron Ore*, 23 Fed. 620.

But where liability for damages by freezing is excepted from a bill of lading, and a loss occurs from the excepted cause, the exception must be the proximate cause of the loss and the sole cause. *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 206.

And the words "while at depots," in a contract between a shipper and a carrier by which the carrier agreed to carry and forward certain property to a point beyond its line on payment of freight and charges, the damages incident to railroad transportation, loss or damage by fire or the elements while at depots excepted, only refer to depots at which the cars containing the goods might be stopped while en route to the place of destination, and not to the depot at that place, so as to relieve the carrier from liability for loss by fire at that depot. *E. O. Standall Mill. Co. v. White Line Central Transit Co.* 122 Mo. 258, 26 S. W. 704.

If, however, the loss resulted in part or in whole from a human agency, and particularly if it resulted from the act or neglect of the carrier himself, the exemption is of no effect.

Thus, the freezing of a part of a cargo of oranges, due to the fact that they were unloaded at a time when the weather was below zero, is not an act of God within the meaning of an exception in the bill of lading of liability for damages caused by an act of God, but is due to the discharging of the oranges at an unsuitable time. *The Alene*, 19 Fed. 875.

And where in a contract with a carrier for the transportation of a quantity of potatoes the parties stipulated that the potatoes were to be carried at the owner's risk of freezing, and the potatoes were injured during transportation by freezing and rotting, it devolves upon the carrier, in an action for the injury, to show, notwithstanding the exception, that the loss did not occur through any fault, want of care, or negligence on its part, or on the part of its agents or employees. *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 206.

And the burden rests with a railroad company to show that cotton transported by it under a bill of lading stipulating against liability for destruction by fire, which was burned while be-

*Consolidated Ditch Co.* 59 Cal. 202; *Fay v. Pacific Improv. Co.* 93 Cal. 253, 261, 16 L. R. A. 188, 26 Pac. 1099, 28 Pac. 943.

As no effort was made by defendant to reform this contract in any way, it must stand, so far as this case is concerned, exactly as it was written; and, so construing it, it is open to but one interpretation, namely, that defendant's liability to return the wheat was absolute, unless it was prevented from so doing by the act of God. Under this construction of the contract, it was no defense for defendant to say, or to show, that the wheat was destroyed without negligence upon its part. It was in-

cumbent upon it to show that the wheat was in fact destroyed or damaged by the elements. The evidence which it adduced tended merely to prove that the fire was of incendiary origin, and thus absolutely to negative the idea that the destruction of the grain was caused by the act of God.

*The judgment and order are therefore reversed, and the cause remanded.*

We concur: **Temple, J.; McFarland, J.**

Rehearing denied.

ing transported, was not lost through its negligence. *Texas & P. R. Co. v. Richmond (Tex.)* 68 S. W. 619.

So, a carrier agreeing to remove a quantity of oats from a designated place within fifteen days from date, wind and tide and other acts of God permitting, is not relieved from liability by the fact that on one occasion his boat was prevented from reaching the place in question by increasing winds, where on another occasion his boat was prevented from reaching such place by an accumulation of logs, and it does not appear that there were not other occasions during the fifteen days when it was possible to reach such place. *Adams v. Ames*, 19 Wash. 425, 53 Pac. 546.

Likewise, a common carrier, though he is exempt by contract from liability for losses arising from fire and like causes, is bound to use ordinary diligence in protecting goods intrusted to his care for transportation, and saving them from loss and injury, which ordinary diligence may be defined to be that care or degree of diligence which reasonable, prudent, and honest men would take or exercise and exhibit in respect to their own concerns under all the circumstances surrounding each particular case. *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 97, 14 S. W. 471.

And an exception in a bill of lading given by an express company, that it is not to be liable for any loss or damage occasioned by fire, does not relieve it from liability for a loss by fire occasioned by the negligence of the railroad company employed by it to carry the goods in question, as the railroad company, when transporting such goods for an express company, is its agent. *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

And a carrier by rail carrying cotton upon open flat cars, which cotton is burned while in transit, is not relieved from liability therefor by a stipulation written across the bill of lading that the carrier was not to be responsible for loss or damage by fire or water, where the cotton might have been stored in box cars, which were safer, and the train carrying the cotton was made up of both classes of cars. *New Orleans, St. L. & C. R. Co. v. Faler*, 58 Miss. 911.

If a loss of goods in the hands of a carrier by fire can be ascribed to a failure to use what diligence and care would suggest was feasible to have been done, the carrier cannot shield himself behind an exemption in the bill of lading from liability for the loss or damage by fire. *Ibid.*

And a stipulation in a contract for carriage, against liability for loss or damages to the goods carried by fire or the elements, cannot be construed to operate as a stipulation against losses 53 L. R. A.

or damages occasioned by negligence of the carrier, as such damages cannot be stipulated against. *E. O. Stanard Mill. Co. v. White Line Central Transit Co.* 122 Mo. 258, 26 S. W. 704; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 523; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Condict v. Grand Trunk R. Co.* 54 N. Y. 505; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 288, 7 Am. Rep. 327.

A common carrier has two distinct liabilities, —the one for loss by accident or mistake with reference to which he is liable as an insurer, and the other for loss by default or negligence with reference to which he is answerable as an ordinary bailee; and with reference to his liability as an insurer he may protect himself by stipulations limiting his liability for injury or damage by fire or other casualty. But with reference to losses occurring from his own default or neglect of duty, public policy will not permit him to stipulate for immunity. *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590.

And a contract for transportation by a carrier, stipulating against liability for losses or damages by fire or the elements, will be construed strictly and most strongly against the carrier, where there is reasonable doubt as to whether the stipulation would include loss or damage occasioned by negligence. *E. O. Stanard Mill. Co. v. White Line Central Transit Co.* 122 Mo. 258, 26 S. W. 704; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 523.

A stipulation in a shipping receipt for a carload of cotton, however, shipped from one state to another, that the railroad company should not be liable for destruction of the cotton by fire, or any other damage thereto by causes beyond its control, is not prohibited or rendered ineffectual by a statutory provision of the state of shipment that railroad companies and other common carriers for hire within the state shall not limit their liability as it exists at common law by inserting exceptions in the bill of lading or otherwise, since such provision is confined to carriers within the state, and does not apply to interstate commerce. *Texas & P. R. Co. v. Richmond (Tex.)* 68 S. W. 619.

#### IV. Other miscellaneous contracts.

The rules above stated seem to apply to all contracts in which a party stipulates to be responsible, damage by the elements excepted.

Thus, a person contracting with another for the sale of a quantity of canned corn at a specified price, the contract providing that in case of a destruction of the cannery by the elements the seller is not to be held liable for nondelivery, is excused, in case of a subsequent destruc-

tion of the cannery by fire, from the performance of any part of the contract not due at the time of the fire. *Allen v. Quann*, 80 Ill. App. 547.

So, a contract for lock excavation for the enlargement of the basin of a canal, providing that additional time may be allowed for the completion of the work if the contractor shall be prevented therefrom by freshets, ice, or other force or violence of the elements without his fault, leaves no discretion in the officer to whom the question was referred, except in respect to the amount of additional time to be allowed, where the working season on the river was limited to a short period by unprecedented and unusual floods, which prevented the completion of the work within the time agreed upon, as the word "may" in such case must be construed to mean "shall," and in determining the amount of additional time there must be an exercise of a just and reasonable judgment, and not of arbitrary power. *Gleason v. United States*, 33 Ct. Cl. 65.

For an application of the above rules to such a provision in a contract by a warehouseman, see *POPE v. FARMERS' UNION & MILL CO.*

#### V. Conclusion.

Damage by the elements is held to be the equivalent of injury by the act of God, the elements being the instrumentalities through which God acts. As to what constitutes a loss by a carrier through the act of God, see *note* to *Blythe v. Denver & R. G. R. Co.* (Colo.) 11 L. R. A. 615.—*Defenses in action for loss by carrier; act of God as an excuse.* It includes damage by fire, floods, wind, rain, frost, and heat.

Questions as to exceptions against liability for damage by the elements arise most frequently with reference to covenants in leases, to surrender the premises in good condition; and in such cases, in order to relieve from liability, the damages must have resulted from something sudden, unusual, and unexpected, and the prevailing rule is that it must have occurred without human agency. And while there is a conflict of authority, the prevailing rule would seem to be that such a stipulation qualifies a stipulation to repair, so that the tenant would not have to repair in case of injury by the elements, though the opposite rule prevails in New York.

Carriers are not liable for damage by the act of God or the public enemy, and therefore stipulations against liability for damage by the elements in their contracts would seem to be of little use, and are of rare occurrence. They have seen fit, however, in some instances, to insert stipulations against liability for loss by fires, floods, winds, storms, and cold, and, with reference to such covenants, the rule applicable to covenants against liability for damage by the elements in leases would seem to apply. But the loss must not have resulted from any want of ordinary care on the part of the carrier; and such a stipulation cannot be construed so as to excuse him from the consequences of his own negligence or that of his agents or servants.

These rules apply to all contracts containing similar stipulations. But, owing to the rule that the act of God excuses, such stipulations in contracts other than those between landlord and tenant are not numerous, and cases construing are scarce.

F. H. B.

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Griffith COIT *et al.*, Appts.,

WESTERN UNION TELEGRAPH COMPANY, Resp't.

(130 Cal. 657.)

1. Compliance with its statutory duty to use great care and diligence in transmitting messages is established in favor of a telegraph company by a finding that it has not been guilty of any negligence.
2. One who complies with a telegraphed request to furnish information by telegram is the agent of the one making the request, so that the latter will be bound by his agreement that the company shall not be liable for mistakes in unreported messages.
3. Transmission of a telegram at a time when a storm has made the wires work badly is not gross negligence on the part of the telegraph company, if, when it is actually sent, the wires are in good working order, and the statute requires the forwarding of messages at the earliest practicable moment.

(December 14, 1900.)

**A**PPPEAL by plaintiffs from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action brought to recover damages for failure to correctly transmit and deliver a telegram. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Thornton & Mersbach* for appellants.

*Messrs. George H. Fearons and R. B. Carpenter*, for respondent:

The contract contained on the blank of the message was valid.

*Hart v. Western U. Teleg. Co.* 66 Cal. 579, 55 Am. Rep. 119, 6 Pac. 637; *Redington v. Pacific Postal Teleg. Cable Co.* 107 Cal. 317, 40 Pac. 432; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *MacAndrew v. Electric Teleg. Co.* 17 C. B. 3; *Baxter v. Dominion Teleg. Co.* 37 U. C. Q. B. 470; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Clement v. Western U. Teleg. Co.* 137 Mass. 403; *Passmore v. Western U. Teleg. Co.* 78 Pa. 242; *Kiley v. Western U. Teleg. Co.* 109 N. Y. 231, 16 N. E. 75; *United States Teleg. Co. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Aiken v. Western U. Teleg.*

**NOTE.**—As to stipulation restricting liability of telegraph company for mistakes in unreported messages, see, in this series, *Gillis v. Western U. Teleg. Co.* (Vt.) 4 L. R. A. 611, and *note*; *Pepper v. Western U. Teleg. Co.* (Tenn.) 4 L. R. A. 660; *Western U. Teleg. Co. v. Stevenson* (Pa.) 5 L. R. A. 515; *Western U. Teleg. Co. v. Short* (Ark.) 9 L. R. A. 744; *Wertz v. Western U. Teleg. Co.* (Utah) 13 L. R. A. 510, and *note*; *Brown v. Postal Teleg. Cable Co.* (N. C.) 17 L. R. A. 648; *Francis v. Western U. Teleg. Co.* (Minn.) 25 L. R. A. 406; *Birkett v. Western U. Teleg. Co.* (Mich.) 33 L. R. A. 404; *Reed v. Western U. Teleg. Co.* (Mo.) 34 L. R. A. 492; and *Western U. Teleg. Co. v. Eubank* (Ky.) 36 L. R. A. 711.

Co. 5 S. C. N. S. 358; *Western U. Teleg. Co. v. Carew*, 15 Mich. 525.

Garoutte, J., delivered the opinion of the court:

Plaintiffs telegraphed to W. B. Dennis, at St. Louis, asking him to telegraph them the lowest cash price for 220 tons of 40-pound steel rails. The message was correctly delivered, and in answer thereto Dennis telegraphed to plaintiffs the price to be \$37 per ton. This despatch was delivered in due time, but when delivered it read \$27 per ton; the mistake in the message having occurred in transit, by reason of atmospheric disturbances. Relying upon the words of the message as delivered, plaintiffs entered into contracts to buy and sell steel rails, and great damage resulted to them by reason of the mistake of defendant heretofore stated. To recover this damage the present action is brought. The facts of the case are largely agreed upon, and in addition the court made a finding of fact as follows: "The defendant, Western Union Telegraph Company, was not guilty of gross or any other degree of negligence in the transmission of the message of Dennis to the plaintiffs; nor was the error or mistake in the said despatch of said Dennis, as the same was delivered to said plaintiffs, due to or caused by the gross or any other degree of negligence of the said defendant, Western Union Telegraph Company." Upon the facts, judgment was rendered for defendant, and this appeal from the judgment and order denying a motion for a new trial is now before us. This finding in favor of defendant of no negligence is essentially a finding of the ultimate fact in the case, and will be so treated by the court in the consideration of the merits of this appeal.

The Civil Code declares (§ 2162): "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." In many jurisdictions it is held that the phrase "gross negligence" is a misnomer, and that the adjective "gross" in no way qualifies the noun "negligence." But in this state the rule is recognized to the contrary, not only by the decisions of this court, but by many sections of our Civil Code. The phrases "gross negligence" and "slight negligence" are found in common use in the law of this state, and, being so used, each must be held to have a distinctive meaning. The defendant in this case was required to use great care in the transmission and delivery of this message. The court found that, in the transmission and delivery of this message, defendant was not guilty of any negligence. Not being guilty of any negligence whatever, defendant must be held to have used great care; and the finding of fact quoted is the equivalent of an express finding that defendant used great care in the performance of its duty in the transmission and delivery of the message here involved. But, in view of the conclusion at which the court has arrived, it is unnecessary to determine whether or not the evidence in this case is sufficient to support

a finding of fact to the effect that defendant was not guilty of any negligence whatever, and this conclusion is based upon the following reasons:

The written message which was delivered by Dennis to defendant, to be sent to San Francisco and delivered to plaintiffs, contained the following regulation and stipulation bearing upon defendant's duties and liabilities: "It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." In this case the message sent from St. Louis to plaintiffs was not a "repeated message." The foregoing stipulation constituted a valid and binding contract between Dennis, the sender, and the defendant company. As to its validity and binding force in this state, at least, the law may be considered settled. *Hart v. Western U. Teleg. Co.* 66 Cal. 579, 55 Am. Rep. 119, 6 Pac. 637; *Redington v. Pacific Postal Teleg. Cable Co.* 107 Cal. 317, 40 Pac. 432; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098. These authorities declare the rule of this state upon the question. It follows, therefore, that if Dennis, the sender of the message, was bringing this action against defendant for damages suffered by him, he would be bound by the agreement made, and could only recover in case defendant was guilty of wilful misconduct or gross negligence in the performance of its duty. The interesting question then presents itself, Do these plaintiffs, the addressee and receiver of the message, stand in a better position, as against defendant's negligence, than does Dennis, the sender of the message? In England it is held by the courts with entire unanimity that the addressee of a message has no right of action against the telegraph company for failure of performance of duty. And this conclusion is based upon the proposition that the relation between the parties is purely one of contract, and the addressee is not a party thereto. In this country it may be deemed settled law that the addressee has a right of action against the telegraph company when by its negligence he has suffered damages. At the same time the different reasons given by the different courts in adopting this rule of law are many. We will not here enter into a discussion of the general principles governing litigation arising between individuals and telegraph companies in the matter of sending and receiving messages, but will confine ourselves to a consideration of the law bearing upon the facts of this particular case.

Plaintiffs telegraphed to Dennis, in St. Louis, requesting him to send by telegram the price of 220 tons of steel rails. In pursuance of that request, Dennis telegraphed the desired information. It is thus plain that Dennis performed service for plaintiffs at their request. And, that being so, we deem the conclusion irresistible that, in the

performance of the service, Dennis was acting for plaintiffs, and was their agent. The fact that plaintiffs by a telegram requested him to perform this service is immaterial. They could have made the request with the same legal result either by letter or parol. If a party residing in St. Louis had been engaged for a consideration by plaintiffs to telegraph them the information here desired, and that party had done so, certainly such party would have been the agent of plaintiffs. Yet the fact, if it be a fact, that no consideration was paid by plaintiffs for the performance of the service by Dennis is not a material element in the consideration of the question of agency. Dennis, in sending the message, being the agent of plaintiffs, they were bound by the contract made with the defendant. Plaintiffs, by requesting him to send the message, necessarily authorized him to contract with defendant as to how that message should be sent. And this general authorization was sufficiently broad to include the agreement as to nonliability heretofore set out, and therefore the agreement was binding upon the principal, these plaintiffs. In discussing this identical question, Thompson on the Law of Electricity (§ 237) says: "In such a case is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the receiver has against the company rests upon privity of contract, and depends upon the circumstances that the sender was his agent,—in other words, if the contract with the telegraph company was the contract of the receiver, through his agent, the sender,—then, on the most unshaken grounds the receiver would be bound by this condition, if the circumstances were such that it would bind the sender." Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation; and, having power to make it, his principal can only stand in his shoes. But it is said the action of the addressee of a message is founded upon tort, namely, a breach of public duty, and that therefore the question of contract does not enter into it. Yet, in a case like the one at bar, it may with equal legal propriety be said that a cause of action by Dennis against defendant would be founded on tort, namely, a breach of public duty, and thus eliminate any question of contract from the case. But this court has said that it cannot be done, and that Dennis must stand upon his contract as made. In cases where no question of privity of contract arises between the sender and the receiver of a message, the addressee may rest his right of action on tort; but where a party to a special contract, either directly, or indirectly through the sender, his agent, brings his action against the company, he must stand upon his contract rights.

We find many cases which support the conclusion at which we have arrived. The roads traveled by courts in arriving at this conclusion are many, yet those roads all lead to the same destination. In the leading case of *Ellis v. American Tele. Co.* 13 53 L. R. A.

Allen, 238, no question of agency was adverted to in the opinion, yet the court said: "Besides, it is difficult to see how the plaintiff, who claims through the contract entered into by the sender of the message with the defendants, which created the duty and obligation resting on the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such right accrued or was derived." In *Curtin v. Western U. Tele. Co.* 16 Misc. 347, 38 N. Y. Supp. 58, it is said: "The stipulation for exemption from liability contained in the printed blank of the company, upon which the sender writes his message, constitutes a contract which binds him and the person to whom the message is addressed, if the assent of the sender to such stipulation can be presumed." In *Aiken v. Western U. Tele. Co.* 5 S. C. N. S. 371, it is held: "It is equally clear that any stipulation of an express nature intended to mold and limit the obligation must be considered as attaching to the obligation in its fullest extent, and affecting equally all the persons related to it, either as sender, receiver, or agent of transmission. Under this view of the contract, the plaintiff is entitled to enforce its provisions as a direct party in interest." In *De Rutte v. New York, A. & B. Electric Magnetic Tele. Co.* 1 Daly, 556, we find this language: "When the defendants, therefore, undertook and were paid for sending the message, their contract was with the plaintiff, through his agents, and the action for the breach of it was properly brought by him." There is some authority opposed to the general tenor of the cases cited,—as, for example, *New York & W. Printing Tele. Co. v. Dryburg*, 35 Pa. 303, 78 Am. Dec. 338, and *La Grange v. Southwestern Tele. Co.* 25 La. Ann. 384. But no question of agency appears to have been involved in those cases, and it is upon the contract made by Dennis with the defendant, and the privity of contract existing between Dennis and plaintiffs, that we plant our conclusion upon this branch of the case.

In view of what has been said, the remaining question presents itself, Has defendant been guilty of wilful misconduct or gross negligence? No question of wilful misconduct is presented by the record, and the question then is, Does the evidence support the finding of fact that defendant was not guilty of gross negligence? Gross negligence is defined to be "the want of slight diligence." "Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the rights and welfare of others." "Gross negligence is that entire want of care which would raise a presumption of a conscious indifference to consequences." See *Redington v. Pacific Postal Tele. Cable Co.* 107 Cal. 317, 40 Pac. 432. It is conceded that the mistake in the message was occasioned by atmospheric dis-

turbances, and that "it is impossible to overcome the action of the elements upon the wire and repeaters with any kind of care and diligence." Plaintiffs' counsel, in his brief, says: "In this case negligence does not consist in the manner in which the act was attempted to be done, but in the attempt to do the act at all." The mistake in the message arose in transit between Denver and Los Angeles. And, in view of the fact that the message had arrived at Denver from St. Louis in due time and in proper form, there is no showing of gross negligence up to this point. Especially is this true in view of the further fact that when the message arrived at Chicago from St. Louis, in transit to San Francisco, the only open line of communication to the point of its destination was *via* Denver and Los Angeles. It follows that counsel's claim is that, in view of the general atmospheric disturbances going on between Denver and Los Angeles at the time, defendant should have held the message at Denver until climatic changes for the better had taken place. There can be no question but that it was the duty of defendant to forward this message from Denver at the earliest practicable moment. Our statute, in terms, demands it. Now, this message was received at Denver at 1:55 A. M. February 20th, and a great storm was then prevailing at intervals of distance and intervals of time between that point and Los Angeles. During the night of the 19th-20th more than 200 messages were transmitted over the line in question from Denver. The operator at Denver knew the line had been working badly by reason of the storm, and at times it was impossible to get a message through. The line was working badly at the time the message was received at Denver, and had been so working off and on all night. But at the time the message was sent from Denver, about 5 A. M., the wire was in good working order. The two operators at Denver and Los Angeles respectively engaged in sending and receiving the aforesaid 200 messages subsequently never heard of any complaint as to the manner of their transmission. Under the circumstances here depicted, defendant was required to do either one of two things, namely, hold the message at Denver for an unlimited time, or send it on its way. And, testing the facts in view of the meaning of the words "gross negligence" as the law defines them, this court cannot say that the finding made by the trial court to the effect that defendant was not guilty of gross negligence has no support in the evidence. The wire at the time the message was sent "was in good working order." The fact that a storm was rioting over the route should not of itself convict defendant of gross negligence in attempting to forward a message. If that be the law, then messages would not be sent for days at a time, or even weeks, during the winter season. The important question is, What is the condition of the wire? Is it in good working order? And is there a reasonable probability that the message as sent will arrive at its destination?

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tion? Here the salient fact appears that the wire was in good working order when the message was sent. Taking the evidence all together, the finding of the court that there was no gross negligence upon the part of the defendant will not be disturbed.

For the foregoing reasons, the judgment and order are affirmed.

We concur: Van Dyke, J.; Harrison, J.

Rehearing denied.

# ONTARIO DECIDUOUS FRUIT GROWERS' ASSOCIATION, *Respt.*,

*v.*  
CUTTING FRUIT PACKING COMPANY,  
*Appt.*

(.....Cal.....)

1. A buyer of fruit growing on trees, under a contract fixing a minimum quantity to be delivered, cannot, after inspecting the orchards and ascertaining that it will be impossible to deliver the amount called for, receive what is available and refuse to pay for it, because of failure to deliver the quantity required by the contract.
2. Under a contract for the sale of the crop of a certain orchard, stating the minimum quantity of fruit to be delivered, the seller cannot be made liable in damages for failure to deliver the specified quantity because of failure of crop due to unusual climatic conditions; nor can he be compelled to substitute other fruit for that contemplated in the contract.
3. Parol evidence is admissible to explain the meaning of the words "sundry orchards" in a contract for the sale of the fruit growing in them.
4. Parol evidence is admissible to show that at the time of making a written contract for the sale of the fruit growing in certain orchards, which specifies a minimum amount to be delivered, it was agreed that the seller should not be bound to deliver the quantity named unless it was grown in the orchards embraced in the contract.

(August 15, 1901.)

NOTE.—For other cases in this series as to effect of intervening impossibility to perform as a relief from obligation of contract, see *Stewart v. Stone* (N. Y.) 14 L. R. A. 215, and *note*; *Parker v. Macomber* (R. I.) 16 L. R. A. 858; *Anderson v. L. L. May & Co.* (Minn.) 17 L. R. A. 555; *Renny v. Olds* (Cal.) 21 L. R. A. 645; *Pengra v. Wheeler* (Or.) 21 L. R. A. 726; *Fisher v. Walsh* (Wis.) 43 L. R. A. 810; *Smith v. North American Transp. & Trading Co.* (Wash.) 44 L. R. A. 557; *Angus v. Scully* (Mass.) 49 L. R. A. 562; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* (N. Y.) 51 L. R. A. 951; and *Bath Twp. Bd. of Edu. v. Townsend* (Ohio) 52 L. R. A. 868.

For acceptance of goods to preclude right to complain of defects, see *Studer v. Bleistein* (N. Y.) 5 L. R. A. 702, and *note*; *Miller v. Moore* (Ga.) 6 L. R. A. 374; *Jones v. McEwan* (Ky.) 12 L. R. A. 399, and *note*; *Cream City Glass Co. v. Friedlander* (Wis.) 21 L. R. A. 135; and *Talbot Paving Co. v. Gorman* (Mich.) 27 L. R. A. 96.

**A** PPEAL by defendant from a judgment of the Superior Court for San Bernardino County in favor of plaintiff in an action brought to recover the contract price of certain fruit sold and delivered. *Affirmed.*

The facts are stated in the Commissioner's opinion.

*Mr. Warren Olney, with Messrs. Curtis & Curtis, for appellant:*

Where a day has been appointed for the payment of money, and the day is to be after the thing which is the consideration of the money is performed, no action can be maintained for the money before the performance.

A fair construction of the contract, taken as a whole, leads to the conclusion that it is a warranty on the part of the seller that it will deliver at least the minimum quantity prescribed in the contract, and will be entitled to pay from the buyer only in case that minimum quantity is delivered.

The covenants for delivery and for payment are dependent covenants, and the familiar principle applies that plaintiff must perform before he can seek performance from the defendant.

*Remy v. Olds* (Cal.) 21 L. R. A. 645, 34 Pac. 218.

The interests of society demand strict compliance with covenants.

*Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Dermott v. Jones*, 2 Wall. 6, *sub nom. Ingle v. Jones*, 17 L. ed. 762; *Eddy v. Clement*, 38 Vt. 486; *Benjamin, Sales*, 554; *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244; 2 Chitty, Contr. 1074; *M'Gehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277; *Cocley v. Davidson*, 13 Minn. 92, Gil. 86.

The contract declares that the plaintiff is to furnish a certain specified quantity of peaches to be grown on sundry orchards in Ontario and Cucamonga. It means that the plaintiff can fill its contract by delivering peaches from any of the orchards in Ontario and Cucamonga.

A patent ambiguity "is an ambiguity which arises from the words of the will, deed, or other instrument, as looked at in themselves and before they are attempted to be applied to the object or to the subject which they describe."

*Ambiguitas patens*, says Lord Bacon, cannot be helped by averment, and the reason is because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment, which is of the lower account in law, for that would be to make all deeds hollow and subject to averment.

*Cyclopædia of Law*, title *Ambiguity*, p. 527; *Brandon v. Leddy*, 67 Cal. 43, 7 Pac. 33; *Leonard v. Miner*, 120 Cal. 406, 52 Pac. 655; *Holman v. Whitaker*, 119 N. C. 113, 25 S. E. 793; *Worth v. Simmons*, 121 N. C. 357, 28 S. E. 528.

No man can be excused from complying with his obligations on the ground that it will cost him more money to do so than he anticipated.

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*Cyclopædia of Law*, title *Contracts*, p. 901; *Williams v. Vanderbilt*, 28 N. Y. 223, 84 Am. Dec. 333; 2 *Parsons, Contr.* 3d ed. 185.

*Mr. E. B. Annable, for respondent:*

There is no patent ambiguity on the face of this contract.

If the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings, or circumstances, or if the terms be vague and general, or have diverse meanings, parol evidence of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect, will always be admissible.

2 *Taylor, Ev.* § 1195; 1 *Greenl. Ev.* § 287; *Benjamin, Sales*, § 213; *Blackburn, Contract of Sale*, 47; *Macdonald v. Longbottom*, 1 El. & El. 977; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; *Preble v. Abrahams*, 88 Cal. 246, 26 Pac. 99; *Hancock v. Watson*, 18 Cal. 137; *California Title Ins. & T. Co. v. Pauly*, 111 Cal. 122, 43 Pac. 586.

In cases of general contracts for the delivery of goods, partially performed, the vendor may recover the contract price of so much as has been delivered and accepted by the vendee, subject to an abatement for damages arising out of nondelivery of the balance.

*Clark v. Moore*, 3 Mich. 55; *Benjamin, Sales*, § 47; *Boucker v. Hoyt*, 18 Pick. 555; *Wilson v. Wagar*, 26 Mich. 452; *Gage v. Meyers*, 59 Mich. 305, 26 N. W. 522; *Allen v. McKibbin*, 5 Mich. 449; *Ecgoie v. McKenzie*, 26 Mich. 472; *Beach, Modern Law of Contracts*, § 117; *Shimp v. Sidel*, 6 Houst. (Del.) 421; *Smith v. Keith & P. Coal Co.* 36 Mo. App. 567; *Elliott v. Espenhain*, 59 Wis. 272, 18 N. W. 1; *Wolf v. Gerr*, 43 Iowa, 399; *Polhemus v. Heiman*, 45 Cal. 573; *Willamette Steam Mills Lumbering & Mfg. Co. v. Union Lumber & Supply Co.* 94 Cal. 156, 29 Pac. 773.

If a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident the vendor is not liable to the vendee for nondelivery.

*Beach, Modern Law of Contracts*, § 237; *Howell v. Coupeland*, L. R. 1 Q. B. Div. 258; *Taylor v. Caldwell*, 3 Best & S. 828, 32 L. J. Q. B. N. S. 164; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Anderson v. May*, 50 Minn. 280, 17 L. R. A. 555, 52 N. W. 530; *Russel v. Levey*, 2 Lower Can. Rep. 457.

*Gray, C.*, filed the following opinion:

This action was brought to recover the price of certain peaches sold and delivered under a contract in writing. The defendant set up as a defense noncompliance of plaintiff with the contract, and also a counterclaim on account of damages arising out of such noncompliance. The plaintiff had



judgment, from which, and from an order denying a new trial, the defendant appeals.

The contract between the parties contains the following stipulations: "Seller has this day sold and agrees to deliver to buyer f. o. b. cars at South Cucamonga, and buyer has bought and agrees to receive from seller, the peaches, to the extent named, grown during the year 1898 on the orchard or land known and described as follows: Sundry orchards in Ontario and Cucamonga, at the prices and on the terms and conditions named." Then follow the terms, showing the grades and varieties of peaches sold, the minimum and maximum quantities of each, and the price per ton, and then the contract proceeds as follows: "Deliveries shall be made between the 20th day of July and the 1st day of September, 1898, and shall conform as far as possible to the mutual convenience of buyer and seller." Then follows a description of the fruit as to quality and size, and after that we quote again: "Payments shall be made as follows: One half the delivery value within ten days of the date of full delivery, and one half (the balance) of delivery value within thirty days of the date of final delivery, or the execution of all the terms of this contract by the seller." The contract is signed by the corporation plaintiff as the "seller" and the defendant corporation as the "buyer." At the trial it was shown by oral evidence, against the objection and exception of defendant, that the "sundry orchards" spoken of in the written contract referred to and was confined to orchards belonging to the stockholders of plaintiff. It appears that the fruit crop in the districts mentioned in the contract promised well at the date of the making of said contract, and that in an ordinary year the orchards referred to therein would have produced sufficient fruit to carry out the contract. But before it was fully grown the season turned unusually dry and hot, and hot winds impaired the quantity and quality of the fruit to such an extent that it was impossible for plaintiff to furnish, from the orchards of its stockholders in the said districts mentioned in the contract, a quantity of fruit equal to one half of the minimum amount agreed to be furnished. Plaintiff did, however, furnish to defendant, and defendant received, such fruit as was grown on said orchards of the varieties and qualities described in the contract. When it was apparent that the varieties named in the contract could not be obtained from said orchards to the extent agreed upon, the defendant offered to accept "Salway" peaches in satisfaction of the contract, but the plaintiff failed to comply with this offer. "Salway" peaches were not mentioned in the contract. The defendant places its contention for a reversal upon three grounds, as follows: First, the plaintiff could recover nothing without a full delivery of the minimum contract quantity of fruit, as such delivery was a condition precedent to the right to recover anything under the contract; second, the court erred in permitting plaintiff to explain by oral evi-

dence what was meant by "sundry orchards;" and, third, plaintiff's refusal to furnish Salway peaches in accordance with defendant's request.

As to the first ground, we think that defendant should not be permitted to accept and retain the peaches of plaintiff, and yet refuse to pay for them. The defendant's agents had inspected the orchards of the stockholders of plaintiff, and it must have been known at the time it was receiving this fruit that it was impossible to comply strictly with the contract. The rule is that, "though a contract of sale be entire, and the seller deliver only a part of the goods bargained for, yet, if the vendee retain such part, the vendor may recover the value of the part retained in an action for goods sold and delivered." *Clark v. Moore*, 3 Mich. 55. The acceptance and retention of a part of the goods is treated as a waiver of the condition precedent as to the delivery of the rest of the goods. And where the sale is of specific goods, and the goods perish before delivery, without the fault of the vendor, the vendee has no right of action for failure to deliver on the part of the vendor. This rule applies also where it becomes impossible to deliver a part of the property sold, as is illustrated in the English case of *Howell v. Coupland*, L. R. 9 Q. B. 462. As to this case we quote from Benjamin, Sales, § 570, as follows: "The principle of *Taylor v. Caldwell* [3 Best & S. 826] was applied to a case (*Howell v. Coupland*) where the contract was to sell '200 tons of potatoes grown on land belonging to the defendant in Whaplode.' The potatoes were not in existence at the date of the contract, but the land, when sown, was capable in an average year of producing far more than the quantity of potatoes contracted for. There was a failure of the crop from disease, and the vendor was only able to deliver eighty tons. In an action for non-delivery of the residue, the defendant was held to be excused from further performance on the ground that the contract was for a portion of a specific crop, and therefore subject to an implied condition that the vendor should be excused if, before breach, performance became impossible from the perishing, without default on his part, of the subject-matter of the contract." In the case at bar, the sale having been of specific varieties of fruit growing and to be grown on specific orchards, and the orchards having been so far affected by the extraordinary drought that they did not produce sufficient fruit of the varieties named to comply with the contract, the plaintiff could be compelled to perform the contract only so far as it was possible for it to do so. It could not be made to perform impossibilities, nor was it liable in damages by way of counterclaim or otherwise for a failure to comply with its contract resulting from *vis major*, and not attributable to any fault on the part of said plaintiff. Nor could plaintiff be compelled to substitute other peaches than those contemplated in the original contract of sale. If the sale had been

of a specific lot of horses, and half of them had died before delivery, I take it that no one would contend that the vendor could be compelled to substitute other horses before he could recover for such as the vendee had already received. The vendee having accepted a part of the fruit, it should pay for it at the agreed rate, and the loss of the other fruit is the misfortune of the vendee as well as the vendor, and neither is liable to the other on account of it. *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415. The furnishing of other peaches for those lost would be substituting a new sale, rather than substantially complying with the original contract of sale. There is nothing in *Remy v. Olds* (Cal.) 21 L. R. A. 645, 34 Pac. 218, in any way conflicting with the foregoing principles.

There was no error in permitting plaintiff by parol evidence to identify the subject-matter of the contract. The expression "sundry orchards in Ontario and Cucamonga" shows on its face that it was not the purpose of the contract to include all the orchards in the districts named, and it

therefore became necessary to resort to oral evidence to explain what orchards were meant. *Benjamin, Sales*, § 213; *Taylor, Ev.* §§ 1194, 1195. Nor was there prejudicial error in permitting it to be shown by oral evidence that defendant agreed at the time the contract was signed not to hold the plaintiff bound to deliver the minimum quantity mentioned in the contract, unless that quantity was actually grown on the particular orchards embraced in the contract, because, as we have already seen, that condition could be fairly implied from the written agreement, and it could do no harm to prove by oral evidence that which was already established by the written contract. The judgment and order should be affirmed.

We concur: **Chipman, C.; Smith, C.**

**Per Curiam:**

For the reasons given in the foregoing opinion, *the judgment and order are affirmed.*

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

GEYSER-MARION GOLD MINING COMPANY, *Appt.*,  
v.  
Charles B. STARK.

(45 C. C. A. 467, 106 Fed. 558.)

- \*1. It is the duty of every corporation to use reasonable diligence in each case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make transfers so authorized, and to prevent those unauthorized; and for every breach of this duty it is liable to the injured party for the damage it inflicts.
2. The legal presumption is that a trustee has no power to sell or transfer the subject of his trust.
3. A corporate record and certificate of ownership of stock by A. B., trustee, is notice to the corporation that he holds it, without the power of disposition, for some *cestui que trust*.
4. It is actionable negligence for the corporation to cancel the certificate and transfer the stock on the signature of the trustee to the assignment, without any inquiry for the *cestui que trust*, or for his assent to the transfer.
5. A local custom of dealers in a place where a sale is made, which violates a well-established principle of law, and changes the nature and obligations of the relation of two parties to each other, is inoperative unless known and assented to by both.

(March 11, 1901.)

\*Headnotes by SANBORN, Circuit J.

NOTE.—As to duty of corporation in reference to transfers of stock held in trust, see *Peck v. Providence Gas Co.* (R. I.) 15 L. R. A. 643, and *note*.

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APPEAL by defendant from a decree of the Circuit Court of the United States for the District of Utah in favor of plaintiff in a suit brought to compel the reinstatement upon defendant's books of certain shares of stock in plaintiff's name or payment of their value. *Affirmed.*

Statement by Sanborn, Circuit Judge:

This was a suit in equity brought by the appellee, Charles B. Stark, against the appellant, the Geyser-Marion Gold Mining Company, a corporation of the state of Utah, to compel it to either reinstate upon its records the registry of his ownership of 3,000 shares of its stock, or to pay to him the value of that stock, which the appellee alleged the corporation had negligently permitted to be transferred upon its records to third parties. The appellant answered that the stock in question stood upon its books in the name of Felix J. Stark, trustee; that, pursuant to a custom which existed in Salt Lake City, this trustee sold and assigned the stock to third parties, who surrendered the certificates to the corporation, and thereupon the appellant issued new certificates of stock to these purchasers, and registered the ownership thereof in their names, without any notice that the complainant was interested therein. At the close of the hearing these facts were established: Charles B. Stark was a resident of St. Louis, Missouri. Felix J. Stark, his brother, resided in Salt Lake City, in the state of Utah. In 1897 and 1898 Felix J. Stark bought for Charles B. Stark 3,000 shares of the stock of the appellant. A certificate for 1,000 of these shares was issued in the name of Charles B. Stark, who subsequently assigned

it in blank, or signed a power of attorney authorizing Felix J. Stark to transfer it, and delivered the certificate to him. Thereupon Felix J. Stark surrendered the certificate for these 1,000 shares to the corporation, and at his request the corporation issued a new certificate for these shares to Felix J. Stark, trustee, and so recorded the ownership upon its books. The certificates for the remaining 2,000 shares, when purchased, were assigned either in blank or to Felix J. Stark, and were delivered to him. He surrendered them to the corporation, and at his request the corporation canceled them, and issued and delivered to Felix J. Stark, trustee, new certificates for these 2,000 shares, and recorded the ownership thereof in his name as trustee upon its books. Felix J. Stark had no beneficial interest in any of this stock. The appellee, Charles B. Stark, was the equitable and beneficial owner thereof, and Felix J. Stark held it as his trustee. The appellee pursued the course indicated by these facts for the purpose of enabling him to direct his trustee to sell and transfer his stock at any time by wire, without waiting to forward the certificates from St. Louis. The appellee never did authorize his trustee, Felix, to sell or transfer the stock. But Felix J. Stark sold and assigned this stock, by means of the signature, "Felix J. Stark, Trustee," to third parties, and appropriated the proceeds of the sale to his own use, without the knowledge of the appellee. Thereupon the purchasers presented the certificates for these 3,000 shares of stock, with the assignments thereof, signed by Felix J. Stark, trustee, and surrendered them to the corporation. The mining company accepted the surrender, canceled the certificates, issued new certificates for like amounts to these purchasers, canceled the registry in its books of the ownership of this stock by Felix J. Stark, trustee, and recorded its ownership by the purchasers. At the time of these transactions Felix J. Stark was a broker, and a member of the Stock Exchange of Salt Lake City, and it was a custom in that city for brokers to carry in their names, as trustees, stock belonging to third parties, which was extensively bought and sold without any actual transfer of the certificates of stock; the brokers holding them in their possession and in their names as trustees, and accounting to the respective purchasers. It was also the custom for such brokers to transfer and assign the stock by signing the assignments with their names as trustees, without the signatures of the *cestuis que trust*. The appellant had no knowledge of the beneficial ownership of this stock by the appellee, and no actual notice of his interest in it. Upon this state of facts the court below found that the appellee was entitled to recover from the mining company the damages which he had sustained by the transfer and loss of his stock. It found these damages to be \$2,851.22, and entered a decree accordingly. The mining company has appealed from this decree.

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Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

*Mr. H. C. Edwards*, with *Mr. J. E. Frick*, for appellant:

The statute means simply this: That a written assignment or transfer, coupled with a delivery, alone, passes the title, and that a transfer upon the books of the corporation has no effect upon the title, but is for the sole benefit of the corporation, so that its stockholders may be known to it. Owners of stock, however, have full and complete title, whether the corporation knows it or not. This is the generally accepted view of the courts.

*Masury v. Arkansas Nat. Bank*, 35 C. C. A. 476, 93 Fed. 803; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Walker v. Detroit Transit R. Co.* 47 Mich. 347, 11 N. W. 187; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532.

When the appellee assigned and delivered the certificate for 1,000 shares, being certificate No. 1,118, to his brother, and authorized him to purchase stock and have the same assigned to him in the usual and customary way, without in any manner indicating that his brother did not have the full right and title that such assignments and delivery purported to give, the brother had a right to have the same transferred upon the books of the appellant in any manner he saw fit; and appellant was not required to look beyond the certificates which were presented to it by him, and by which he was given full and complete title under the laws of Utah.

If the persons to whom Felix J. Stark had assigned and delivered these certificates, upon the refusal by the appellant to transfer the same, had commenced actions to compel such transfer, it is not easy to understand how appellant could have defended against such an action.

*Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616; *McLean v. Charles Wright Medicine Co.* 96 Mich. 479, 56 N. W. 68; *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

No court has gone to such an extent in holding a corporation liable for the mere act of transfer, without anything more.

*McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Walker v. Detroit Transit R. Co.* 47 Mich. 347, 11 N. W. 187; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616; *Nelson v. Owen*, 113 Ala. 372, 21 So. 75; *Coats v. Louisville & N. R. Co.* 92 Ky. 263, 17 S. W. 564; *Gilbert v. Erie Bldg. Assn.* 184 Pa. 554, 39 Atl. 291; *Hughes v. Droocrs' & M. Nat. Bank*, 86 Md. 418, 38 Atl. 936; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 5 So. 317; *Peck v. Providence Gas Co.* 17 R. I. 275, 15 L. R. A. 643, 21 Atl. 543, 23 Atl. 967; *Graffin v. Robb*, 84 Md. 451, 35 Atl. 971; *Wood's Appeal*, 92 Pa. 379.

The following cases will be found to discuss and decide, more nearly than any other, the rights of a stockholder against a corporation for transferring stock:

*Brewster v. Sims*, 42 Cal. 139; *Winter v.*

*Belmont Min. Co.* 53 Cal. 428; *McLean v. Charles Wright Medicine Co.* 96 Mich. 479, 50 N. W. 68; *Masury v. Arkansas Nat. Bank*, 35 C. C. A. 476, 93 Fed. 603; *Smith v. Nashville & D. R. Co.* 91 Tenn. 221, 18 S. W. 548.

In those jurisdictions where the rule prevails that the title of the stockholder passes upon the assignment of the certificate without registration on the corporation books, it is essential, in establishing the liability of the company, that it appear that its action in registering the unauthorized transfer by the trustee operated to aid the breach of trust, and contributed directly to the loss of the stock by the *cestui que trust*. The mere fact that the company's officers were aware of the trust, or that the facts within their knowledge were sufficient to put them upon inquiry as to the terms upon which it was held and the right of the transferor to make the sale, is not sufficient. The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust*.

2 Thomp. Corp. § 2543; *Coffey v. Coffey*, 179 Ill. 283, 53 N. E. 590.

Where a sale is made by a broker or factor, whether it is in excess of authority or not, good title passes. This is so because by custom and usage of trade a broker or factor holds goods and stock for sale, and a power to sell is thus implied by law.

*Arnold v. Halenbake*, 5 Wend. 34; *Jones v. Hodgkins*, 61 Me. 480.

Appellee, by virtue of his own conduct, is estopped from claiming damages against the appellant.

The fact that no consideration passed between appellee and Felix J. Stark does not in the least affect the principle involved. Estoppels never rest upon a consideration, and require none.

2 Thomp. Corp. § 2399; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Continental Nat. Bank v. National Bank*, 50 N. Y. 579; *Pom. Eq. Jur.* §§ 805, 811, 812, and note on pp. 1117-1119.

Where one person presented stock for transfer to which he had the perfect apparent legal title, and, in common with other owners, placed a limitation upon his title by having "trustee" written after his name, as it was customary for the actual owners to do, wherein was appellee injured, or what right has he to complain of a custom that he did nothing in any way to affect? He certainly cannot say that he relied upon the law applicable to the word "trustee," as he neither placed it upon the certificate nor caused it to be placed there, so far as appellant knew or had any cause to know. Therefore, both upon reason and sound authority, this case does not fall within the principle announced in *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107, but it squarely falls within the principle that a person must take notice of the custom and usage prevailing at the place where he deals through his broker or agent.

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*Horton v. Morgan* (N. Y.) 75 Am. Dec. 311, note; *Hibbard v. Peck*, 75 Wis. 619, 44 N. W. 641; *Gillett*, *Indirect Ev.* §§ 127-129; *Mechem, Agency*, 278-281.

The directions not to sell, given by appellee to his agent, were secret. The right to sell generally existed. The only question was the state of the market, which was dependent upon the conditions of the mines. How could purchasers know that the market when Felix J. Stark sold the stock was not just the market appellee desired? Perhaps it was in fact.

A person who intrusts his property to the hands of a trustee, with secret instructions, has the burden of showing that persons dealing with such trustee were not innocent purchasers, or that they had notice of such secret instructions.

*Hanrick v. Gurley* (Tex. Civ. App.) 48 S. W. 1002; *Johnson v. Newman*, 43 Tex. 642.

*Mr. John W. Judd, with Messrs. Richard B. Shepard, Harrison O. Shepard, Allen T. Sanford, and Charles B. Stark in propria persona*, for appellee:

Corporations are the trustees of their stockholders, and are bound to exercise proper care and vigilance to prevent unauthorized transfers of their shares; and if they negligently cancel certificates and issue new ones without authority from the true owners they are responsible for the loss.

*St. Romes v. Levee Steam Cotton Press Co.* 127 U. S. 614, 32 L. ed. 289, 8 Sup. Ct. Rep. 1335; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Bayard v. Farmers' & M. Bank*, 52 Pa. 232; *Loring v. Salisbury Mills*, 125 Mass. 138; *Loring v. Brodie*, 134 Mass. 453; *Louvy v. Commercial & F. Bank*, Taney, 310, Fed. Cas. No. 8,581; *Pratt v. Taunton Copper Mfg. Co.* 123 Mass. 110, 25 Am. Rep. 37; *Hughes v. Drovers' & M. Nat. Bank*, 86 Md. 418, 38 Atl. 936; *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 683, 4 S. W. 287; *Salisbury Mills v. Townsend*, 109 Mass. 116; *Crocker v. Old Colony R. Co.* 137 Mass. 417; *Marbury v. Ehlen*, 72 Md. 216, 19 Atl. 648; *Pennsylvania R. Co.'s Appeal*, 86 Pa. 80; *Peck v. Bank of America*, 16 R. I. 710, 7 L. R. A. 826, 19 Atl. 369; *Stewart v. Firemen's Ins. Co.* 53 Md. 575; *Thurber v. Cecil Nat. Bank*, 52 Fed. 514; *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 500; *Abell v. Brown*, 55 Md. 222; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L. R. A. 84, 38 Atl. 983; 2 Beach, Corp. ed. 1891, § 650, p. 1024.

The word "trustee" written in the face of a certificate of stock in a corporation, after the name of the person designated therein as the owner of the shares, is notice to all persons dealing therewith that such person is not the beneficial owner of such shares.

1 Cook, Corp. 4th ed. § 325, p. 631; *Lowell, Transfer of Stock*, § 69; 2 Beach, Corp. ed. 1891, § 650, p. 1024; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Bundy v. Monticello*, 84 Ind. 119; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234, 29 N. E. 115; *Sturtevant v. Jaques*, 14 Allen, 523; *Central Nat. Bank v. Conneo*

*trust Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. ed. 142; *Union P. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391; *Bailey v. Finch*, L. R. 7 Q. B. 34; *Sweeney v. Bank of Montreal*, 12 Can. S. C. 661, L. R. 12 App. Cas. 617; *Dugan v. London & C. Loan & Agency Co.* 19 Ont. Rep. 272; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; *Budd v. Munroe*, 18 Hun. 316; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 55 N. W. 825; *Walsh v. Stille*, 2 Pars. Sel. Eq. Cas. 117; *Welles v. Larrabee*, 2 L. R. A. 471, 36 Fed. 866; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

The law does not confer on a trustee the power to sell trust property; hence one who alleges that the trustee possesses such power must prove that it has been conferred on him by the trust instrument or by the *cestui que trust*.

*Duncan v. Jaudon*, 15 Wall. 165, 21 L. ed. 142; *Jaudon v. National City Bank*, 8 Blatchf. 430, Fed. Cas. No. 7,230; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98; 18 Am. L. Rev. 981.

A local usage to disregard the word "trustee," written on the face of a certificate of corporate stock, following the name of the person described therein as the owner thereof, and to treat the holder as the absolute owner of the shares, is void:

1. Because a local usage cannot vary or abrogate a rule of law.

*Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Lowell, Transfer of Stock*, § 69; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 5 So. 317; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; *Robinson v. Mollett*, L. R. 7 H. L. 817; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Cranwell v. Fanny Fosdick*, 15 La. Ann. 436, 77 Am. Dec. 190; *Eastham v. Riedell*, 125 Mass. 585; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Palmer v. New York & L. C. Transp. Co.* 57 N. Y. S. R. 307, 27 N. Y. Supp. 561; *Wright v. Boller*, 42 Hun. 77; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655; *Thompson v. Ashton*, 14 Johns. 317; *Jenkins v. Hooper Irrig. Co.* 13 Utah, 100, 44 Pac. 829; *Nelson v. Southern P. Co.* 15 Utah, 325, 49 Pac. 644; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65.

2. Because one's property cannot be taken from him without his consent, except by due process of law.

*Western U. Tele. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047.

A local usage prevailing among brokers of a particular city to write the word "trustee" after their names in stock certificates, for the purpose of concealing the true ownership of corporation stocks, and by that deception to induce purchasers to pay higher prices for the stock, is void because it is dishonest and immoral.

*Taylor v. Carpenter*, 2 Woodb. & M. 1; *Farnsworth v. Hemmer*, 1 Allen, 494, 753 L. R. A.

Am. Dec. 756; *Evans v. Waln*, 71 Pa. 69; *Lehman v. Marshall*, 47 Ala. 362; *Paaton v. Courtney*, 2 Fost. & F. 131; *Holmes v. Johnson*, 42 Pa. 159; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211.

A local usage prevailing in a city among a certain class of persons is not binding on a resident of a distant state who has no knowledge thereof.

*Coquard v. Bank of Kansas City*, 12 Mo. App. 261; *German-American Ins. Co. v. Commercial F. Ins. Co.* 95 Ala. 469, 16 L. R. A. 291, 11 So. 117; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Walsh v. Mississippi Valley Transp. Co.* 52 Mo. 434; *Brown v. Strimple*, 21 Mo. App. 338; *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211.

Usages must be strictly construed.

*Arthur v. Bokenham*, 11 Mod. 161; *Denn ex dem. Goodwin v. Spray*, 1 T. R. 466; *Muggleton v. Barnett*, 2 Hurlst. & N. 653; *Richardson v. Walker*, 2 Barn. & C. 839; *Leigh v. Smith*, 1 Oar. & P. 638; *Packard v. Getman*, 6 Cow. 757, 16 Am. Dec. 475; *Mussey v. Eagle Bank*, 9 Met. 306.

Sanborn, Circuit Judge, delivered the opinion of the court:

Corporations issue certificates of the ownership of their stock. They condition the rights of their stockholders to vote, to participate in their management, and to receive dividends upon their stock, upon a registry of their ownership of their shares in the corporate books and upon these certificates. They make the certificates and keep the registries, and they thereby assume an obligation to each stockholder to use reasonable diligence to certify and to make their records declare the truth. No man can be lawfully deprived of his property without his consent except by due process of law, and, if he once becomes the owner of stock in a corporation, that association cannot recklessly deprive him of that ownership, and confer it upon another, without liability for the damage it causes. It is bound to use reasonable diligence in every case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make those transfers that are so authorized, and to prevent those that are unauthorized; and for every breach of this obligation it is legally liable to the parties injured for the damage it thus inflicts. *Western U. Tele. Co. v. Davenport*, 97 U. S. 369, 371, 372, 24 L. ed. 1047, 1049; *Cook, Stock, Stockholders & Corp. Law*, § 327; *St. Rome v. Leves Steam Cotton Press Co.* 127 U. S. 614, 32 L. ed. 289, 8 Sup. Ct. Rep. 1335; *Loring v. Salisbury Mills*, 125 Mass. 138; *Loring v. Frue*, 104 U. S. 223, 26 L. ed. 713; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Pratt v. Taunton Copper Mfg. Co.* 123 Mass. 110, 25 Am. Rep. 37; *Pennsylvania R. Co's Appeal*, 86 Pa. 80.

At the time of the transfer of this stock of which complaint is here made, the appellee was its equitable owner; and Felix J. Stark, his brother, held the title to it in trust for his benefit, with no authority to sell or to transfer it. The certificates which

represented it and the corporate books alike declared, not that Felix J. Stark, but that Felix J. Stark, trustee, held the title to it. Felix violated his trust. He signed the name "Felix J. Stark, Trustee," on the assignments of the certificates without any authority from his *cestui que trust* to either sell or assign them, and he delivered them to the purchasers. For these acts the corporation was not liable. After their performance the stock still stood of record in the name of Felix J. Stark, trustee; and the appellee, the *cestui que trust*, still had the right to direct the action of the trustee, to dictate his vote in the management of the affairs of the corporation, to receive the dividends on the stock, and to control its disposition. But when the corporation accepted unauthorized assignments of the trustee, canceled the certificates, issued new certificates for the same shares of stock, which declared the purchasers to be their owners, and recorded the ownership of this stock upon its corporate books in the purchasers, instead of in Felix J. Stark, trustee, the appellee's stock was gone, and he was deprived of all his legal and equitable rights therein. Was the corporation liable to him for this loss? Counsel for the appellant maintain that this question should be answered in the negative (1) because the addition of the word "trustee" to the name of Felix J. Stark gave the corporation no notice that this stock was held in trust for anyone, and imposed upon it no duty to inquire concerning the *cestui que trust*; (2) because the appellee is estopped by the fact that before the title of the stock was recorded in Felix J. Stark, trustee, he permitted assignments thereof to be made to Felix individually, and gave him possession and control of the certificates; (3) because it was the custom of stockbrokers in Salt Lake City to hold the title to stock in their names as trustees, and to assign and transfer it without the consent of their *cestuis que trust*, and (4) because the stock had been assigned to the purchasers by Felix J. Stark, trustee, and this assignment had vested in them a perfect title, so that the subsequent transfer thereof on the corporate books, the surrender of the old certificates, and the issue of new certificates to the purchasers, inflicted no injury upon the appellee.

But the word "trustee" means something. It is a warning and declaration to everyone who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; (3) that he has no right or power to sell or dispose of it without the assent of his *cestui que trust*. It denies the equitable ownership and beneficial interest of the party to whom it is applied, and asserts that he holds it in a representative capacity. It signifies the opposite of the word "owner," and means that, while the party called "trustee" has the naked legal title, he has no beneficial right, title, or interest in the property. No one who should read in stock certificates or in corporate records that one

share was owned by Felix J. Stark, while another was owned by Felix J. Stark, trustee, would fail to understand that he held the former for himself, and the latter for another. Not only this, but the term "trustee" is a term of administration, and not of sale. A trustee ordinarily holds the property intrusted to his charge to collect the rents, issues, dividends, or profits thereof, and to apply them to some specified use. Brokers, administrators, and executors frequently have the power to dispose of the property intrusted to their charge. Trustees commonly have no such power. Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents. The legal presumption is that a trustee has no power of sale. *Jaudon v. National City Bank*, 8 Blatchf. 430, Fed. Cas. No. 7,230; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98, 103; *Duncan v. Jaudon*, 15 Wall. 165, 175, 21 L. ed. 142, 145; *Gerard v. McCormick*, 130 N. Y. 261, 267, 14 L. R. A. 234, 29 N. E. 115; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 32, 30 L. ed. 573, 575, 7 Sup. Ct. Rep. 460. When, therefore, the records of this corporation and the certificates disclosed the fact that this stock was held by Felix J. Stark, trustee, and these certificates were presented for surrender and cancellation, and for the transfer of the stock to third parties, without the authority or assent of the *cestui que trust*, this corporation could not escape notice that Felix held it, not for himself, but for another, and that he had no authority to assign it.

It is said, however, that the term "trustee" gave no indication of the name of the equitable owner, and that this fact relieved the corporation from the discharge of its duty. This corporation was bound to exercise reasonable diligence to ascertain whether or not the equitable owner of this stock had authorized its transfer, and to prevent its cancellation and its loss by him if he had given no such authority. The warning and declaration which the word "trustee" bore to this corporation that Felix J. Stark was not the owner, that he held it for another, that he had no power to assign it, were certainly sufficient to put the company upon inquiry for the *cestui que trust*, and for his assent to the surrender and destruction of the certificates. No reasonable man, in the presence of such a warning, and in the honest discharge of such a duty, would fail to investigate; and notice sufficient to put a man of reasonable prudence and intelligence upon inquiry is notice of all the facts which a diligent investigation would develop, or is evidence from which knowledge of those facts may be inferred and found. The mining company asked no questions, made no inquiry, canceled and surrendered the stock of the appellee upon the unauthorized assign-

ments, and issued certificates and made a record of its ownership by others. This was neither the exercise of reasonable diligence, nor of any diligence, to ascertain the beneficial owner of this stock, and to prevent its transfer without his consent; and it was a clear breach of the obligation of the corporation to discharge this duty. The old excuse for this dereliction, that the word "trustee" pointed to no one but the trustee himself of whom inquiry could have been made, and that such an inquiry would have been idle, because he who would violate his trust would make false answers, is again presented. Its futility has been often shown, and perhaps nowhere better than by Sir John Romilly, master of the rolls, in *Jones v. Williams*, 24 Beav. 62, where he said: "With respect to the argument that it was unnecessary to make any inquiry, because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith*, 1 Hare, 55, that a false answer or a reasonable answer given to an inquiry made may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say."

It is no excuse for the failure to make any inquiry that such an investigation, if made, might have failed to develop the truth. *Shaw v. Spencer*, 100 Mass. 382, 390, 1 Am. Rep. 115, 97 Am. Dec. 107.

The suggestion is made that the bookkeeper of the mining company testified that he remembered that, at the time one lot of stock was transferred to Felix J. Stark as trustee, Felix told him that he was the owner of it, and that it was put in his name as trustee, and in smaller certificates, for the convenience of selling it. But this evidence clearly shows that this statement was not made at the time when the stock was transferred from Stark, trustee, to the purchasers, and that it was not made in response to any inquiry made by the corporation for the *cestui que trust*, in the discharge of the duty then incumbent upon it. The result is that the appellant was guilty of negligence in canceling the certificates of the appellee's stock, and certifying and recording its ownership by others, without making any inquiry to ascertain for whom the trustee held it, and whether or not the *cestui que trust* had authorized its disposition. A corporate record and certificate of ownership of stock by A. B., trustee, is notice to the corporation that he holds it, without the power of disposition, for some *cestui que trust*; and it is actionable negligence for the corporation to cancel the certificate and transfer the stock on the signature of the trustee to the assignee, without any inquiry for the *cestui que trust*, or for his assent to the transfer. *Shaw v. Spencer*, 100 Mass. 382, 389, 113 L. R. A.

1 Am. Rep. 115, 97 Am. Dec. 107; *Sturtevant v. Jaques*, 14 Allen, 523; *Fisher v. Brown*, 104 Mass. 259, 261, 6 Am. Rep. 235; *Duncan v. Jaudon*, 15 Wall. 165, 176, 21 L. ed. 142, 145; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Welles v. Larrabee*, 2 L. R. A. 471, 36 Fed. 866, 870, 871; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 63, 55 N. W. 825; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98, 102; *Bundy v. Monticello*, 84 Ind. 119, 180; *Gerard v. McCormick*, 130 N. Y. 261, 267, 14 L. R. A. 234, 29 N. E. 115; *Bailey v. Finch*, L. R. 7 Q. B. 34; *Pannell v. Hurley*, 2 Colly. Ch. Cas. 241; *Duggan v. London & C. Loan & Agency Co.* 19 Ont. Rep. 272; *Sweeny v. Bank of Montreal*, 12 Can. S. C. 661, 668; *Third Nat. Bank v. Lange*, 51 Md. 138, 144, 34 Am. Rep. 304; *Swift v. Williams*, 68 Md. 236, 256, 11 Atl. 335; *Marbury v. Ehlen*, 72 Md. 206, 216, 19 Atl. 648; *Lowell, Transfer of Stock*, § 69; *Morawetz, Priv. Corp.* §§ 181, 184; *Cook, Stock, Stockholders & Corp. Law*, §§ 325, 327. There are three early decisions which repudiate this declaration of the law. They are *Brewster v. Sims*, 42 Cal. 139, 145 (decided in 1871); *Thompson v. Toland*, 48 Cal. 99, 113 (decided in 1874); and *Albert v. Baltimore*, 2 Md. 159, 171 (a decision rendered in 1852, which has been overruled by the supreme court of Maryland in *Marbury v. Ehlen*, 72 Md. 206, 216, 19 Atl. 648). But these decisions have not been followed, and the reason of the case, the later decisions of the courts, and the declarations of the text-books have united to make the proposition we have announced the established law of the land.

It is contended, however, that the appellee is estopped from insisting upon his claim to recover in this case, because before his stock was placed in the name of Felix J. Stark, trustee, the former certificates which represented it were, by assignments in blank, by powers of attorney, and by delivery of possession, placed under the absolute control of Felix J. Stark, who might then have sold and assigned them without notice to the corporation of the trust relation. The answer is that he did not sell and transfer them when he appeared to be the owner and to have the control of them. While they stood in his name as owner, or while the certificates were assigned in blank, and he had the power to insert the name of the assignee, he appeared to be the owner, and was thereby given apparent authority to sell and dispose of the stock. If he had used this appearance of power, the appellee would have been estopped to deny that the power existed, because he caused that power to appear to be granted to his brother. He did not use it, but caused notice to be spread upon the records of this corporation, and to be inserted in the certificates, that he held the title to this stock, not for himself, but as trustee for another. When this had been done, the corporation had received its notice, and it was too late for it to rely upon an appearance that had been removed. Felix J. Stark had raised the red flag. He had notified the cor-

poration that he was not the owner, and had not the power to dispose of the stock without the assent of his *cestui que trust*. For this reason the appellee was not estopped from enforcing his rights and recovering the value of his stock.

Another objection to the decree for the appellee is that Felix J. Stark was a broker in Salt Lake City, and that it was an established custom among the brokers of that city to carry in their names as trustees the stock of third parties, and to assign and transfer it without the consent of their *cestuis que trust*. There is no evidence that this custom was known to the appellee, who was a resident of the city of St. Louis. But there is another and a conclusive reason why it cannot deprive the appellee of his property in this case. It changes the nature—the essence—of the relation of trustee and *cestui que trust*. It gives to the trustee a power which that relation and the obligations which condition it deny, and for that reason it cannot obtain to destroy or change the legal rights of the parties. A local custom which relates simply to the mode of the performance of a contract or to its interpretation, if established and known to the parties, may be enforced. But one which makes a substantial change in the rights and relations of the parties, and which violates a settled rule of law, binds no one who does not know and assent to it. *Irwin v. Williar*, 110 U. S. 499, 515, 516, 28 L. ed. 225, 232, 4 Sup. Ct. Rep. 160; *Allen v. St. Louis Bank*, 120 U. S. 20, 39, 30 L. ed. 573, 578, 7 Sup. Ct. Rep. 460; *Robinson v. Mollett*, L. R. 7 H. L. 802, 816, 828, 836; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Shaw v. Spencer*, 100 Mass. 382, 393, 1 Am. Rep. 115, 97 Am. Dec. 107; *Lehman v. Marshall*, 47 Ala. 362; *Leuckhart v. Cooper*, 3 Bing. N. C. 99; *Baxter v. Sherman*, 73 Minn. 434, 441, 76 N. W. 211; *Lowell*, Transfer of Stock, § 69.

Finally, it is insisted that there can be no recovery in this case because Felix J. Stark, trustee, had assigned and delivered the certificates of stock to the purchasers, and they were lost to the appellee before the corporation took any action in the matter. In sup-

port of this contention our attention is drawn to § 330 of the Revised Statutes of Utah of 1898, which provides that the delivery of a stock certificate, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title, as against any creditor of the transferor, and all other persons whatsoever. It is conceded that if, before the appellant acted, this stock had been so transferred, by the assignment and delivery of the certificates, that the title and ownership had passed beyond the reach of the appellee, there could have been no recovery against the corporation because it was liable for no loss which its negligence did not cause. The difficulty with the argument for the appellant here is that no such transfer of title had been effected. The certificates themselves bore the declaration that they were the property of Felix J. Stark, trustee. That assertion, as we have seen, was a warning and a statement that he was not the owner of them, and that he had not the power to dispose of them, and every purchaser who took them received them with notice of these facts. If the corporation had refused to accept the surrender of the certificates, to issue new certificates in their place to the purchasers, and to transfer the stock upon its records, the purchasers could have enforced no transfer, and would have acquired no rights by the possession and the assignments of the certificates. But the action of the corporation in canceling those certificates, in issuing others in their place, in certifying the ownership in third parties, and in transferring the title upon their records, destroyed the appellee's evidence of title, estopped the corporation from denying, as against innocent purchasers, that the new certificates belong to others than the appellee, and thus divested him of his property. Neither the act of the trustee nor of the purchasers could have deprived the appellee of his equitable ownership in this stock without the concurrent action of the corporation, and it cannot escape liability for that action.

*The decree below is affirmed.*

#### ALABAMA SUPREME COURT.

R. L. COONEY, *Appt.*,  
v.

PULLMAN PALACE-CAR COMPANY.

(121 Ala. 368.)

1. The reasonable exercise of care to protect the baggage of a sleeping passenger is not shown by a sleeping-car company which allows a number of passengers to leave the car at a station with baggage in their hands, without paying any attention as to whose it is, where an employee is pres-

ent who knows the baggage of the sleeping passenger, and by attention might prevent its removal from the car by a stranger.

2. A sleeping-car company through whose negligence a satchel of a passenger is lost will be liable for mileage tickets, which it is usual for such persons to carry, for opera glasses, compass, razor and accoutrements, and nasal syringe, with accompaniments, which were in the satchel, but not for a pistol which was also in it.
3. The measure of damages for loss, through the negligence of a sleeping-

NOTE.—As to liability of sleeping-car company for loss of passenger's baggage, see, in this series, note to *Mann-Boudoir Car Co. v. Dupre* (C. C. App. 5th C.) 21 L. R. A. 289; *Ball v. Chesapeake & O. R. Co.* (Va.) 32 L. R. A. 792; 53 L. R. A.

*Pullman's Palace Car Co. v. Martin* (Ga.) 29 L. R. A. 498; *Pullman's Palace Car Co. v. Hall* (Ga.) 44 L. R. A. 790; and *Pullman's Palace Car Co. v. Adams* (Ala.) 45 L. R. A. 767.



car company, of personal effects of a passenger which have no market value, is their value to him,—that is, the actual loss in money which he would sustain by being deprived of them.

(April 18, 1899.)

**A** PPEAL by plaintiff from a judgment of the City Court of Birmingham in favor of defendant in an action brought to recover the value of property lost by plaintiff while a passenger in one of defendant's cars. *Reversed.*

Appellant boarded the car at Mobile, Alabama, to go to Birmingham, Alabama. Upon entering the car he delivered his satchels into the possession of the porter, who took them and set them down inside the car. Plaintiff occupied an upper berth, and when ready to dress in the morning asked for his satchels, and one of them was missing. After making a claim upon the company for the restoration of the property or payment of its value, which was refused, this action was brought.

Further facts are stated in the opinion.

**Mr. John W. Tomlinson**, for appellant:

The appellee did not use that care required,—that of taking care of appellant's property while he slept.

Why was the porter kept on guard? Was it not his duty to see that no passenger carried out appellant's baggage by mistake or otherwise while he still slept?

There is no real difference between the modern sleeping car and the modern hotel. In both, persons for a consideration are furnished lodging, and in most instances food. There are a few hotels that furnish only lodging, just as there are some sleeping cars that furnish only lodging, but most of them furnish food and lodging. In the case of a sleeping-car company there is more reason in holding them to the extraordinary liability than there is in the case of an innkeeper; the sleeping passenger is absolutely unable to protect himself and baggage, while the sleeping guest at the hotel can lock his baggage up in his room.

*Pullman Palace Car Co. v. Lowe* (Neb.) 26 Am. St. Rep. 337, note; *Voss v. Wagner Palace Car Co.* 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010; *Pullman Palace Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 384; *Hampton v. Pullman Palace Car Co.* 42 Mo. App. 134.

**Messrs. Walker, Porter, & Walker** for appellee.

**Dowdell, J.**, delivered the opinion of the court:

In the recent case of *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 45 L. R. A. 767, 24 So. 925, decided by this court, it was said: "The rule now seems to be well settled that sleeping-car companies are not held to the responsibility of common carriers and innkeepers. Many reasons for this distinction will be found stated in the text-books and decisions, and nowhere more fully, perhaps, than in *Blum v. Southern Pullman Palace Car Co.* 1 Flipp. 500, Fed. Cas. No. 1,574,"—53 L. R. A.

citing *Hutchinson*, Carr. 617d; 22 Am. & Eng. Enc. Law, p. 797, where the authorities may be found collated. The writer of this opinion is, however, not very profoundly impressed with the soundness of reasoning in the case of *Blum v. Southern Pullman Palace Car Co.* 1 Flipp. 500, Fed. Cas. No. 1,574. In the case above referred to of *Pullman Palace Car Co. v. Adams*, the case of *Lewis v. New York Sleeping Car Co.* 143 Mass. 267, 58 Am. Rep. 135, 9 N. E. 615, is cited with approval, wherein it was said by Morton, Ch. J.: "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping; all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise. The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innkeeper, yet it is its duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passengers and the company, and the decided weight of authority supports it."

It becomes a question in the present case as to whether the defendant car company exercised reasonable care to guard and protect plaintiff's property from loss, by theft or otherwise, while a passenger in defendant's sleeping car. The evidence on the part of the plaintiff made a *prima facie* case in his behalf. Does the evidence of the defendant overcome this *prima facie* case by showing the exercise of that reasonable care for plaintiff's property that he was entitled to, and such as would exempt the defendant from liability?

The first witness introduced by the defendant was Cartwright, the waiter, who took plaintiff's hand baggage when he entered the sleeping car. The testimony of this witness coincides with plaintiff's as to the manner of plaintiff's entering the car, and the disposition of his satchels, except as to the particular place where Cartwright deposited the satchels in the car; and we think, under the circumstances, this was an immaterial conflict. The other two witnesses of the defendant,—the car conductor and the porter,—testified that the car was under the control of the conductor, porter, and waiter, and that it was not customary or usual to have any more persons in control of a sleeping car; that it is the duty of each of these three em-

ployees to guard and watch said car at all times, someone to be on guard at all times; that some one of these employees was on guard and watch all that night; that while on guard he could see the full length of the aisle in the car, and between all the berths on the right and left sides; that no person boarded or left said car between Mobile and Montgomery; and that several people got out of said car at Montgomery, some of them having valises in their hands as they got off the car, though none of the employees knew of the satchel being lost until plaintiff inquired for the same above Montgomery, when he got up out of his berth.

It is evident from the testimony that the satchel was stolen or lost, and it was not stolen or lost between Mobile and Montgomery; but it is a fair and reasonable inference from the testimony that it was stolen or lost upon the arrival of the train at Montgomery. These last two witnesses tell of the duties of the employees, and in a general way how they are and were performed, and yet they wholly fail to show what care, if any, was exercised at Montgomery, where a number of passengers got off said car, some with satchels in their hands, to prevent a theft, or the taking of plaintiff's satchel, through mistake, by any of those leaving the car. The witness Cartwright knew plaintiff's satchel, for he remembered it, and could describe it at the time of the trial of this case. He was evidently up and present at the time the several passengers left the car at Montgomery, for he says that the person who occupied the lower berth beneath the one occupied by plaintiff left the car in a few minutes after the train reached Montgomery. Neither of the defendant's witnesses says that the plaintiff's satchel was or was not taken away by some one of the persons who left the car at Montgomery with satchels in their hands; nor do they pretend to say that they, or either of them, exercised any care whatever in this regard. Can it be denied that reasonable and proper care on the part of defendant's employee, Cartwright, who knew plaintiff's satchels, would have prevented its loss through any one of those leaving the car at Montgomery? After a careful and fair consideration of defendant's evidence, we do not think it shows that reasonable exercise of care and protection to the plaintiff and his property that the law requires.

The next question is as to what articles of the property lost the defendant should be held liable for. The rule as laid down in the case of *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 45 L. R. A. 767, 24 So. 925, supported by the authorities cited in that case, seems to limit the responsibility of the car company to the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money sufficient for the expenses of the journey in which one is engaged. Under this authority, no claim could be made for the pistol, the same being an article not necessary to the journey. The evidence on the part of the plaintiff was that he boarded the 53 L. R. A.

car at Mobile for Birmingham, the latter place being his home and destination, and also that he was general traveling agent of the New York Life Insurance Company, and that it was usual for persons having much traveling to do to carry with them mileage tickets. This being the undisputed proof, he was entitled to recover for the loss of the tickets. For the value of the remaining articles, to wit, the opera glasses, glass and brass compass, razor and strap and accoutrements, and nasal syringe, with accompaniments, being such articles as add and contribute to the comfort, pleasure, and enjoyment of the traveler, and such as are not unusual to be carried by hand while traveling, together with the satchel which contained the same, the plaintiff was also entitled to judgment.

It is insisted that the market value of the articles lost is the only criterion of value; and, the plaintiff's evidence failing to show any market value, he cannot recover. Where it is shown that the property in question has a market value, then that is the proper standard of value; but, if the property be not shown to be marketable, the rule would not apply. It is said in *Hutchinson, Carr. § 770b*: "The general rule of damages in trover, and in contract for not delivering goods, . . . undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property." In *International & G. N. R. Co. v. Nicholson*, 61 Tex. 550, it is said: "The lost articles seemed to be of such a character, viz., secondhand clothing, books, and table furniture, which had been used by the plaintiff, that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover,—not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family." See also the case of *Denver, S. P. & P. R. Co. v. Frame*, 6 Colo. 385.

The plaintiff in the present case testified to the value of the articles lost; and, there being no evidence that the articles had any market value, this evidence of value by the plaintiff was sufficient.

The judgment of the City Court will be reversed, and judgment here rendered in favor of appellant for \$46.25,—that being the total value of the articles lost, and for which the defendant (appellee) is held responsible,—together with interest on the same from the 15th day of November, 1895.

## COLORADO COURT OF APPEALS.

George W. PATTEN, Appt.,

v.

AMERICAN NATIONAL BANK OF DENVER.

(.....Colo.....)

**Suspension of a bank, followed by the appointment of a temporary receiver, does not of itself mature the deposit accounts within the meaning of a statute allowing interest on accounts from the date when they become due, but demand is necessary for that purpose.**

(June 11, 1900.)

**A** PPEAL by plaintiff from a judgment of the District Court for Arapahoe County in favor of defendant in an action brought to recover interest upon a deposit which plaintiff had in the defendant bank at the time of its suspension. *Affirmed.*

The facts are stated in the opinion.

**Mr. Henry B. Babb**, for appellant:

The relations between the bank and its depositors were those of debtor and creditor, the deposit being a loan to the bank upon the implied condition that it would pay the depositor, at any time upon demand made in person or by check, the amount of the deposit, or any part thereof.

*Phœnix Bank v. Risley*, 111 U. S. 127, 28 L. ed. 374.

The demand necessary to fix a liability upon the bank for interest, in the usual course of business, is made unnecessary by the bank's conflict with its law of existence in such manner as to abate all its corporate functions, placing it beyond the reach of its depositor for all purposes of demand, and also destroying its own power to respond to such demand by payment of the debt.

*Chemical Nat. Bank v. Bailey*, 12 Blatchf. 480, Fed. Cas. No. 2,635; *Webster v. Coffin*, 14 Mass. 196; *Cooper v. Mowry*, 16 Mass. 7; *Thurston v. Wolfborough Bank*, 18 N. H. 391, 45 Am. Dec. 382; *Scott v. Armstrong*, 146 U. S. 507, 36 L. ed. 1062, 13 Sup. Ct. Rep. 142; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176; *Casey v. Carver*, 42 Ill. 229.

*On petition for rehearing.*

The law does not require a useless act to be performed; and when it is plain that if a demand had been made it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made.

*Parrott v. Byers*, 40 Cal. 614; *Tarwater v. Davis*, 7 Ark. 153, 44 Am. Dec. 534; *Lovelock v. Franklyn*, 8 Q. B. 371; *Clark v. Crandell*, 3 Barb. 612; *Wyman v. Fow-*

*ler*, 3 McLean, 467, Fed. Cas. No. 18,114; *Wilstach v. Hawkins*, 14 Ind. 541; *Dwyer Bros. v. Tulane Edu. Fund*, 47 La. Ann. 1232, 17 So. 796.

**Messrs. T. J. O'Donnell and Milton Smith**, for appellee:

Interest can be recovered only in the cases specified in the statute.

*De Remer v. Parker*, 19 Colo. 242, 34 Pac. 980; *Dexter v. Collins*, 21 Colo. 455, 42 Pac. 664; *Pettit v. Thalheimer*, 3 Colo. App. 355, 33 Pac. 277.

A depositor places his money with the bank, not for the purpose of obtaining interest on it, but for the convenience of doing business. The undertaking of the bank is to repay the deposit upon demand, and the depositor receives additional benefits from the bank in the way of making collections and procuring exchange and loans if desired, and the circumstances justify the making of the same by the bank.

The debt of the bank to the depositor is not due until demand made.

*Girard Bank v. Bank of Penn. Trop.* 39 Pa. 92, 80 Am. Dec. 507; *Munmerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 14 S. E. 554.

No interest can be recovered on an unliquidated account prior to the date of demand.

*Deater v. Collins*, 21 Colo. 455, 42 Pac. 664; *Morse, Banks & Banking*, § 309; *Sickels v. Herold*, 15 Misc. 116, 36 N. Y. Supp. 488, 149 N. Y. 332, 43 N. E. 852.

**Wilson, J.**, delivered the opinion of the court:

This is an appeal from a judgment on the pleadings in favor of the defendant bank. From these pleadings it appears that on the 22d day of April, 1896, the comptroller of the currency of the United States suspended the current business of the defendant bank, and appointed a temporary receiver, who thereupon took possession of defendant's books, records, and assets; that said temporary receivership and suspension of business continued to the 8th day of January, 1897, when the defendant, upon compliance with certain requirements of the comptroller, was permitted to, and did, resume its general banking business, and has ever since continued therein. It further appears that at the time of suspension the plaintiff had about \$700 on general deposit in the bank, subject to check; that no demand therefor was made until the bank resumed business, on January 8, 1897, when he demanded, through his agent, payment of the principal, with 8 per cent interest thereon from the time when the suspension of business first occurred. The principal was paid, but the payment of interest was refused. Thereupon he commenced this suit therefor. It has been repeatedly held in this jurisdiction that interest in Colorado is a creature of statute, and regulated thereby, and that, in the absence of contracts to pay the same, it is only recover-

**NORM.**—In respect to the effect of insolvency to bring an obligation to maturity, compare *Atkins v. Wilcox* (C. C. App. 5th C.) 53 L. R. A. 118, which decides the question of the effect of bankruptcy of a tenant to mature notes given for unaccrued rent.  
53 L. R. A.

able in the cases specifically enumerated in the statute. *Denver, S. P. & P. R. Co. v. Conaway*, 8 Colo. 16, 54 Am. Rep. 537, 5 Pac. 142; *De Remer v. Parker*, 19 Colo. 246, 34 Pac. 980; *Pettit v. Thalheimer*, 3 Colo. App. 355, 33 Pac. 277. The right, therefore, to recover interest in this state is purely a legal, and in no sense an equitable, one. The section of the interest statute bearing upon the question at issue is as follows: "Creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of 8 per centum per annum, for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing, or on any judgment recovered before any court or magistrate authorized to enter up the same within this state, from the day of entering up said judgment until satisfaction thereof be made; also, on money due on mutual settlement of accounts from the date of such settlement, on money due on account from the date when the same became due, and on money received to the use of another and detained without the owner's knowledge." Laws 1889, p. 206, § 2; Mills's Anno. Stat. § 2252. If recoverable at all in this case, it is only under that provision of the statute which provides for its allowance on "money due on account from the date when the same became due." All authorities agree that in cases of general deposits in a bank like the one under consideration, unless there be some agreement or usage to the contrary,—and none is pleaded in the case at bar,—the undertaking of the bank is only to repay upon demand. Such an account, therefore, does not become due until demand is made for it, and the bank is not in default, or liable to respond in damages, until such demand and refusal. *Girard Bank v. Bank of Penn. Twp.* 39 Pa. 92, 80 Am. Dec. 507; *Munneerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 14 S. E. 554. Hence, under this general rule, the plaintiff was not entitled to receive interest on his deposit, unless the circumstances were such as to legally excuse him from making a demand prior to the time when he did make it. This is the contention of the plaintiff, and presents for determination the sole issue in the case. His argument is that, since a temporary receiver appointed by the government had taken possession of the assets of the bank, a demand would have been unavailing and futile, and that the law does not require a mere idle ceremony. Only one authority directly in point has been cited by counsel on either side, and this is against the position of plaintiff. *Stickles v. Herald*, 149 N. Y. 335, 43 N. E. 852.

We think the better reason, especially considering the special provisions of our statute and the decisions thereon of our supreme court, is in favor of the doctrine laid down in this case. It would seem that our statute, because it imposes upon the debtor an additional burden in the way of damages for the withholding of money after it becomes due on account, should be strictly construed. If there be any doubt about the

maturity of the debt, this doubt should not, in reason and justice, be resolved against the debtor. If any act was required on the part of the creditor in order to bring about the maturity of the indebtedness, we do not believe he should be excused from the doing of this act merely upon the belief—however well grounded it might be—that the debtor could not satisfy the debt. The object of a demand is not only to secure payment of the account, if possible, but to bring about the maturity of the indebtedness, and thereafter, if payment is refused, to secure the additional right under the law to demand and receive interest—an additional sum of money—as damages for withholding payment. The same rule should apply in the case of a bank as in that of an individual, and it certainly could not reasonably be claimed that in the latter case a demand would be excused on the ground that the debtor was, or was believed to be, unable to pay if demand should be made. It will be observed that in this case the appointment of a receiver was only temporary. There was no allegation of insolvency. On the contrary, the reasonable presumptions arising from the facts stated are to the contrary. It is not to be supposed that the government would have permitted a resumption of business, and that the bank would have continued in business, as alleged, if it had been insolvent. While, as we have said, the right to recover interest in this state is purely a statutory, legal right, and not an equitable one, still, in the determination of whether a given state of facts brings the case within the statute, the results of such a construction might be properly considered. If the doctrine urged by plaintiff is correct, then all the deposits of a bank would, without demand, bear interest, no matter how temporary or of how short a duration the suspension may be. The suspension might be for only a few days or weeks, and the deposits amount to millions of dollars. In such case, the loss to the individual depositor would be trifling, if any,—to many, none at all,—but the burden imposed upon the stockholders of the bank would be unreasonable, inequitable, and onerous in the extreme. The demand was not impossible, because the entity of the corporation was not destroyed by the appointment and possession of the temporary receiver. The proper officers of the bank could still have been reached for the purposes of making a demand. We see no reason, either, why a demand could not have been made upon the receiver, if he were in charge as alleged in the complaint. The authorities cited by counsel for plaintiff, and bearing upon the principles involved in the case, are all in cases where the bank was insolvent, and, as such, had made an assignment, or had been taken possession of by the proper parties for the purpose of liquidation. We can see some reason why a demand by a depositor in such case should not be necessary to bring about the maturity of his debt. By operation of law in such case, it might be said all the indebtedness of a bank matured

upon the coming about of such a state of affairs. The object of the assignment, and of the appointment of a receiver, would be for the express purpose of winding up the affairs of the bank and discharging all of its indebtedness,—to the extent at least its assets would allow. This, however, is not the case presented here, and we express no opinion upon it. If a demand should be excused on the assumption that the debtor would be unable to pay, why might it not, with equal propriety, be assumed that, by a failure to demand, the creditor elected that he would not declare the debt to be due, and that he waived any right to demand interest? We do not say that in no case in this state could a debt due upon demand mature until a demand is specifically made, but we do say that the circumstances of this case, as presented by the pleadings, were not sufficient, under our statute and under the general tenor and spirit of its judicial interpretation by our appellate courts, to have excused a demand by plaintiff, and entitle him to receive interest upon his deposit account as claimed by him.

For these reasons *the judgment will be affirmed.*

A petition for rehearing having been filed, the following response was handed down on January 14, 1901:

The relation between bank and depositor is that of debtor and creditor, the debt being payable on demand. This relation exists only during the will and pleasure of either party, and, when the creditor desires to terminate it, he must make a demand upon the bank for payment. This is, in effect, a notice of his desire and intention to terminate the relation, and when given at once brings about the maturity of the debt. Upon refusal by the debtor to pay after such notice, the right is then conferred upon the creditor for the first time to maintain an action against the debtor for the recovery of the debt, and, under express provision of the statute, to recover interest thereon from the time of such notice of intention and demand of payment. When the circumstances are such, as is contended in the present case, that the demand would be unavailing because of the inability of the debtor to pay, and would therefore be excused, there still remains the necessity that the creditor should desire and intend to terminate the relation of debtor and creditor by bringing about the maturity of the debt before interest should begin to run. If he does not desire his money, nor wish to terminate the relation of debtor and creditor, nor effect the maturity of the debt, we know of no law which would force him to do so. Such desire and intention being essential in order to constitute the maturity of the debt, it would seem reasonable that some notice thereof, of some kind or character, should be given to the debtor, so as to fix the time when interest should begin to run, if for no other reason. It could hardly be contended that, because a tempo-

rary embarrassment disabled a debtor from making payment, a creditor could come in at any time afterwards, and claim interest from the time of such disability, solely because of such temporary disability. It is a matter of common knowledge that, in the history of the large majority of banks and of business men, there are occasions when, if suddenly called upon to meet their demand obligations, they would be unable to do so. To hold that in such case the law steps in, and says to the debtor, without any act, application, or intervention of the creditor, or without any evidence of an intention on his part to invoke a privilege which the law gives him, "All of your demand obligations are now matured, and shall bear interest henceforth and until paid, if the creditor should at any time hereafter, no matter how remote, demand it," would be an unconscionable hardship, as well as a doctrine destitute of all support, either in reason or legal authority. The creditor may not desire nor need his money, may feel amply secure, and have no intention of terminating the relation of debtor and creditor; but the law, in its kindly solicitude for his interests, says: "You may need it at some future time, and then you may demand and receive interest upon the debt from the time when, if you had desired your money and made a demand for it, the debtor would have been unable to pay. This, too, although the debtor never knew or had reason to suspect that you intended to exact this penalty, and although many times after his temporary embarrassment he could have paid if you had manifested the slightest desire for payment." This occasion might arise, if the principle contended for by the plaintiff were acknowledged. We do not believe, however, that a doctrine which will permit of such results ever was, or ought to be, the law. In our opinion, the only reasonable construction of the law, under like circumstances to the case at bar, is that even though a debtor may be unable to pay, and a demand therefore be excusable to that extent, still there must be some notice to him of some kind, either by the institution of a suit or otherwise, of the creditor's intention to terminate the relation of debtor and creditor by declaring the maturity of the debt, or some act of the creditor evidencing such desire and intention, before he can be allowed to recover interest. In the case at bar there was no pretense of anything of the kind. During nearly nine months of the alleged temporary inability of the bank to pay, the plaintiff neither commenced suit nor gave notice in any manner of a desire for payment to any officer of the bank, or to the temporary receiver or custodian of its assets. When he did give such notice for the first time, on January 8, 1897, by the presentation of a check for the full amount of his deposit, the debt was promptly paid. There is no allegation in the complaint that plaintiff desired payment of his deposit at any time before it was paid, or that he would have so desired or requested

before such time had the bank been transacting its business as usual. After careful consideration of the able arguments present-

ed by counsel on rehearing, we see no reason to change our views, and the judgment will be affirmed.

### CONNECTICUT SUPREME COURT OF ERRORS.

Patrick H. CONDON *et al.*, Selectmen of  
Bristol,  
v.  
Ruana E. POMROY-GRACE.

(78 Conn. 607.)

1. A daughter's willingness to provide in her home a comfortable bed and sufficient food for her indigent mother is not conclusive of absence of neglect within the meaning of a statute authorizing the court to interfere in case of neglect, where the provision is coupled with such harsh treatment from the daughter as justly compels its refusal.
2. The mere imposition upon a person of a statutory obligation to support his mother does not carry with it a right to determine where the support shall be furnished.
3. Gen. Stat. § 3318, as amended by Pub. Acts 1893, chap. 88, imposing the duty of providing support and maintenance for indigent relatives in such manner and proportion as the court shall judge just and reasonable, does not change the moral duty of support into an absolute legal obligation; but such obligation is not complete until the court has found the necessity for aid, the ability to aid, and prescribed to what extent the aid shall be furnished.
4. That the trial court found in accordance with the testimony of one witness against that of three others is not ground for exception.
5. A statute giving a right to costs in any civil action will include a proceeding by the poor authorities under the provisions of a statute to compel a child to support its indigent parent.

(April 2, 1901.)

**C**Ross-APPEALS from a judgment of the Superior Court for Hartford County in an action brought to recover for the care and support of defendant's mother; the defendant appealing from so much of the judgment as held her liable; and plaintiffs appealing from so much as refused to award them costs. *Affirmed on defendant's appeal. Reversed on plaintiffs' appeal.*

Statement by **Hamersley, J.**:

This action was brought by the selectmen of the town of Bristol under § 3318, Gen. Stat., as amended by chap. 88, Pub. Acts 1893. The allegations of the complaint are: "(1) Mrs. Ruana E. Baldwin, of said Bristol, is poor and unable to support herself, and is being supported by the town of Bristol. (2) The defendant is the daughter of

said Ruana E. Baldwin. (3) The defendant is able to provide support for her said mother. (4) Ever since the 1st day of April, 1899, she has refused and neglected to provide such support." The relief claimed is "an order upon the defendant to contribute to such support, from the date hereof, such sum as the court may find to be reasonable and necessary." The answer denied paragraphs 1 and 4, and admitted paragraphs 2 and 3. It also stated a second defense, alleging that the defendant has continuously offered to support Mrs. Baldwin at her house in Hartford, but that the selectmen insisted that such support should be furnished directly to the town, in the form of cash payments. The reply denied the allegations of the second defense, and, in avoidance of that defense, alleged that Mrs. Baldwin had tried to live with defendant at her house, but had been treated with such unkindness and neglect that she was not able to remain, and that the defendant's house was not a suitable home for Mrs. Baldwin. The substantial issues of fact tried by the court were raised by the defendant's denial of paragraphs 1 and 4 of the complaint, and by the defendant's denial of the matter in avoidance of the second defense alleged by the plaintiffs in their reply. After judgment for the plaintiffs, the court (Robinson, J.), upon request of defendant, made a special finding. A motion to correct this finding was denied, and exception taken. The errors assigned in the defendant's appeal are: "(1) The court does not find that the defendant has neglected to provide support for Mrs. Baldwin, and the facts found do not constitute such neglect as is contemplated by the statute. (2) The court, while finding preliminarily that the defendant's house was a suitable and satisfactory home for Mrs. Baldwin in so far as her physical comfort and material surroundings were concerned, errs in his final conclusion that the house of the defendant was not a proper or suitable home for Mrs. Baldwin, to which the plaintiffs should compel her to go. (3) The court does not find Mrs. Baldwin to be a poor person, nor was she such in fact." The appeal was afterwards amended by adding a claim of error in denying the defendant's motion to correct the finding by striking out the paragraphs relating to the defendant's treatment of her mother, which motion was made on the ground that the facts as found by the court, while supported by the testimony of one witness, were denied by that of three, and also that the court had found one fact without any evidence. The plaintiffs' appeal assigns as the only error the refusal of the court to give judgment for costs to the plaintiffs.

NOTE.—For another case in this series as to duty of child to support indigent parent, see *McCook County v. Kammos* (S. D.) 31 L. R. A. 461.

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**Mr. Epaphroditus Peck**, for plaintiffs:  
It is the right and duty of the selectmen to determine the residence of paupers.

Gen. Stat. § 3299.

Defendant "expressly stated that she was willing to provide for and support her daughter at her own house, thus casting upon the superintendent the duty of determining whether her offer was suitable and sufficient."

*Aldridge v. Walker*, 151 N. Y. 527, 45 N. E. 950.

When the home offered is in another town, as in this case, the selectmen are without power to remove the pauper thereto.

Gen. Stat. § 3310.

It was not the law "that he who was bound by law to support a person had a right to restrain his locomotion, and place him where his support would be most cheap and convenient. There was no statute giving sanction to the position, and the common law affords it no countenance."

*Backus v. Dudley*, 3 Conn. 568.

The defendant's house is not a suitable home for the mother.

The suitability of defendant's house, if it involves a question of law at all, is one of those mixed questions of law and fact "wherein the determining facts cannot be transferred from the mind of the trier to the mind of the appellate court, and the conclusion is therefore practically a conclusion of fact."

*Nolan v. New York, N. H. & H. R. Co.* 70 Conn. 159, 43 L. R. A. 305, 39 Atl. 115; *Fow v. Kinney*, 72 Conn. 404, 44 Atl. 745.

The mother herself, the selectmen her legal overseers, the trial court,—all declare that the defendant's house is no suitable home for the mother. This court cannot gain from this record such a knowledge of the situation as to say that they are all mistaken.

*Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106; *Lowder v. Hartford Street R. Co.* 72 Conn. 74, 43 Atl. 545.

**Messrs. J. Gilbert Calhoun and Edward J. Garvan** for defendant.

**Hamersley, J.**, delivered the opinion of the court:

The defendant's appeal discloses no error. The judgment of the trial court found all the issues of fact in favor of the plaintiffs. The conclusions of the judgment are consistent with the subordinate facts found. The claim of inconsistency in the only particulars suggested in the reasons of appeal has no merit. These conclusions cannot, therefore, be reviewed, unless they involve some erroneous view of the law. The assignment of errors in law lacks that clearness and distinctness which is strictly requisite. Treating the errors discussed in argument as sufficiently specified, they all depend upon the soundness of this proposition: As a matter of law, the court cannot order the defendant to contribute the sum of \$12.50 per month towards the support of her mother, so long as the defendant expresses her willingness to support her mother

in the defendant's home, which is suitable and satisfactory, so far as her mother's physical comfort and material surroundings are concerned; and this is true, notwithstanding the fact that, by reason of the defendant's harsh treatment of her mother while an inmate of the defendant's house and subsequently, that home has become so hateful to the mother that any attempt to keep her there by compulsion would be exceedingly cruel to her. This proposition is not sound. While the willingness of a daughter to provide for her mother in the daughter's home may affect the determination of her neglect, within the meaning of the statute, it is only one element, and not conclusive. The superior court has found the fact of neglect in view of all the evidence, and that finding must stand unless the court erred in refusing to consider as decisive of the question an offer by the daughter of a comfortable bed and sufficient food, coupled with such harsh treatment from the daughter as justly compelled its refusal. The law does not force a parent to become the unhappy prisoner of a thankless child, as the only alternative of starvation. A house, however comfortable and luxurious as to its material appointments, where one is subjected to treatment which renders life unendurable, is not a suitable home, even for an aged pauper. As to the defendant's claim that the facts found do not support the conclusion of the court in reference to the daughter's conduct, we think they are too plainly sufficient to justify discussion. Indeed, it would seem difficult for an impartial mind to reach a different conclusion, in view of facts appearing in the record, as admitted by the daughter.

If we rightly apprehend the underlying logic of the considerations urged by defendant's counsel they depend upon a misapprehension of the statute under which this action is brought, and especially upon the claim that the statute imposes upon the daughter an absolute legal duty to support her mother, and that such a statutory duty carries with it a right to determine the place where the support shall be furnished. It is not true that the mere imposition of a statutory obligation to support an adult clothes the party bound with such power over the person of the one supported. That power has in some instances been given by statute, but it cannot be inferred from the mere creation of the obligation. *Backus v. Dudley*, 3 Conn. 568, 573. The opinion in the case cited applies this principle to the obligation of a father to support an adult son. But the statute does not impose such absolute legal duty. Its enactment did not change the moral obligation of a parent to support an adult child, or that of the child to support its parent, into an absolute legal obligation. The legal obligation created by the statute is coincident with the order which the court is authorized to make, and is not complete until the court has found the necessity for aid, the ability to aid, and prescribed to what extent the aid should be furnished. In 1699 the selectmen were directed to make

necessary provision for idiots and lunatics who were incapable of providing for themselves. 4 Col. Rec. p. 285. In 1715 an addition to this act provided that the relatives (within the degrees named) of "such poor impotent persons," being of sufficient ability, "shall relieve such poor persons in such manner as the county court in that county where such sufficient persons dwell shall assess." 5 Col. Rec. p. 503. In the revision of 1750 (page 90 of the edition of 1754) the language used definitely includes within the scope of the act all persons who by age, sickness, or otherwise shall become poor and impotent and unable to support themselves; and the act provides that such poor persons shall be supported by their relatives who stand in the line of father, etc., if they are of sufficient ability, "which sufficient relations shall provide such support and maintenance in such manner and proportion as the county court, in that county where such idiot, distracted, poor, or impotent person dwells, shall judge just and reasonable, whether such sufficient relations dwell in the same or any other county. And the said courts are hereby fully authorized and empowered, upon application to them made, either by the selectmen of the town or any one or more of such relations, to order the same accordingly." It is to be noted that, from the first enactment of this act to the present day, no authority has been given to any court to enforce in any manner the moral obligation of a child to support its parent, except through an order of court, made in pursuance of this act, defining the support to be furnished. The act as thus settled appears substantially in the same form in the compilation of 1808 (page 382); and its meaning and legal effect, so far as the nature and extent of the legal obligation created and the power of the county court (now of the superior court) over the subject-matter is concerned, have been fixed by the decisions of this court. In *Waterbury v. Hurlburt*, 1 Root, 60 (1773), it was held that by the common law there is no legal duty resting on a son to support a parent, "and by the statute only *sub modo*, viz., by the particular application to the county court." In *Wethersfield v. Montague*, 3 Conn. 507, there was an application to the county court under this statute, and we held that the moral duty of a child to support a parent did not involve a legal liability, and that the statute created such liability only in cases within its terms, and that any legal liability created by the statute was, at most, potential and prospective, to be enforced when and not until the court had, upon the prescribed application, found, "not only the ability of the relations to support, but the manner and proportion in which they are to contribute." *Newtown v. Danbury*, 3 Conn. 553, 559; *Cook v. Bradley*, 7 Conn. 60, 62, 18 Am. Dec. 79; *Stone v. Stone*, 32 Conn. 143. The statute thus construed was subsequently transferred from the title of *Idiots* to that of *Paupers*. It has from time to

time been added to as to some details. In the course of successive revisions its language has been condensed and modernized. The same peculiar remedy has been authorized for enforcing the different obligations of a husband upon an application made by the wife, and in respect to the scope of this extension we have recently said that the "statute is a remedial one, and to be liberally construed." *Cunningham v. Cunningham*, 72 Conn. 157, 159, 44 Atl. 41. But the essential features of the act as affecting the legal liability of a child to support a parent, and the conditions under which that liability can arise and be enforced, have not been altered. The meaning of the act in these respects, as settled in the early cases cited, has never been questioned during the intervening eighty years.

We therefore deem it clear that the court having properly found that Mrs. Baldwin has become poor and unable to support herself, and that her daughter, being able, neglects to provide such support, it was empowered by the statute to order the defendant to contribute any sum reasonably necessary for her mother's support in the town of her residence and settlement, and also clear that the neglect to provide support, within the meaning of the statute, may be established by proof that for six months preceding the application the defendant refused and still refuses to provide any support whatever unless Mrs. Baldwin will leave her place of residence, move to another town, and become an inmate of the defendant's house, where she had been so treated by the defendant that to compel her to return would be exceedingly cruel.

As to the exceptions taken to the findings: The one which excepts to the finding of certain facts because the trial court believed one witness, and did not believe others, is unjustifiable. The other, which excepts to the finding of a certain fact because there was no evidence offered on the question, is unsupported by the testimony testified.

The error assigned in the plaintiff's appeal is well taken. The trial court correctly held that the right to costs in all cases at law, if it exists, rests on the provisions of some statute, or some rule of court authorized by statute. *Studwell v. Cooke*, 38 Conn. 549, 554. But the right to costs in any civil action is clearly recognized by statute. Gen. Stat. §§ 990, 3720. The words "civil action," as used in these sections, is broad enough to cover this proceeding. *Pettis v. Pomfret*, 28 Conn. 566, 570. We think the statute entitles the plaintiffs to costs, and therefore the refusal of the court to give judgment for costs on the sole ground that the law did not permit any recovery of costs in such an action was error.

There is no error in the defendant's appeal. On the plaintiffs' appeal there is error, and the cause is remanded, that the judgment rendered may be perfected in accordance with the opinion.



## Margaret CARNEY

v.

James HENNESSEY and Wife, *Appts.*

(.....Conn.....)

1. One occupying real estate at a certain time may testify as to who made use of adjoining land up to the division fence, as tending to show adverse possession in him, and that the owner of the land occupied by witness was only in possession as far as the fence when he conveyed the property to a third person, and as to the construction which had been put by the adjoining owners upon their title deeds.
2. Admissions as to boundary by a general agent in possession of real estate for the purpose of caring for it, made within the scope of his authority, are binding on his principal whether known to the latter or not.
3. One who has been ousted from possession of his real estate by an open, visible, and exclusive possession in another, which has continued uninterruptedly for the limitation period, will be presumed to have knowledge of it.
4. A claim of title, or specific intent to make the land his own, is not necessary to perfect the title of one in adverse possession of real estate for the statutory period.
5. Minority of the owner of real estate of which adverse possession is taken will not prevent the running of the statute of limitations against the right to recover it, but will merely give an additional time for suit after the disability is removed.
6. Evidence of declarations of the remote grantor of two parcels of real estate as to where he intended to draw the line between them is not admissible upon the question of the division line.
7. The question of costs allowed by the trial court will not be considered on appeal at the instance of the party prevailing in the trial court, where no appeal was taken from the judgment upon that question.

(July 23, 1901.)

**A**PPEAL by defendants from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff in an action brought to recover damages for trespass on plaintiff's real estate. *Reversed.*

The facts sufficiently appear in the opinion.

*Messrs. Frank S. Bishop and George E. Beers*, for appellants:

The court erred in ruling that if one under disability is ousted the statute of limitations is suspended while the disability lasts, and for five years thereafter, and that a purchaser within that time has the full fifteen years in which to sue.

Gen. Stat. § 1368, provides that "no person shall make entry . . . but within fifteen years next after his right or title to the same shall first descend or accrue, . . . but if any person who shall have such right or title of entry . . . shall, at the time of the first descending or accruing of said right or title, be . . . a

NOTE.—For adverse possession in case of dispute as to boundary, see *Freeble v. Maine C. R. Co.* (Me.) 21 L. R. A. 829, and *note*.

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minor, . . . he and his heirs may, notwithstanding the expiration of said fifteen years, bring such action or make such entry at any time within five years next after full age."

The right or title of entry arises on the ouster, and the language of the statute contemplates that there may be an ouster during minority. The meaning is that the ouster is regarded as occurring when it in fact occurs, and that then the statute begins to run; if the fifteen years comes to an end after the disseisee reaches twenty-six years, he is barred; if at any time before twenty-six, he has until that time (five years after full age) in which to sue.

*Henry v. Carson*, 59 Pa. 297; *Bunoe v. Wolcott*, 2 Conn. 32; *Griswold v. Butler*, 3 Conn. 241; *Watson v. Watson*, 10 Conn. 89; *Angell*, Limitations of Actions, 5th ed. § 479.

Unless there is a provision saving the rights of those under disability, they are in no different position than others.

13 Am. & Eng. Enc. Law, p. 735; *Powell v. Koehler*, 52 Ohio St. 103, 26 L. R. A. 482, 39 N. E. 195.

This is a suit by the infants' remote grantee. Being disseised during minority, the infants remained disseised at the time they made their deed.

*Williams v. Council*, 49 N. C. (4 Jones, L.) 206; *Den. ex dem. Murray v. Shanklin*, 20 N. C. (4 Dev. & B. L.) 289; *Harrison v. Adcock*, 8 Ga. 68.

The deed therefore conveyed no title upon which the plaintiff can sue.

*Merwin v. Morris*, 71 Conn. 565, 42 Atl. 855.

The saving clause excepts infants, and expressly refers to their heirs, but says nothing of assigns. It seems to confer a personal benefit only.

*Williams v. Council*, 49 N. C. (4 Jones L.) 206.

The most that can be contended is that the purchaser shall stand in the seller's shoes.

*Thomson v. Gaillard*, 3 Rich. L. 418, 45 Am. Dec. 778; *Erwin v. English*, 57 Conn. 562, 19 Atl. 238.

The act of Carney was within the scope of his agency. The admission contained in the length of sidewalk ordered was in the performance of his duty as agent, and was therefore a part of the *res gestæ*. The fact that the plaintiff had no knowledge of the order is immaterial.

*Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Willard v. Buckingham*, 36 Conn. 402; *Thills v. Perkins Electric Lamp Co.* 63 Conn. 484, 29 Atl. 13; *Haynes v. Leppig*, 40 Mich. 602; *Gilmour v. Heinze*, 85 Tex. 76, 19 S. W. 1075.

It is not necessary that the real owner should know or acquiesce in the occupation of the disseisor.

*Scruggs v. Scruggs*, 43 Mo. 142; *Wilson v. Williams*, 52 Miss. 493; *School Dist. No. 8 v. Lynch*, 33 Conn. 334; *Murray v. Hoyle*, 92 Ala. 562, 9 So. 368; *Poignard v. Smith*, 6 Pick. 173.

One may acquire title by adverse possession although he has not a specific intent to oust the owner from his land and thus acquire title by adverse possession.

*French v. Pearce*, 8 Conn. 443, 21 Am. Dec. 680; *Abbott v. Abbott*, 51 Me. 584; *Erck v. Church*, 87 Tenn. 575, 4 L. R. A. 645, 11 S. W. 794; *Bryan v. Atwater*, 5 Day, 187, 5 Am. Dec. 136; *Johnson v. Gorham*, 38 Conn. 521; *Spaulding v. Warren*, 25 Vt. 316; *Brown v. Leete*, 2 Fed. 440; *Brown v. Morgan*, 44 Minn. 432, 46 N. W. 913; *Brown v. M'Kinney*, 9 Watts, 565, 36 Am. Dec. 139; *Hitchings v. Morrison*, 72 Me. 331.

Ownership draws with it possession only "in connection with the fact that no one else was in the actual exclusive possession."

*Church v. Meeker*, 34 Conn. 422; *Waterbury Clock Co. v. Irion*, 71 Conn. 259, 41 Atl. 827; *Mervin v. Morris*, 71 Conn. 573, 42 Atl. 855; *Fitch v. New York, P. & B. R. Co.* 59 Conn. 422, 10 L. R. A. 188, 20 Atl. 345.

Mr. C. S. Hamilton, for appellee:

The possession required by law to obtain title by adverse possession must be of the character described in the charge.

*Huntington v. Whaley*, 29 Conn. 391; *Russell v. Davis*, 38 Conn. 562.

The presumption is always in favor of the owner of property being in possession thereof as owner.

*Hanford v. Fitch*, 41 Conn. 486; *Russell v. Davis*, 38 Conn. 565; *Noyes v. Stillman*, 24 Conn. 15; *Hale v. Wiggins*, 33 Conn. 101; *Mervin v. Morris*, 71 Conn. 555, 42 Atl. 855; *Watson v. Watson*, 10 Conn. 77.

In order to gain adverse possession, defendants must have held the property, claiming it adversely as against somebody else.

*Huntington v. Whaley*, 29 Conn. 396; 1 Swift, Dig. p. 169.

The doctrine of adverse possession is to be taken strictly.

*Huntington v. Whaley*, 29 Conn. 398.

Adverse possession can never be assumed as a matter of law from mere exclusive possession, however long continued.

*Russell v. Davis*, 38 Conn. 562; *Mervin v. Morris*, 71 Conn. 569, 42 Atl. 855.

Torrance, J., delivered the opinion of the court:

The plaintiff and defendants are adjoining proprietors of land in New Haven fronting westerly on State street, and running east to Olive street. The plaintiff owns the north lot, and the defendants the south lot. The dispute between them relates to the question whether the boundary line between said lots runs along the outside face of the southerly wall of the brick building on plaintiff's land, as claimed by the defendants, or whether it runs about a foot and a half, more or less, southerly of said face of said wall, as claimed by the plaintiff. Both lots were owned as one by Joseph Fairchild in 1874, and in October of that year he conveyed the north lot to his daughter Mrs. Easton. She died in 1876, and the lot came then by descent to her two minor daughters, Josephine and Mary. Josephine came of 53 L. R. A.

age in 1888, and Mary in 1889 or 1890; and after this, in November, 1890, they conveyed the lot to Gallagher, who immediately conveyed it to Forsyth, who in 1892 conveyed it to the plaintiff. Joseph Fairchild died testate in 1881, leaving other land of his on State street, which included the south lot, now owned by the defendants, in equal shares to his five sons; and said south lot by mesne conveyances finally came into the ownership and possession of the defendants in March, 1891. Both parties claimed to own the *locus in quo* under their respective chains of deeds produced in evidence; and in addition to this the defendants claimed (1) that they owned it by adverse possession; and (2) that, when the deeds of the daughters of Mrs. Easton and of Gallagher and Forsyth were delivered as hereinbefore stated, the grantors in those deeds were ousted of possession of the *locus in quo*. These claims of each party were denied by the other. The evidence produced by each party in the court below tended to prove their respective claims. The reasons of appeal are based mainly upon alleged errors of the court in its rulings upon evidence, and in its instructions to the jury with reference to the claims of the defendants. These reasons are quite numerous, but, in the view here taken of the case, it will be necessary to consider only a few of the more important of them.

The defendants claimed that at some time before 1881, and after the conveyance of the north lot to Mrs. Easton, a fence was built from the southeast corner of her house to Olive street; that said fence had remained there up to the time this suit was brought; and that the defendants and their predecessors in title, from the time said house and said fence were built, and for more than fifteen years before the bringing of this suit, had been in the exclusive and adverse possession of all the land south of said brick house and said fence. In support of this claim the defendants offered Mrs. Hayes as a witness. She, having testified that she lived in the house now owned by the plaintiff from 1877 to 1881, and that when she went there first the fence aforesaid was then standing, was asked this question: "During the life of Mr. Joseph Fairchild, will you state who, if anyone, made use of the land south of the fence?" The evidence sought for by this question was claimed as tending to prove (1) adverse possession of the defendants as claimed; (2) the fact that plaintiff's grantor was ousted of possession at the time the deed to the plaintiff was delivered; and (3) the practical construction put by the parties upon the deeds, the descriptions in which, as to the exact location of the boundary line in question, the defendants claimed, upon the evidence, were uncertain and ambiguous. This question was objected to and excluded on the ground "that it calls for a conclusion of the witness as to what somebody else did, and does not call for any act that she did." This objection should have been overruled. Assuming, as we should upon this record, that the answer

would have been responsive to the question, we think the evidence was clearly admissible for all the purposes for which it was offered, and that its exclusion under the circumstances was harmful error.

The defendants offered evidence, and claimed to have proved, that the plaintiff, since her purchase of the north lot, had resided thereon only a part of the time, and that the care of the place had been intrusted by her to her brother, who was authorized to, and did, act as her agent in caring for it, paying taxes and assessments thereon, and having general charge of it as her general agent. In view of this evidence and claim, the defendants offered evidence of certain acts and admissions claimed by them to have been made by this agent during and within the scope of his agency. The court excluded the evidence. The ground of exclusion, so far as it is stated in the record, is that it did not appear that the plaintiff had any actual knowledge of the claimed acts and admissions of her agent. For aught that appears upon the record, the court was satisfied that a *prima facie* case of agency had been made out by the defendants; for it does not exclude the offered evidence on that ground, but simply on the ground that the plaintiff was not bound by the acts and admissions of her agent unless she had knowledge of them. This, clearly, was not a sufficient ground for excluding the offered evidence; for it is elementary law that if her brother was her agent, engaged in executing an authority she had conferred upon him, his acts and declarations while so doing, relating to her business and within the scope of his authority, were admissible against her, whether known to her in fact or not. It may be that the court intended to exclude this evidence on the ground that the agency had not been sufficiently shown, but, if so, that is not the ground stated.

The defendants complain of the charge of the court to the jury with reference to the question of adverse possession. They say that the jury, in divers parts of the charge, were told, in substance (1) that such adverse possession must have been known to and acquiesced in by the owner, or must have been so far notorious as to have been presumptively within the knowledge of the owner; and (2) must have been held by the defendants and those under whom they claim under a claim of title, or with a specific intent to claim the land as their own. We think the record bears out these claims of the defendants, and that the charge, as a whole, upon these points, was liable to mislead the jury. If the owner of real estate is ousted of possession, and the ouster continued uninterruptedly for a period of fifteen years, by an open, visible, and exclusive possession in another, without the license or consent of the owner, such possession is presumed to be with the knowledge of the owner. *School Dist. No. 8 v. Lynch*, 33 Conn. 330. And the jury should have been told that such facts, if true, would constitute presumptive notice of adverse possession to the owner. *Wilson v. Williams*, 52 Miss. 493. Nor was it correct to tell the jury that the adverse possession of the defendants and those under whom they claim must have been made under a claim of title, or under a claim that the land was their own. *Bryan v. Atwater*, 5 Day, 181, 5 Am. Dec. 136; *French v. Pearce*, 8 Conn. 442, 21 Am. Dec. 680; *Johnson v. Gorham*, 38 Conn. 513.

The defendants offered evidence to prove and claimed they had proved an ouster from the *locus in quo* either of Mrs. Easton or of her daughters during their minority, and they complain of the charge of the court with respect to the running of the statute of limitations against the minor daughters. Upon this point the court charged as follows: "If you should find that there has been any sufficient adverse possession and occupation of that property amounting to an ouster of the plaintiff or a predecessor in title of the plaintiff, but should find that such adverse possession began after the Easton girls . . . came to have a title to that property, . . . then you are not to regard the fifteen years of the statute as beginning to run until the date of the transfer from these children to a successor in title, their grantee. Their infancy constitutes a disability which suspends the operation of the statute, if their right of entry accrued during their minority. . . . But if you find any adverse possession sufficient to amount to the requirements of the law, and that it first occurred while the daughters of Mrs. Easton were minors, why, then, the practical consideration is that the statute of fifteen years does not begin to run, until they make a conveyance of their interest, which, I may say, would make it impossible for these defendants to have gained their title by the necessary continuous occupation for fifteen years. This deed having been given by these daughters of Mrs. Easton in 1890, there would be no question on this subject of adverse possession. It would be decisive if you were to find that, though there were adverse possession, the statute did not begin to run, under the instructions I have given you, until the deed from" the two daughters. The title to the north lot devolved by descent upon the minor daughters in March, 1876: They, when of full age, conveyed to Gallagher on the 20th of November, 1890. By this charge the jury were told, in effect, that if the defendants and those under whom they claimed had ousted the minor daughters in April, 1876, and had continued such ouster down to the date of this suit, in August, 1898, they could not thereby legally acquire title to the *locus in quo*; in other words, that, under such circumstances, the defendants could acquire no title until they had continued the ouster for fifteen years after the deed to Gallagher in November, 1890. That, clearly, is not the law. The court told the jury that if the adverse possession began after the daughters got title, and during their minority, the statute did not run against them while minors. This is not

against them while minors. This is not

true. "The statute always begins to run against a man the moment he is disseised, whether he is under a disability or not. All the difference is that an additional time is allowed where a disability exists, after the removal of it." Swift, Ch. J., in *Bunce v. Wolcott*, 2 Conn. 27, 33; *Griswold v. Butler*, 3 Conn. 227. This part of the charge was thus clearly wrong, and may well have misled the jury to the prejudice of the defendants upon a material point in the case. For this and the other errors already considered, we think a new trial should be granted; and, in this view of the case, we deem it unnecessary to consider the other assignments of error, as most, if not all, of them appear to be either not well founded, or not important enough to merit further consideration.

A bill of exceptions allowed by the trial court for the plaintiff remains to be considered. The bill presents two questions: The

first relates to the admissibility of the evidence of Henry C. Davis, and the second to the rulings of the trial court upon the question of costs. Davis, a witness for the plaintiff, testified to declarations made by Joseph Fairchild as to where he intended to draw the line between the defendants' lot and the plaintiff's lot; and, because it was simply a declaration of what he intended to do, the court excluded it. Under the circumstances, we think the ruling was correct. The plaintiff took no appeal from the judgment of the trial court upon the question of costs, and, in the absence of such appeal, the second question presented by the bill of exceptions cannot be considered. *Watson v. New Milford*, 72 Conn. 561-567, 45 Atl. 167.

*There is error, and a new trial is granted.*

The other Judges concur.

#### MARYLAND COURT OF APPEALS.

Sarah E. WRIGHT, Garnishee, etc., *Appt.*,  
v.

Samuel P. RYLAND *et al.*

(92 Md. 645.)

1. Execution upon an original judgment cannot be had after a judgment of fiat in a scire facias thereon.
2. A grantee of a judgment debtor holds the property free from the lien of the original judgment after a judgment of fiat is obtained in a scire facias thereon, although such grantee is free from any lien of the new judgment because he was not made a party to the scire facias.

(*Jones, J., dissents.*)

(February 8, 1901.)

**NOTE.**—Effect, upon an existing judgment lien, of proceedings to renew, revive, or extend the judgment.

Whether the lien of a judgment is cut off during the time for which it originally stood, by proceedings taken during that period to renew, revive, or extend the judgment, is a question upon which there seems to be but little authority, and that little not free from conflict.

The doctrine of merger being generally relied upon to destroy the original lien, the test has been said to be whether the judgment entered in the new proceedings was a new judgment, or simply an order that the judgment creditor have execution on the original judgment. This test was applied in two cases in the Iowa supreme court resulting in each instance in a decree that the lien of the original judgment ceased to exist, and became merged in a judgment entered in the so-called revivor proceedings for the full amount of the former judgment with interest and costs. *Denegre v. Haun*, 13 Iowa, 240; *Bertram v. Waterman*, 18 Iowa, 529. In each case the court deemed it only necessary to settle the true nature and character of the proceedings, and said that if the judgment entered therein was to be treated as a new judgment, then the prior one was vacated or merged in the new judgment, and 53 L. R. A.

**A** PPEAL by the garnishee from a judgment of the Baltimore City Court in favor of attaching creditors of William Coath, who levied upon property in the possession of the garnishee, which was alleged to be subject to the lien of the judgment of the attaching creditors. *Reversed.*

The facts are stated in the opinion.

*Messrs. Charles F. Harley and John Whittle*, for appellant:

If the plaintiff had not elected to renew its judgment by scire facias, the old judgment, under Acts 1890, chap. 114 (Poe's Supp. art. 26, § 20), would have been a lien upon this property at the time of laying the attachment on June 23, 1899, as the old judgment would not have expired till June 29, 1899.

Under the law the plaintiff had that rene-

ceased to have any operative effect or force, but if not a new judgment, but simply an order that plaintiff should have execution for the original judgment, then the original lien continued as though the proceedings to revive had not been instituted. The court was of the opinion in each case that under the pleadings the judgment creditor would have been entitled to a revivor of the right to enforce the original judgment, but that the judgment obtained was clearly a judgment as in an action of debt.

So, in *Purdy v. Doyle*, 1 Paige, 558, the lien of a judgment was held to have been lost by the prosecution to judgment of an action of debt upon the first judgment.

A like conclusion was reached in *Gould v. Hayden*, 63 Ind. 443. In this case a judgment had been recovered in Ohio upon a judgment previously rendered in Indiana; execution having been subsequently issued on the Indiana judgment, an injunction was sought to prevent a sale under such execution. The court stated that the question was whether the Indiana judgment was so merged and absorbed in the judgment rendered thereon in Ohio as to destroy the lien, vitality, and other qualities of the first-named judgment, and said: "It seems very clear to us that this question must be answered in the affirmative. . . . The judgment plaintiff, of

dy, qualified by another remedy in the nature of a scire facias.

Attachment may issue at any time within twelve years from the date of judgment, "provided that at any time before the expiration of twelve years . . . the plaintiff shall have the right to have a writ of scire facias to renew or revive the same."

It took advantage of this right; but the renewed judgment has no life as against this garnishee, because she was not made a party defendant therein, and the lands and tenements in controversy were not described in the sheriff's return in said scire facias proceedings.

*Warfield v. Brewer*, 4 Gill, 266; *Polk v. Pendleton*, 31 Md. 118; *Thomas v. Farmers' Bank*, 46 Md. 43; *Bish v. Williar*, 59 Md. 382; *Poe, Pl. & Pr.* § 593; *Black, Judgm.* § 492; *Freeman, Judgm.* p. 767.

course, controls his judgment. He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is to our minds a convincing and conclusive reason why each successive personal judgment ought to, and must, be regarded as a complete merger and extinguishment of the preceding judgment with all its qualities and incidents." The court distinguished the case of *Stockwell v. Walker*, 3 Ind. 215, *infra*, on the ground that in that case the judgment had been revived upon a scire facias, and the real question for decision was whether or not the original judgment was merged in the judgment of revivor, and said: "The court very properly, we think, decided that it was not so merged. The judgment of revivor simply revived or gave vitality to the original judgment. The judgment of revivor did not become a new debt of record, but merely revived the old debt of record."

And in *Garvin v. Garvin*, 27 S. C. 472, 4 S. E. 148, the court thought that a judgment would be merged in a junior judgment if the former was the cause of action of the latter, and that a purchaser of land from the judgment debtor prior to the entry of the junior judgment would hold the land free from the lien of the older judgment.

But in *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861, the court, though of the opinion that as a general rule a judgment between the same parties or their privies, when used as a cause of action which ripens into a new judgment, is merged in the new judgment, refused to apply the doctrine to a judgment which at the death of the judgment debtor constituted the only lien upon his entire estate, and which would unquestionably have retained its lien and preference had not an action been instituted on the judgment as a cause of action, and prosecuted to judgment, on the ground that such an application of the doctrine of merger would produce manifest hardship, and the earlier judgment was therefore declared to be a first lien on all property of the deceased judgment debtor.

To the extent that these cases decide that a judgment is determined and extinguished by a judgment obtained in an action upon the first

A prior lien creditor can, under no circumstances, question the validity of his debtor's conveyance, when he fails to make such grantee a party defendant in the scire facias proceedings.

*Armington v. Rau*, 100 Pa. 165; *Long v. McConnell*, 158 Pa. 578, 28 Atl. 233.

An attachment cannot be issued upon the old judgment after its renewal by scire facias, even within its original lifetime.

The judgment on the scire facias is the effective judgment, and ought to have been accurately recited in the process of execution.

*Hall v. Olagett*, 63 Md. 61; *Freeman, Executions*, § 94; *Richardson v. M'Dougall*, 19 Wend. 80; *Roberts v. Pising*, Rolle, Abr. 900; *Foster, Scire Facias*, 27; *Lambson v. Moffett*, 61 Md. 431.

Where an execution is sued out after a

judgment, they are squarely in conflict with a class of cases which denies to the second judgment any such effect on the theory that one judgment cannot extinguish another of equal nature and degree. The following are cases of this character: *Preston v. Perton*, Cro. Eliz. pt. 2, p. 817; *Andrews v. Smith*, 9 Wend. 53; *Mumford v. Stocker*, 1 Cow. 178; *Griswold v. Hill*, 2 Paine, 492, Fed. Cas. No. 5,836; *Weeks v. Pearson*, 5 N. H. 324.

It is suggested, however, that the lien of the first judgment may be merged in the junior judgment, although the earlier judgment is not itself extinguished, and that consequently cases of this character shed no real light on the question under discussion. It will be seen that three of the cases cited as illustrations of this class of cases were decided in the same state as was *Purdy v. Doyle*, 1 Paige, 558, *supra*, a circumstance tending to lend support to the view that these cases do not necessarily show that the lien of the earlier judgment is not lost by the prosecution to judgment of an action upon such judgment.

The mere bringing of an action of debt upon a judgment has been held not to be a waiver of the lien created by that judgment. *Erby v. Erby*, 1 Salk. 80. To the contrary is a *dictum* in *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 Am. Dec. 236, that the institution of an action of debt upon a judgment, as it is incompatible with, and cannot be prosecuted at the same time and together with, an execution upon the judgment, amounts to a waiver of the lien arising from the right to issue execution, or an admission that no such lien then exists.

The prosecution to judgment of unauthorized proceedings to revive will not destroy the existing lien of the judgment sought to be revived. *Lyon v. Cleveland*, 170 Pa. 611, 30 L. R. A. 400, 33 Atl. 143, 170 Pa. 621, 33 Atl. 145. In these cases proceedings to revive a judgment against a terre-tenant, after receiving notice that he held a secret deed to the property at the time a judgment had been revived by an amicable scire facias signed by the judgment debtor alone, were held not to amount to an abandonment of the judgment on the amicable scire facias, which was a lien upon the land and bound it in the hands of the terre-tenant, since such proceedings were not only unnecessary, but unauthorized.

To the same effect, is *Hughes v. Wilkinson*, 37 Miss. 482, in which the court held that, conceding a revival upon scire facias to be irregular or even void, the subsequent proceedings under the original judgment were as valid as though no scire facias had been sued out or judgment of revivor entered.

scire facias on a judgment, the execution must be grounded on the judgment in scire facias, though the scire facias was sued out unnecessarily.

*Davis v. Norton*, 1 Bing. 133.

The judgment of scire facias seems also to merge the original judgment, so that if a second scire facias is desired it can only be obtained on the first scire facias, and not on the original judgment.

*Freeman*, Judgm. § 447, p. 773; *Harris*, Entries, 690; *Walsh v. Bosse*, 16 Mo. App. 231; *Wonderly v. Lafayette County*, 74 Fed. 706.

The plaintiff is entitled to scire facias one day or year after his original judgment is rendered, or at any time within twelve years. The only penalty is that, if he sue out a scire facias, he must rely on his new judgment therein for his execution.

*Freeman*, Executions, § 88, p. 329; *Roberts v. Pising*, Rolle, Abr. 900; *Lambson v. Moffett*, 61 Md. 426; *Wonderly v. Lafayette County*, 74 Fed. 702.

As far as the terre-tenant is concerned, the scire facias is a new proceeding, although as to the defendant it is but a continuation of an old action. But whatever may be the nature of the proceeding or action, the judgment of *fiat execution* in the proceedings scire facias *executionem non* is a new judgment; certainly a renewed judgment, as the statute says.

*Wauver v. Boggs*, 38 Md. 264; *Mullikin v. Duvall*, 7 Gill. & J. 360; *Warfield v. Brewer*, 4 Gill, 269; *Bish v. Williar*, 59 Md. 382; *Lambson v. Moffett*, 61 Md. 431; *Co. Litt.* § 505; *Poe, Pl. & Pr.* § 585; *Walsh v. Bosse*, 16 Mo. App. 231; *Lafayette County v. Wonderly*, 34 C. C. A. 362, 92 Fed. 313.

So far as *WRIGHT v. RYLAND* is an authority for the proposition that the judgment entered on a scire facias extinguishes the lien of the original judgment as against one not bound by the new judgment because not made a party to the proceedings to revive, it seems to be contrary to the conclusion reached in other cases in which this question has been discussed.

Thus, in *Stockwell v. Walker*, 3 Ind. 215, a revival of the judgment against the judgment debtor in proceedings instituted against him alone was held not to extinguish the first judgment or release the replevin bail upon that judgment, and he still remains bound thereby, and liable to proceedings to enforce it.

If this case can be distinguished from *WRIGHT v. RYLAND* on the theory that the judgment in scire facias in Indiana is but an award of execution, while in Maryland it is a new judgment, there remain two Pennsylvania cases in which the same result has been reached despite the fact that in that state a judgment obtained upon scire facias is *quod recuperet*. *Fursht v. Overdeer*, 3 Watts & S. 470, is the first of these cases. Here a judgment entered on a scire facias issued to revive the lien of a judgment without notice to the terre-tenant was held not to extinguish the original lien of the former judgment so as to take away the right of the plaintiff to revive it against the defendant and his terre-tenant by a new scire facias issued within five years from the time when the original judgment was entered. To make this decision essentially in conflict with *WRIGHT v. RYLAND* it would seem only necessary to show that in Pennsylvania the existence of a lien is requisite to the right to issue a scire facias to re-

*Messrs. Alexander Hardcastle, Jr., and Frank D. Wynn*, for appellees:

Upon the death of Maria Coath there became vested in William Coath an undivided one-third interest in the leasehold property, levied on this case. The interest so vested is an equitable interest or estate.

*Neale v. Hagthorp*, 3 Bland, Ch. 551; *Smith v. Doe ex dem. Dennis*, 33 Md. 449; *Rock Hill College v. Jones*, 47 Md. 21.

The judgment against William Coath, which was in full operation at the time of the death of Maria Coath, constituted a valid lien against this equitable interest or estate.

*Shryock v. Morris*, 75 Md. 79, 23 Atl. 68.

The lien of the original judgment is not extinguished by the judgment of fiat, but remains in force for the statutory period of twelve years.

The language of the statutes is absolute and unqualified in continuing the lien of the judgment for a period of twelve years.

The appellee cannot be deprived, by mere implication, of a right positively conferred upon it.

Code Pub. Gen. Laws, art. 26, §§ 19, 20, Acts 1890, chaps. 114, 314.

Failure to bring in such terre-tenant does not affect the rights of the judgment creditor to enforce an existing lien by execution or attachment.

2 Poe, Pl. & Pr. §§ 586-588; *Doub v. Barnes*, 4 Gill, 9; *Murphy v. Cord*, 12 Gill & J. 182; *Warfield v. Brewer*, 4 Gill, 265.

The office of a scire facias to revive a judgment is to reinvest it with all the powers, attributes, and conditions that originally belonged to it, and which have been wholly

live such lien. It is submitted that this is shown by Pa. act 1827 (Pub. Laws, 129), the statute in force when this case was decided, declaring a judgment to be a lien for five years from date of entry, but no longer unless proceedings to revive are sued out within that period. It is significant, also, that the only defense urged by the terre-tenant to the new scire facias was that the plaintiff had lost his lien by reviving the original judgment without notice to the terre-tenant. The court in overruling this defense, said that, although a judgment on the scire facias issued to revive the lien of a former judgment is for some purposes in the nature of a new judgment, "it is not considered as operating to merge and extinguish the original judgment to all intents and purposes so as to take away the rights of the plaintiff. The original judgment still has its operation and efficacy. The lands bound by the original judgment continue so bound, notwithstanding a further lien may be acquired by the new judgment."

This case was followed in *Little v. Smyser*, 10 Pa. 381, which differed from the earlier case only in the fact that the judgment sought to be revived was itself a revival judgment. This difference the court regarded as immaterial, stating that, as the original judgment still subsists for the purposes of the lien, notwithstanding a further lien may be acquired by the new judgment, the same is true of every intermediate judgment of revival,—at least for the period of five years from the time of its rendition. The court conceded that a judgment rendered in a scire facias for the plaintiff may be a bar to another scire facias on the same judgment, where the successive judgments of revival are

or in part suspended by lapse of time, change of parties, and the like.

*Moore v. Garrettson*, 6 Md. 448; *Huston v. Ditto*, 20 Md. 328; *Hoffman v. Shuff*, 80 Md. 614, 31 Atl. 505.

A scire facias to revive a judgment *post annum et diem* is but a continuation of the original action, and the execution thereon is an execution on the former judgment.

*Irwin v. Nixon*, 11 Pa. 425, 51 Am. Dec. 559; *Fursht v. Overdeer*, 3 Watts & S. 471; *Little v. Smyser*, 10 Pa. 385.

On petition for reargument.

The theory that it is not necessary to notify terre-tenants by scire facias before issuing a fieri facias within the statutory period is borne out by all the Maryland decisions except one.

*Arnott v. Nicholls*, 1 Harr. & J. 472, which decision is reversed in express terms by *M'Elderry v. Smith*, 2 Harr. & J. 72; *Warfield v. Brewer*, 4 Gill, 268; *Murphy v. Cord*, 12 Gill & J. 182.

When the debtor alienated lands subject to the lien of a judgment before the right to issue an immediate execution was suspended a scire facias was unnecessary to affect the terre-tenants.

*Murphy v. Cord*, 12 Gill & J. 182; *Duval v. Speed*, 1 Md. Ch. 229; *Hayden v. Stewart*, 1 Md. Ch. 464; *Hodges v. Sevier*, 4 Md. Ch. 384; *Anderson v. Tydings*, 8 Md. 443, 63 Am. Dec. 708; *Jarboe v. Hall*, 37 Md. 350; *Manton v. Hoyt*, 43 Md. 265.

The writ of scire facias and the judgment of fiat are for the purpose of continuing and perpetuating the judgment, but not with the purpose of destroying the vested lien.

*Moore v. Garrettson*, 6 Md. 448; *Huston*

*v. Ditto*, 20 Md. 328; *Hoffman v. Shupp*, 80 Md. 614, 31 Atl. 505; *Fursht v. Overdeer*, 3 Watts & S. 471; *Little v. Smyser*, 10 Pa. 385.

*Schmucker*, J., delivered the opinion of the court:

Ryland & Brooks obtained judgment in the Baltimore city court against George W. Grafflin and William Coath for \$457.16 on June 29, 1887. The judgment was entered to the use of the Ryland & Brooks Lumber Company, which caused a scire facias to be issued thereon, in which a judgment of fiat was entered on May 8, 1899. The only defendants to the scire facias were the original judgment debtors, no notice having been taken of their grantees or alienees. In August, 1892, Maria Coath, the mother of the defendant William Coath, died intestate, being the owner of a sub-ground-rent of \$180 per annum, issuing out of a lot of ground in Baltimore city. She left three children, including William, each of whom was entitled to an undivided one third of her estate. He assigned his interest in the estate shortly before the distribution thereof to his sister Sarah E. Wright, by a deed duly executed and acknowledged, which was lodged in the office of the register of wills of Baltimore city, but was not recorded in the land records. The assignment recited a consideration of \$1,000, and its bona fides is not assailed in the record. By the final administration account of the estate two thirds of the net residue, including the subrent of \$180, was distributed to Sarah E. Wright, and a conveyance thereof was made to her by the administrator under the order of the orphans'

between the same parties or their privies, operating in extension of the lien, but said that where the land was aliened before the last judgment, and the object of the scire facias was, as in *Fursht v. Overdeer*, 3 Watts & S. 470, *supra*, to continue the lien of the original judgment which still subsisted against the land in the hands of the vendees of the original defendants, it was absolutely necessary to sue on the first judgment for the reason that "the second was rendered after the alienation against the alienor alone, and consequently the alienee could not for any purpose be deemed a party to it. It was therefore regarded as *res inter alios acta* so far as the quality of lien was concerned. As against the defendant in it, it was personally binding, and would subject him to execution, or might be levied on any estate he had. A consequence was that, as against him alone, any subsequent process must be founded upon it. But for every purpose of lien against the land originally bound, it was utterly naught. In seeking the extension of that lien, the plaintiff was, therefore, necessarily driven to overlap the second judgment, as unconnected with the great object of the new process. . . . In determining whether a party can have recourse to an intermediate judgment, we are to consider whether the last carries with it all the incidents and qualities attendant upon the first or intermediate ones as against all the parties to whom the plaintiff may legally look as liable to be affected by it in person or estate. If not and the lien of any of the precedent judgments still exists, the plainest principles of justice require the plaintiff should be at liberty to proceed upon it. Were this denied him a perfectly valid en-

cumbrance would be liable to defeat by the mistake of suing out scire facias within the five years against the defendant alone in ignorance of his conveyance to another, or through the accident of not including some of several alienees; a thing of easy occurrence in a country where lands pass so rapidly from hand to hand."

And this rule seems to be recognized in *Lyon v. Cleveland*, 170 Pa. 611, 80 L. R. A. 400, 33 Atl. 143, in which the court said that a judgment creditor who revives his judgment without legal notice to a purchaser from the judgment debtor who has recorded his deed or entered into the actual possession of the land will lose his lien as to the lands so acquired by the terre-tenant at the end of five years from the time when the notice of the terre-tenant's title can be brought home to him. Although this language of the supreme court was criticised in *Suter v. Findley*, 5 Pa. Super. Ct. 163, on the ground that it nullified the provisions of Pa. act June 1, 1837 (Pub. Laws, 289), that no proceedings shall be available to continue the lien of a judgment "against a terre-tenant whose deed for the land bound by the said judgment has been recorded, except by agreement in writing signed by said terre-tenant and entered on the proper lien docket, or the terre-tenant or terre-tenants be named as such in the original scire facias," the later case also recognizes that, though under this statute a terre-tenant whose deed is on record at the time of an attempted revival is not affected thereby unless he is named as a party to the scire facias or signs an amicable scire facias, he remains bound by the judgment sought to be revived for five years from its rendition.

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court, and she entered into possession of it. That conveyance was duly recorded in the land records on August 16, 1894, nearly four years before the issuing of the scire facias on the judgment against Grafflin & Coath. On June 23, 1899, the Ryland & Brooks Lumber Company, after the judgment of fiat had been entered, issued an attachment reciting both the original judgment and the fiat. On the next day, June 24th, the attachment was levied as per schedule upon the interest of William Coath, in the subrent of \$180, and on July 8, 1899, it was laid in the hands of Sarah E. Wright. She appeared to the attachment, and pleaded property in herself to the interest in the subrent which had been levied on, and also moved to quash the attachment on the same ground, and for the further reason that she had not been made a party to the scire facias by which the judgment had been revived before the attachment was issued. The motion to quash and the issue on the attachment were tried at the same time before the court without a jury, and the court overruled the motion to quash, and rendered a verdict and entered judgment for the plaintiff for the property attached, and the garnishee appealed.

At the trial of the case the court granted the prayer of the plaintiff, which briefly recited the facts already stated in this opinion, and asserted the plaintiff's right to a verdict thereon, and it rejected the three prayers of the garnishee, which asserted that there was no evidence legally sufficient to entitle the plaintiff to a verdict, or to entitle it to a condemnation of the property levied on, or to show that the defendant had any interest therein either when the judgment was rendered, or when the attachment was issued, or at any time since. There are two bills of exceptions,—one on the court's action on the prayers, and the other to the refusal of the motion to quash.

The original judgment against Grafflin & Coath was a lien on Coath's one-third interest in the ground rent of which his mother died intestate. That lien was not divested by the sale and conveyance of his share of the estate to his sister, and the plaintiff might have seized it under a fi. fa. on the original judgment at any time before the issue of the scire facias. But, after the judgment of fiat in the scire facias, he could not have execution upon his original judgment. This court has repeatedly held that the fiat "is considered a new judgment" (*Mullikin v. Duvall*, 7 Gill & J. 355; *Weaver v. Boggs*, 38 Md. 204); and that it is "the effective judgment," and must be "accurately recited in the process of executions" (*Hall v. Claggett*, 63 Md. 61). In *Lambson v. Moffett*, 61 Md. 431, this court cites with approval *Roberts v. Pising*, Rolle, Abr. 900, where it was held that the plaintiff, who sued out a scire facias within a year and a day after judgment, could not have execution until he had a new judgment in the scire facias, and say that it is authority, if any were needed, for the proposition that, where a party unnecessarily sues out a scire

facias when he is entitled to and can have an immediate execution, he thereby subjects himself to the inconvenience and delay of having the execution withheld until he obtains a judgment of fiat under the sci. fa.

The remaining question to be determined is whether the lien of the original judgment upon the subrent was revived by the scire facias to which Mrs. Wright, the vendee of Coath's interest therein, was not made a party as terre-tenant. The question who are necessary defendants to a scire facias has been frequently before this court. In *Arnott v. Nicholls*, 1 Harr. & J. 472, which was decided at a time when the law required a judgment to be reviewed by a scire facias after a year and a day from its date before a fi. fa. could issue upon it, the court held that if a defendant sells and conveys his lands bona fide for a valuable consideration after the judgment, even within the year and day, no execution can issue against the lands of the vendee until a scire facias has been sued out on the judgment, and notice given to him as terre-tenant. That case has been erroneously referred to as having been overruled by *M'Elderry v. Smith*, 2 Harr. & J. 72; but an inspection of the latter case shows that it did not overrule the former one at all, but simply decided that, where the defendant aliened his land during the pendency of a scire facias the plaintiff, after a fiat on the scire facias, might issue a fi. fa. and levy on the land so aliened, without proceeding against the parties who became vendees *pendente lite*. In *Murphy v. Cord*, 12 Gill & J. 182, a fi. fa. levied upon lands which had been mortgaged by the defendant within a year and day after the judgment was upheld in an ejectment brought by the mortgagee against the purchaser of the land under the fi. fa. but no opinion was filed in the case, and it does not appear upon what grounds or authority the court relied in making the decision. In *Warfield v. Brewer*, 4 Gill, 268, the court expressed the opinion that a fi. fa. issued within a year and day after the entry of the judgment might be levied on lands conveyed by the defendant after the judgment without first issuing a scire facias against the vendee; but the court relied, in so holding, upon the erroneous assumption that *Arnott v. Nicholls*, 1 Harr. & J. 472, had been overruled by *M'Elderry v. Smith*, 2 Harr. & J. 72. It appears, however, from the record in *Warfield v. Brewer*, that the expression by the court of the opinion just mentioned was merely an *obiter dictum*, as it did not appear in that case whether the alienation of the lands of the defendant had been made before or after the sci. fa. was issued, and for that reason, among others, the judgment in favor of the terre-tenant was affirmed. It has been uniformly held that, when the sci. fa. was not issued until after the year and day, which period was extended by act 1823, chap. 194, to three years, during which execution might issue without resort to scire facias, it was necessary to make the alienees after judgment parties to the writ if it was desired to affect the lands conveyed



to them. In *Warfield v. Brewer*, 4 Gill, 268, the court says: "We know, however, of no decision of our courts that, when the judgment is to be revived, it is not necessary to make the terre-tenant a party in order to proceed against his land, or that he is bound by any sci. fa. issued after the alienation, and to which he was not a party." In *Polk v. Pendleton*, 31 Md. 123, the court, in speaking of the necessity of including the terre-tenants in the sci. fa., says: "They are in as of the estate of the judgment debtor, and, before the judgment can be revived and enforced by execution against the land so as to divest their title, it is necessary to warn them by the scire facias, so that they may have an opportunity of making their defense and of claiming contribution from others holding lands of the judgment debtor bound by the judgment." See, to same effect, *Walsh v. Boyle*, 30 Md. 270. Since act 1884, chap. 178, authorized an execution to be issued upon a judgment at any time within twelve years from its date, this court has not passed upon the necessity of making the terre-tenants parties to a scire facias issued within that time, but both the practice hitherto pursued in issuing the writ and the principles of pleading seem to require that they should be made parties. So far as they are concerned, the proceeding is a new one, and it may result in giving vitality for a long time to a burden on their lands which is about to expire. Scire facias, although a judicial process, "so far partakes of the nature of an action that the defendant may appear and plead to it in the same manner as to an action founded upon an original writ, and the judgment thereon is considered a new judgment." *Weaver v. Boggs*, 38 Md. 264. It has been held in several cases that the writ is in the nature of a declaration, and that it must "contain upon its face such a statement of facts as to justify the process in respect to the form in which it issues and the persons who are made parties to it." *Nesbit v. Manro*, 11 Gill & J. 265; *McKnew v. Duval*, 45 Md. 509. In view of the decisions to which we have referred, it would be inconsistent to hold that the owner of the land thus put in jeopardy should have no notice of the proceeding which he is entitled to defend, and which, if undefended, might prove destructive of his title to his lands. The law in its present status is very liberal towards the plaintiff, who may issue execution on his judgment at any time during the twelve years for which it is a lien, and levy upon the lands of the terre-tenant without previous notice to that person. It imposes no hardship upon him to require that, when he seeks to revive and extend the lien of the judgment for another twelve years, the parties owning the land and to be affected by the revived lien should have notice and an opportunity to be heard in their own behalf before the fiat goes against them.

We think that the appellant, Sarah E. Wright, was entitled to notice of the scire facias as terre-tenant, and should have been made a defendant to it. The assignment to  
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her of the equitable interest of her brother in their mother's estate, followed, as it was, by the distribution of it to her in the administration account, and the subsequent conveyance of the legal title to her by the administrator in pursuance of the order of the orphans' court, and her entry into possession thereunder, constituted her an alienee and terre-tenant of his interest in the rent. The omission to make her a party to the scire facias resulted in a failure to revive the lien of the judgment against the interest which she derived from her brother in the ground rent. The second and third prayers of the appellant presented this issue, and they should have been granted by the court below.

*Judgment reversed, with costs.*

**Jones, J.**, dissenting (Filed August 14, 1901):

For the reasons which are given in the following expression of my views, I have felt constrained to dissent, though with great respect, from the conclusions of the court in this case. Though the facts of the case appear in the opinion of the court, it will conduce, perhaps, to a better understanding of the views I shall here submit, to accompany them with a particular statement of the facts:

On the 29th of June, 1887, Samuel P. Ryland and Chauncey Brooks, partners, obtained in the Baltimore city court a judgment for \$457.16, with interest and costs, against George W. Graffin, Jr., and William Coath, partners trading as Graffin & Co., which was on the 28th of April, 1899, entered to use of the Ryland & Brooks Lumber Company, a body corporate. On the 28th of April, 1899, a writ of scire facias to revive this judgment was issued, and was returned as "made known to George W. Graffin and William Coath, copartners trading as Graffin & Co., by service" on each of the partners in the regular form. On the 8th of May, 1899, judgment of fiat was entered in the scire facias proceeding. On the 23d of June following, the plaintiffs sued out an attachment upon which there was the following return: "Entry made and attached and appraised as per schedule, on the 24th day of June, 1899. Notice of this attachment given to Charles F. Evans and John B. Spence, trading as Evans & Spence, occupants in possession of the property attached described in schedule; also notice of this attachment given to Sarah E. Wright and Ella C. Dunlap on the 8th day of July, 1899; also laid in the hands of Sarah E. Wright on the 8th day of July, 1899, at 1:50 o'clock P. M., in presence of Bernard Schminke, and garnishee summoned." The property embraced in the schedule accompanying the return was all the right, title, interest, estate, etc., of William Coath in and to a lot of ground, with the improvements thereon, and particularly the annual subrent issuing thereout of \$180, which was described as situated on Lombard street, in the city of Baltimore, and as "being the same property subleased by Maria Coath to Moses Moses by sublease bearing date the 31st day of

January, 1868," etc. Sarah E. Wright, who was returned as garnishee, appeared to the attachment, and pleaded (1) that the land and tenements mentioned in the schedule annexed to the sheriff's return at the time of entering up the judgment upon which the attachment was issued, and at the time of laying the said attachment, were, and always since have been, and still are, her property; (2) that they did not at any of the times mentioned belong to the defendants nor to either of them; and (3) the defendants did not at any of said times, nor did either of them, have any right, title, or interest in or to said lands and tenements. The plaintiffs traversed the pleas, and upon issues joined the case was submitted to the court for trial. Upon the trial the evidence showed that one Maria Coath, in the month of August, 1892, died intestate, possessed of the annual sub-ground-rent of \$180 issuing out of the lot of ground described in the schedule returned by the sheriff with the writ of attachment sued out in this case; that William Coath, one of the defendants in this case, Sarah E. Wright, the garnishee, and one Ella C. Dunlap were the next of kin of the said deceased, and entitled, as distributees, to her estate; that on the 30th day of January, 1894, William Coath executed, in consideration of \$1,000, to Sarah E. Wright, an assignment of all his "right, title, interest, and distributive share in and to all the personal estate of" his mother, Maria Coath, which assignment was acknowledged before a justice of the peace, and recorded in the office of the register of wills of Baltimore city; that William Coath, as administrator of the estate of Maria Coath, in making distribution thereof, distributed to "Sarah E. Wright, a daughter of the intestate and assignee of the distributive share" of himself, "a son of said deceased, under deed dated January 30, 1894, left to be recorded in the office of the register of wills, two undivided one-third interests in the annual subrent of \$180," etc., and to Ella C. Dunlap "one undivided one-third interest" in the said subrent; and that thereafter, in pursuance of an order of the orphans' court, the said administrator executed, on the 23d day of April, 1894, to the said Sarah E. Wright and the said Ella C. Dunlap, a deed of the said annual subrent, giving to the former two, and to the latter one, undivided interest in the same. This deed was duly recorded among the land records of Baltimore city, and by virtue of this deed, and of the before mentioned assignment, the said Sarah E. Wright and Ella C. Dunlap entered into possession of their respective interests in and to said subrent. Upon this evidence, under the pleadings, the plaintiffs offered a prayer which the court granted; and the garnishee offered three prayers, to the effect that there was no evidence legally sufficient to sustain a verdict for the plaintiffs, or to entitle plaintiffs to a judgment of condemnation of the lands and tenements mentioned, etc., or to show that the defend-

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ants or either had any right, title, or interest in or to said lands and tenements at the time of entering up the judgment upon which the attachment was issued, or at the laying of the attachment, or at any time since. These prayers the court rejected. The action of the court upon the prayers is the subject of the first exception contained in the record. The garnishee then made a motion to quash the attachment upon the grounds set up as a defense in her pleas, and upon the additional ground that the original judgment upon which the attachment was issued was extended June 29, 1887, and scire facias proceedings to renew the same were instituted by plaintiffs on April 28, 1899, and judgment of fiat was entered thereon on May 8, 1899, and that the defendant William Coath had prior to these proceedings in scire facias, by a good and valid deed, "assigned, conveyed, and granted to the garnishee the lands and tenements mentioned in the schedule annexed to the sheriff's return, and at the time of the institution of said proceedings in scire facias the garnishee was an alienee or terre-tenant of said lands and tenements, deriving title from said Coath, and that said garnishee was not made a party defendant in said scire facias proceedings, and was not served with the writ of scire facias, nor were the lands and tenements mentioned in said schedule annexed to the sheriff's return in this attachment case described in the sheriff's return in said scire facias proceedings, and the defendant Graffin has not now, and never at any time had, any right, title, interest, or estate in and to said lands and tenements. The motion to quash was submitted by counsel to the court upon the evidence that had already been given in the case, and was overruled by the court. This action of the court was made ground for the second exception by the garnishee, as disclosed by the record. After the overruling of the motion to quash, a verdict was entered by the court for the plaintiffs, followed by "judgment of condemnation of the property attached as per schedule," from which the appeal here was taken. The attachment issued in this case recited the original judgment against the defendants therein, and also the scire facias proceedings and the judgment of fiat thereon, which was proper (*Hall v. Claggett*, 63 Md. 57), and showed upon its face that the garnishee had not been brought in under the scire facias and made a party to that proceeding.

The real question in the case, though there is some confusion in the record in presenting it, is whether this omission to so bring in the garnishee under the scire facias proceedings as terre-tenant is fatal to the attachment as levied against the property described in the sheriff's schedule, which is now possessed by the garnishee under the circumstances detailed in the proof. At the death of his mother, Maria Coath, in 1892, William Coath became entitled to an equitable interest in the property levied upon un-

der the attachment in this case to the extent of one undivided third-part thereof as one of her distributees; and this interest immediately became subject to the lien of the original judgment rendered against him and his partner on June 29, 1887 (2 Code, art. 83, § 1; 1 Code, art. 26, § 19), and, subject to the payment of the debts of the deceased and to abide the due administration of her estate, was liable to immediate execution thereunder, as the law then stood. Formerly execution could not have been had, where the judgment had been standing for a year and a day, unless the same was first revived by scire facias proceedings. This was first changed by the act of 1823, chap. 194, which extended the time, within which execution might issue without a resort to scire facias to revive the judgment to be executed, to three years. When the judgment here in question was rendered, the act of 1884, chap. 178, which had repealed and enlarged the provisions of the act of 1874, chap. 320, had provided that an execution might issue at any time within twelve years from the date of a judgment. This act has been followed by the acts of 1888, chap. 421, and of 1890, chap. 114, which are practically identical with it as respects the question which has been stated as the one involved in this case. Under the law as it stood prior to the act of 1823, it was at one time held by the general court that no execution could be levied on land which the judgment debtor had aliened, after judgment, bona fide, and for a valuable consideration, although when so aliened a year and a day had not expired, and the judgment was still alive, unless a scire facias had been sued out, and fiat had against the alienee (*Arnott v. Nicholls*, 1 Harr. & J. 471); but this case was subsequently overruled in the case of *M'Elderry v. Smith*, 2 Harr. & J. 72, as interpreted in the case of *Warfield v. Brewer*, 4 Gill, 265, where it is said that the law was then settled "that if the fl. fa. be issued within a year and a day (now three years) after the rendition of the judgment it may be levied as well on land conveyed by the defendant after the judgment as on lands belonging to him at the time of levying the fl. fa." In the case of *M'Elderry v. Smith*, the alienation was made pending scire facias proceedings to revive the judgment, and execution was levied by the plaintiffs upon the land aliened, under the judgment of fiat upon said proceedings, without having proceeded by scire facias against the alienees. This the general court held to be irregular, but this decision was reversed by the court of appeals. In the subsequent case of *Murphy v. Cord*, 12 Gill & J. 182, a judgment was obtained against a certain John Dallam, who, within a year and a day after the rendition of the judgment (on the 6th of February, 1822), executed a mortgage of the lands which were subject to the lien of the judgment. The plaintiffs in the judgment, not having issued execution on the same within a year and a day, instituted a scire

facias proceeding, and obtained a fiat thereon, but did not make the mortgagee a party to this proceeding. On this judgment of fiat execution was issued, under which the mortgaged premises were levied upon and sold, and it was held by the county court, and affirmed on appeal, that the mortgagee could not maintain ejectment against the purchaser. In affirmance of rulings in this case, see *Doub v. Barnes*, 4 Gill, 1 (p. 11). The facts in reference to which these several rulings were made show them to have been that where a judgment debtor aliened lands, subject to the lien of the judgment, while the judgment was still alive, a fieri facias issued upon the judgment, subsequent to such alienation, and before it became dormant, could be levied upon such lands without first suing out a scire facias against the alienee; and that where a scire facias had been sued out against the original defendant in a judgment, while the judgment was yet alive, to have it revived, and pending the proceeding on the scire facias, but after the time had elapsed when, in the absence of proceedings to revive, the judgment would have become dormant, lands subject to the lien were aliened, a fieri facias, under the judgment of fiat, could be levied upon such lands without first proceeding by scire facias against the alienee; lastly, that where lands subject to a judgment were aliened when the judgment was still alive, if subsequently it was revived by scire facias against the original defendant, to which the alienee was not a party, execution could be had against the lands so aliened under the judgment of fiat. The effect of these rulings was to require that in the conditions named all parties should, at their peril, take notice of the rights of the judgment creditor. This was entirely consistent with the reason given for requiring scire facias to revive judgments remaining unexecuted, first for a year and a day, and then (under the act of 1823) for three years, before execution could be had of them. This reason was that after such lapse of time the judgment was presumed to be satisfied or released. *Foster, Scire Facias*, \*3; 3 Bacon, Abr. 724; *Johnson v. Lemmon*, 37 Md. 336-343. In *Warfield v. Brewer*, 4 Gill, 265, the court said: "When the plaintiff himself has suffered his judgment to die, and a sci. fa. is necessary in order to reanimate it, the law presumes it, until revived, to be satisfied, and the purchaser has some right to presume it also, and may have purchased it [the property] under that belief." On the other hand, it may reasonably be presumed that an alienee of property, who has taken it with the notice that the records give him of an existing judgment encumbering it as a lien, and which can, at any moment, be executed against it, has so taken it, as regards price paid and precautions for protection, with reference to the existence of the judgment, just as he would take it with reference to any other existing lien or encumbrance of

which the law would require him to take notice. Now, under our statutes, which have been referred to, the law as it now stands, and as it stood at the date of the original judgment in the case, neither raises nor suggests any presumption of satisfaction or release of a judgment during the period of twelve years that it remains a lien on the real and leasehold property of the judgment debtor. During that period it is unnecessary to have scire facias proceedings to revive the judgment for the purpose of executing the same, for the statute now provides, and did so provide at the date of the original judgment here, that execution may issue "at any time within twelve years from the date of the judgment," or that it "may be otherwise proceeded with within twelve years from its date." So that the judgment is continued and invested with its full "active energy" during the full period of twelve years. It is also further provided "that at any time before the expiration of twelve years from the date of any judgment or decree, or in case of the death or marriage of any defendant in the judgment, the plaintiff shall have right to have a writ of scire facias to renew or revive the same." When, therefore, a purchaser or alienee takes property subject to the lien of a judgment under our present statute law, he does so with notice of the existence of an active, live judgment, upon which process of execution may issue at any moment. There is no fiction to excuse any want of care. Not only so, but he has notice that the judgment may, by the express terms of the statute, be revived by scire facias at any time during the twelve years, and so have its "active energy" continued indefinitely. Is it not reasonable to suppose that a purchaser, in taking property under such circumstances, has provided for his own protection? And ought the law not to require this of him, rather than expose the plaintiff in the judgment to further expense, and the risk of further litigation with such purchaser or alienee, by exacting the giving of a notice to him of the rights of the plaintiff under the judgment before they can be enforced against property taken subject to those rights? Would it not be more just and reasonable to treat him as already having notice of these rights? The rights of a plaintiff, in a judgment under our present statute law, with respect to continuing the effectiveness of the same, may be likened to his right to issue an execution "to lie," and renewing the same from term to term, whereby the judgment may be kept alive and operative for an indefinite time. *Hagerstown Bank v. Thomas*, 35 Md. 511. Here, according to the authority just cited, the judgment creditor, by the proceeding of issuing an execution "to lie," preserves the effectiveness of the judgment and its priority over subsequent lienors, and for the same reason he would be protected against subsequent purchasers. This reason must be that the law requires all parties to take notice of the rights of the judgment creditor who by the proceeding of having execution issued and repeated from term to term puts on record notice of his rights. Why would it not be even more consonant with reason to require of all parties to take notice at their peril of the rights secured to the judgment creditor by our present statute law as to continuing the effectiveness of his judgment when they are notified by the public records of the existence of a live active judgment, and by the law of the right of the party holding the lien to have it renewed and kept indefinitely in active force? This would seem to be in accord with the spirit and policy of the legislation in question, the object of which was to promote convenience and diminish expenses to suitors in using the process of the courts by simplifying and making less cumbrous the proceedings which events subsequent to the judgment sometimes made necessary, as the law formerly stood, to enable the fruits of a judgment to be realized. The inconvenience and delay of having to resort to scire facias proceedings in many instances where it was formerly required are now dispensed with and avoided, the statute providing the easy and summary mode of a suggestion in writing upon the record of the fact necessary to appear in the further prosecution of rights under the judgment. In case of the death or marriage of any defendant, a scire facias may still be issued to revive the judgment against, and bring in, the necessary parties, and at any time within twelve years from the date of the judgment "the plaintiff shall have the right to have a writ of scire facias to renew or revive the same." It is not in terms provided that alienees shall be served with notice of the scire facias proceeding, and this is not without significance in legislation which provided for making a judgment live and active during the whole twelve years that it is provided the judgment shall remain a lien, when, as we have seen, there were decisions to the effect that when lands subject to the lien of a judgment were alienated while the judgment was alive and active it could be revived by scire facias, so as to affect the lands so alienated without making the alienees parties to the proceeding. If it was not intended to preserve the whole effect of such a judgment, it would have been proper to employ terms of modification or exclusion. The foregoing considerations require, it would seem, that the principle in the ruling in *Murphy v. Cord*, 12 Gill & J. 182, should be applied in the construction of our present statute law regulating the issuing of a scire facias to revive a judgment and that it ought to be accordingly held that, where a judgment creditor avails of the right to have scire facias to revive his judgment within the twelve years from the date thereof, it is not necessary that he should bring in and make parties to the proceeding the alienees of the real or leasehold estate of the judgment debtor to whom such estate has been conveyed after the judgment has become a lien thereon.

This view of the case makes it unnecessary to discuss or decide the question, which was argued, whether the garnishee under the title which she has attempted to show to the property upon which the attachment in this case was laid is, in the purview of the law, a terre-tenant of that property.

If the foregoing views be correct, there is no error in the ruling in which the trial court refused to sustain the motion to quash the attachment in this case. The grounds upon which the motion was based are all at variance with these views. As to the first three grounds, the extent to which they are supported by the evidence is that the title to the property upon which the attachment was levied devolved upon William Coath, one of the defendants in the case, as distributee of the estate of his mother, pending the original judgment which was revived by proceeding on scire facias, and that prior to this proceeding, to which the garnishee was not a party, the property had been assigned by him, and subsequently to his assignment conveyed by deed from the administrator of his mother's estate to the garnishee. It would follow, from the views herein expressed, that these facts could not avail to defeat the attachment. The fourth ground of the motion did nothing more than to set out and detail these facts. In reference to the first exception, the prayers of the defendants were, in my judgment, properly rejected. There was evidence to sustain the verdict, and evidence sufficient to entitle the plaintiffs to condemnation of the property which was the subject of the levy, and which was described in the sheriff's return in the case. The first two prayers of the defendants assert propositions to the contrary of this. The third prayer was based on the facts herein already recited, in disposing of the motion to quash, as being the basis of the allegations in the first three grounds of the motion, which, as we have seen, do not support the legal conclusion deduced therefrom by the prayer. The prayer of the plaintiffs may have been open to criticism in its assumption of some of the facts which were embodied therein, but no special exceptions were filed, and it was substantially correct in the legal proposition it asserted. After rehearsing the facts which had appeared in evidence other than those that appeared on the face of the proceedings on the attachment, it in effect asked the court to rule, as matter of law, that the one undivided third interest which passed to William Coath as distributee of his mother's estate was subject to the lien of the plaintiffs' judgment, and liable to condemnation under the attachment, notwithstanding the transfer of this interest by him to the garnishee by the assignment of the 30th of January, 1894, and the subsequent deed by him, as administrator, dated the 23d of April, 1894, to the garnishee and Ella C. Dunlap. This legal conclusion is in accord with the views expressed herein. I am of the opinion the judgment below ought to be affirmed.

Rehearing denied.

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WOMAN'S FOREIGN MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH, *Appt.*,

v.

John T. MITCHELL, Admr., etc., of Maria A. Sherman, Deceased.

John T. MITCHELL, Admr., etc., of Maria A. Sherman, Deceased, *Appt.*,

v.

Isaiah M. SHERMAN et al.

(.....Md.....)

1. A legacy to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church" for the education of girls in India, no body of that name being in existence, will go to the Woman's Foreign Missionary Society of said church, that being the only foreign missionary society in the Methodist Church that is engaged in the particular work to which the legacy is devoted.
2. A legacy to a missionary society "to be held in trust" to educate six girls in India who shall be given certain names, and to purchase a building which shall be called a certain name, and to be used for the education of girls therein, the location of which shall be left to the decision of a certain bishop and his successors, does not create a trust void because vague, indefinite, and uncertain, where the society is engaged in that work, but is merely a bequest to the society for the prosecution of its work upon conditions annexed to the gift.

(March 8, 1901.)

**A**PPEALS by plaintiff in the first case and defendant in the second from decrees in the Circuit Court for Garrett County dismissing a bill for the establishment of rights under the will of Maria A. Sherman, deceased, and annulling the will. *Reversed.* The facts are stated in the opinion.

*Messrs. Frederick W. Story and Rig-  
nal W. Baldwin*, for appellants:

Money left to "Home Mission of Presbyterian Church in Baltimore," given to "Trustees of the Presbytery of Baltimore," also "Presbyterian Infirmary on Division street in Baltimore,"—were held to designate the Union Protestant Infirmary.

*Reilly v. Union Protestant Infirmary*, 87 Md. 664, 40 Atl. 894; *Vansant v. Roberts*, 3 Md. 119; *Frick v. Frick*, 82 Md. 218, 33 Atl. 462; *Zimmerman v. Hafer*, 81 Md. 350, 32 Atl. 316; *Brown v. Thompkins*, 49 Md. 423; *Tucker v. Seamen's Aid Soc.* 7 Met. 188; *Miller v. Travers*, 8 Bing. 244, 1 Moore & S. 342; *Charter v. Charter*, L. R. 7 H. L.

**NOTE.**—For earlier cases in this series as to definiteness of charitable gifts, see *note* to *Cottman v. Grace* (N. Y.) 3 L. R. A. 149; *Heiskell v. Chickasaw Lodge No. 8* (Tenn.) 4 L. R. A. 699, and *note*; *Stratton v. Physio-Medical Institute* (Mass.) 5 L. R. A. 33; *Bullard v. Chandler* (Mass.) 5 L. R. A. 104, and *note*; *Tilden v. Green* (N. Y.) 14 L. R. A. 33; *Gambel v. Trippe* (Md.) 15 L. R. A. 235; *Kelly v. Nichols* (R. I.) 19 L. R. A. 413; *People v. Powers* (N. Y.) 35 L. R. A. 502; *McClugh v. McCole* (Wis.) 40 L. R. A. 724; and *Harrington v. Pler* (Wis.) 50 L. R. A. 307.

364; 1 Greenl. Ev. § 288; Jarman, Wills, 6th ed. 397-415.

All uncertainty which arises from applying the description contained in the will, either to the thing devised or to the person of the devisee, may be helped by parol evidence.

*Miller v. Travers*, 8 Bing. 244.

There are three reasons why the court should strongly endeavor to vest this legacy in the appellant society: (1) It is a charity; (2) it is a residuary legacy; (3) it is the manifest intention of the testatrix.

*Bennett v. Baltimore Humane Impartial Soc.* 91 Md. 10, 45 Atl. 888.

In every case held void appears one of two difficulties which does not exist here: (1) There was a failure of the legal title, because of lack of incorporation either of trustees or *cestuis que trust*, or because of legal failure of the actual trustees (as named in the will); (2) because it was sought to create an involved perpetuity (usually in the shape of a fund, the income of which was to be used indefinitely).

If there be a manifest design to establish a trust, then no trust will be declared, though the words employed would, but for the contrary intention, be sufficient to create a trust.

*Bennett v. Baltimore Impartial Humane Soc.* 91 Md. 10, 45 Atl. 888.

It is not necessary that the authority to assume a trust be conferred by express words, but it may be implied whenever the trust is in furtherance of the general objects of the corporation.

*Phillips Academy v. King*, 12 Mass. 546; *Robertson v. Bullions*, 11 N. Y. 243.

There is no trust for the Bible readers and buildings. The corporation is to use the money, not keep it for someone else's use.

A correct reading of the will will show that the society itself is the beneficiary to use this money in its own written purpose,—one of the very purposes of its creation, and one of its recognized lines of work.

*Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052; *Orisp v. Crisp*, 65 Md. 426, 5 Atl. 421; *Eutaw Place Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244.

*Messrs. Edwin L. Mitchell, John T. Mitchell, and R. T. Semmes* for appellees.

**McSherry**, Ch. J., delivered the opinion of the court:

There are two appeals in this record, and both were taken from the same decree. That decree disposed of two cases which had been previously consolidated. One of these cases was instituted on the equity side of the circuit court for Garrett county by the Woman's Foreign Missionary Society of the Methodist Episcopal Church against John T. Mitchell, administrator *cum testamento annexo* of Maria A. Sherman; and the other was fled in the same court by Isaiah M. Sherman, and others against John T. Mitchell, administrator *cum testamento annexo*, and the Woman's Foreign Missionary Socie-

ty of the Methodist Episcopal Church, and others. In each of these proceedings precisely the same questions were presented for adjudication, though they were presented in opposite ways, and the cases were therefore properly consolidated. These questions—and there are two controlling ones—involve the interpretation of Maria A. Sherman's will. One of these inquiries is whether the Woman's Foreign Missionary Society of the Methodist Episcopal Church is the devisee and legatee intended to be named and actually described in the residuary clause of the will, and the other is whether that residuary clause is valid. Its validity is assailed on the ground that it creates a trust whose objects are indefinite and uncertain. By the decree appealed from the bill in the first case, under which the Woman's Foreign Missionary Society claimed the residuary estate, was dismissed, while the relief sought in the second, viz., the annulment of the will, was granted. We shall not have occasion to refer to these proceedings any further. We will at once take up and dispose of what we have said are the two controlling questions in the consolidated cases.

The clause of the will which gives rise to the pending controversy is in these words: "I direct that my two houses and lots in Mountain Lake Park, Garrett Co., Maryland, and my lots in Covington, Kentucky, and the stock in the Southern Building Association held in care of W. G. Hay, of Hagerstown, Maryland, and all other property, both real and personal, other than that already bequeathed, be sold, and the proceeds thereof, together with whatever moneys I may die possessed, be held in trust by the Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church of the United States of America for the following purposes: After all my debts, bequests, and provision for my burial, etc., be paid, that sufficient be used to educate as Bible readers in India six girls, one to be named Dorcas Sherman; one, Avis Cecil Sherman; one, Mary Jane Sherman; one, Sarah Jennie Sherman; one, Jennie Smith; one, Grace Mabel Sherman; the money remaining after that set aside for the education of the aforesaid Bible readers to be applied to the purchase of a building to be used for the education of girls in India, to be called the 'M. Adelaide Sherman Home,' and the location of said building to be left to the decision of Bishop Thoburn or his successors."

Of late years we have repeatedly had occasion to state the various rules to which resort may be had in the interpretation of wills, and they have become so familiar that we need not now reiterate them. The cardinal canon around which all others center is this: That the intention of the testator, when ascertained from the whole instrument, or from the instrument as read in the light of surrounding circumstances existing at the date of its execution, must be given effect, if that intention does not antagonize or conflict with some rule of law or of property. At the threshold we are met face to

face by the fact, which stands out prominently, that the attempt made under the second of the consolidated bills is to strike down the intention of the testatrix, though that intention ought to be gratified if it is legally possible to do so. If the collateral kindred who filed that bill succeed in getting the property disposed of by the residuary clause just quoted, they will get it, not because the testatrix wished them to have it, but in spite of the obvious fact that she did not want them to possess it at all. Her intention would be defeated instead of being respected.

Starting with the indisputable fact that the testatrix did not intend her collateral relations to have the property in question, because she specifically declared that it should go in a totally different direction, let us see whether the body corporate which filed the first of the two consolidated bills, and which claims that it is entitled to the property, is the same entity which is misnamed in the will, but which was designed by the testatrix to be the object of her bounty. This is a question purely of identification. The misnomer of a corporation will not defeat a devise or a bequest to it if its identity is otherwise sufficiently certain. Adjudged cases on this subject do not help in solving the inquiry now under consideration, though they may illustrate the application of the principle which must in the end determine the controversy. At most, they merely hold that under their own peculiar facts there were misnomers which did not obscure the identity of the real beneficiary, or else, under other conditions, that the misdescriptions were incurably defective, and consequently that the attempted gifts were inoperative. All such cases are controlled by the same principle, and to that principle, rather than to its application in other judgments, resort must be had in these appeals. That principle, distinctly relating to this inquiry, is that the real and actual intention with respect to the identity of the devisee, as that intention is gathered from the face of the will, or from the face of the will when viewed in the light of all the circumstances which surrounded the testatrix when the will was made, must be gratified, if this can be done consistently with recognized rules of law; for, when it is clear who was intended to take, the accidental misnaming of the beneficiary's name will not invalidate the gift. If it did, then that accident would defeat the otherwise clear intention. Now, it cannot admit of a doubt that Miss Sherman intended some foreign missionary society of the Methodist Episcopal Church to be the recipient of her bounty, because she has said so in plain and unambiguous words. But there is no such corporate or other body as the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church," though there is an organization having a corporate existence, and named the "Woman's Foreign Missionary Society of the Methodist Episcopal Church." This latter, as the evidence shows, is the only foreign missionary society in the Methodist Church

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that is engaged in the particular work which the will indicates the intended devisee and legatee was expected to perform with the proceeds of the residuary estate. The identification of the beneficiary depends not wholly on its name. The clause in question, while calling the beneficiary the "Board of Managers of the Foreign Missionary Society," has set at rest all doubts as to identity by describing the beneficiary as a society engaged in mission work among women and girls in India,—a work in which no other organization of the Methodist Episcopal Church is enlisted in that distant land, save the Woman's Foreign Missionary Society. Of this society the testatrix was a member, and she was herself an evangelist. It has been clearly shown by the evidence that she took a deep interest in the benevolent work of this society, that the society is supported by women, and that its mission is exclusively among women and girls. Its charter, granted under the laws of New York, specifically declares "that the particular business and objects of said society is to engage and unite the efforts of Christian women in sending female missionaries to women in foreign mission fields of the Methodist Episcopal Church, and in supporting them and native Christian teachers and Bible readers in those fields." India is one of those fields. Here, then, we have a clear and explicit expression of an intention to give the residuary estate not only to a foreign missionary society of the Methodist Episcopal Church, but to a particular foreign missionary society of that church, which society is described as engaged in a class of work that no other known organization in that denomination performs or professes to perform, and of which society the testatrix was herself a member; and yet we are asked to disregard all this unerring evidence of identification solely because in the name by which the clearly indicated thing is called the words "Board of Managers" are inaccurately used where the word "Woman's" ought to have been written. This request proceeds upon the hypothesis that the name must control the description, inasmuch as the name is not merely a means of identification, but is the entity itself. This is obviously fallacious. The name of a corporation is no more the corporation than is the name of an individual the individual. It is the identity of the individual, natural or artificial, that is material, and not the name, for that is simply one of the numerous means by which the identity is ascertained. The identity being established, the name is of no importance. Consequently, when it clearly appears from the will what corporation was meant and intended to be the beneficiary, and there is a sufficient description of that corporation, the gift will not fail merely because the devisee and legatee has not been called by the precise name it may bear. This is fully illustrated by the recent case of *Reilly v. Union Protestant Infirmary*, 87 Md. 664, 40 Atl. 894. But, apart from adjudged cases, this proposition is so inherently self-evident as to be perfectly obvious without further

discussion. We conclude, then, that there is no reasonable ground to suggest a doubt, as to what society was intended to be the beneficiary, and that the Woman's Foreign Missionary Society is entitled to the residuary estate if the will is otherwise free from imperfections.

This brings us to the consideration of the second inquiry, *viz.*, Is the residuary clause void by reason of its creating a trust whose objects are vague, indefinite, and uncertain? Not a great deal need be said in disposing of this inquiry. If there is no trust created, or if none was intended to be created, as to this residuum, then there can be no trust that is void by reason of the objects of it being indefinite and uncertain. So, clearly, the first question to be determined is whether there is a trust which has been actually created pursuant to an intent to create one. It is true, the testatrix declared that the property should "be held in trust by the Board of Managers," etc., "for the following purposes." These purposes, it is alleged, are, after the payment of debts, bequests, and funeral expenses, "that sufficient be used to educate as Bible readers in India six girls," to be named as directed in the clause, and that "the money remaining after that set aside for the education of the aforesaid Bible readers" should "be applied to the purchase of a building to be used for the education of girls in India, to be called the 'M. Adelaide Sherman Home,' and the location of said building to be left to the decision of Bishop Thoburn or his successors." Excluding the sums applicable to the payment of debts, legacies, and funeral expenses, there is and can be no trust at all. If there be a manifest design not to establish a trust, then no trust will be declared, though the words employed would or might, but for the contrary intention, be sufficient to create a trust. *Bennett v. Baltimore Humane Impartial Soc.* 91 Md. 10, 45 Atl. 888. Now, perhaps, had the precise phraseology which is found in the will before us been used in making a like devise and bequest to a natural person, it might be said that the design was to create a trust, because the purposes indicated are not those ordinarily performed by an individual; but when it is remembered that the very end which the corporation here made the beneficiary was organized to effect is the education of Bible readers and the instruction of girls in foreign lands, it becomes evident that the property was given to the corporation, not in trust for indefinite objects, but that it was given to it to be used for its recognized and clearly defined corporate purposes. The specific design of the gift is that the proceeds of the property shall be used (that is, spent) by the beneficiary for its chartered ends, and not for some one else's benefit. The corporation is not to hold the fund for the use of others, but it is to spend that fund in the prosecution of its missionary work. The declaration by the testatrix that the funds should be used to educate six girls as Bible readers impresses no trust upon the fund,

because the education of girls, whether six, or more or less, as Bible readers, is precisely the purpose to which the funds would have been applied had the gift been made to the same devisee and legatee without these superadded words. It may and probably would be accurate to say that the provision requiring six girls to be educated, who are to be named as in the will indicated, is a condition annexed to the gift, as contradistinguished from a trust impressed upon the gift. The testatrix could have had no object in creating a trust, since without a trust precisely the same application will be made of the funds under the charter of the society as if there had been or could be a valid appropriation of them to these identical ends by means of a trust. If it were held that the words of the will attempted to create a trust, which trust when created would be denounced as void for uncertainty, and which therefore would be called into existence only for the purpose of being considered as not in existence, a court ought to hesitate before putting such a construction on the words, if another construction, which treats them as creating a condition instead of a trust, and therefore which upholds the decedent's intention, is equally available and accurate. The whole scheme of the testamentary disposition contemplates imposing upon the beneficiary in declaratory language precisely the duty which its charter would have required it to perform with respect to this property had such declaratory language been omitted, save as to the number and names of the girls to be educated. These exceptions constitute, we think, not evidence of an intention to establish a trust, but they denote simply a condition which has been annexed to the gift; and this condition relates, not to the vesting of the property, but to the expenditure of it. Much of the reasoning employed in the recent case of *Bennett v. Baltimore Humane Impartial Soc.* 91 Md. 10, 45 Atl. 488, is pertinent to this branch of the controversy. As that case was decided less than a year ago, we do not deem it necessary to quote from it now. What has been said in relation to the six Indian girls is also applicable to the remaining portion of the clause respecting the purchase of a building to be used for the education of girls in India. This is a gift to the society, the property given to be used in the line of that society's mission work. The use is a corporate use, within the limits of its charter powers. In effect, the testatrix said, by her will, to the society: "You have power under your charter to educate females in far-off lands. In prosecuting this work, you have authority to build or buy houses, as houses are necessary in carrying on schools. Now, I give you these funds,—the proceeds of this residuary estate,—to be used by you for these corporate purposes; but the building you purchase with the money I give you must be called the 'M. Adelaide Sherman Home.'" Can it be pretended that such a declaration would create a trust, and a trust, too, that would be void because the objects of it are indefinite? Obviously, it amounts



merely to a gift for corporate uses, coupled with the condition that the building, when purchased or constructed, should bear the benefactor's name. Without questioning any judgment heretofore pronounced by this court, we say that this will creates no trust, because none was intended to be created; and the evidence that none was intended to be created is furnished by the fact that the gift, whatever the language used in making it, was to a corporation capable of taking for its chartered purposes, some of which purposes are precisely those indicated in the will as the ones to which the funds were to be devoted. The gift is, therefore, not to the society in trust, but to it for its legitimate corporate uses, and is free from restrictions other than the conditions that have been indicated.

From these views, it follows that there was error in granting the relief prayed in

the bill filed by the decedent's collateral kindred, and the entire decree passed in the consolidated cases must be reversed. The cause will be remanded, so that a new decree may be passed, awarding to the Woman's Foreign Missionary Society of the Methodist Episcopal Church so much of the property disposed of by the residuary clause of Miss Sherman's will as may remain after her debts, bequests, funeral expenses, and the costs of these two cases, both above and below, have been paid.

*Decree in consolidated cases reversed, and record remanded, that a new decree may be passed, awarding to the Woman's Foreign Missionary Society of the Methodist Episcopal Church so much of the proceeds of the residuary estate as may remain after the debts, bequests, and funeral charges of the testatrix, and the costs in these proceedings, both above and below, have been paid.*

#### DELAWARE SUPREME COURT.

William CRAIG, *Plff. in Err.*,  
v.

Benjamin F. GINN.

(.....Del.....)

1. A termination of a prosecution for obtaining money by false pretenses, in favor of defendant, which will support an action for malicious prosecution, is not effected by his discharge, secured by an agreement by which defendant, who insists on a postponement which is objected to by plaintiff, agrees to pay the amount found due by his accounts, and half the costs.
2. A plaintiff cannot impeach, as procured by duress, an agreement which he insisted upon making a part of his case, and stated was material thereto.

(January 16, 1901.)

**E**RROR to the Superior Court for Newcastle County to review a judgment in favor of defendant in an action brought to recover damages for alleged malicious prosecution. *Affirmed.*

The facts are stated in the opinion.

Mr. Franklin Brockson, for plaintiff in error:

The proof, being that the plaintiff was "released from said charge," establishes conclusively that the termination was in his favor, and not against him.

The termination of the criminal proceeding is a mere technical matter in no way concerning the merits of the action.

*Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977; *Cooley, Torts*, 216; *Douglas v. Allen*, 56 Ohio St. 156, 46 N. E. 707.

Where the criminal proceeding is termi-

**NOTE.**—On the question what constitutes termination of a transaction in favor of the defendant in order to sustain an action by him for malicious prosecution, see also cases in *note* to *Pope v. Pollock* (Ohio) 4 L. R. A. on page 260.

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nated favorably to the accused or without his conviction, so that there can be no further proceeding upon the complaint or indictment, and no further prosecution of the alleged offense without the commencement of a new proceeding, then there has been a sufficient termination thereof to enable him, proving the other requisite facts, to maintain an action for malicious prosecution.

*Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977; *Clark v. Cleveland*, 6 Hill, 344; 14 Am. & Eng. Enc. Law, p. 31; *Cooley, Torts*, 216; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Zebley v. Storey*, 117 Pa. 478, 12 Atl. 569; *Apgar v. Woolston*, 43 N. J. L. 57; *Graves v. Dawson*, 133 Mass. 419; *Clegg v. Waterbury*, 88 Ind. 21; *Richter v. Koster*, 45 Ind. 440; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; *Hatch v. Cohen*, 84 N. C. 602, 37 Am. Rep. 630; *Welch v. Cheek*, 115 N. C. 310, 20 S. E. 460; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Douglas v. Allen*, 56 Ohio St. 156, 46 N. E. 707.

A discharge by an examining magistrate is an end of the prosecution in favor of the plaintiff.

*Sayles v. Briggs*, 4 Met. 421; *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 682; *Fay v. O'Neill*, 36 N. Y. 11; *Zebley v. Storey*, 117 Pa. 478, 12 Atl. 569; *Gilbert v. Emmons*, 42 Ill. 144, 89 Am. Dec. 412; *Driggs v. Burton*, 44 Vt. 125; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Hamilton v. Davey*, 28 App. Div. 457, 51 N. Y. Supp. 88; *Moyle v. Drake*, 141 Mass. 238, 6 N. E. 520.

Malice is established by proof that the proceedings of which accused complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in the furtherance of justice.

*Webb's Pollock, Torts*, 396.

If it is shown that there was a want of any probable cause, the law implies malice from that circumstance.

*Wells v. Parsons*, 3 Harr. (Del.) 505; *Bobbin v. Kingsburg*, 138 Mass. 538; *Mitchinson v. Cross*, 58 Ill. 366; *McWilliams v. Hoban*, 42 Md. 56; *Paddock v. Watts*, 116 Ind. 146, 18 N. E. 518; 2 Greenl. Ev. § 453; *Cooley*, Torts, 214; *Webb's Pollock*, Torts, 303, note 1; *Torsch v. Dell*, 88 Md. 459, 41 Atl. 903.

Probable cause for the prosecution is such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, as will warrant a cautious man in believing the party accused to be guilty.

*Torsch v. Dell*, 88 Md. 459, 41 Atl. 903; *Ritter v. Ewing*, 174 Pa. 341, 34 Atl. 584.

The evidence conclusively proves that the defendant got security for the debt which the plaintiff owed him, and that then and there he abandoned the prosecution. The defendant used the prosecution for the purpose of collecting a debt, and not for the purpose of a public prosecution. If he so abused the process of the state, the law implies that he acted both maliciously and without probable cause.

*Page v. Cushing*, 38 Me. 523; *Kimball v. Bates*, 50 Me. 308; *Antcliff v. June*, 81 Mich. 477, 10 L. R. A. 621, 45 N. W. 1019; *Prough v. Entriken*, 11 Pa. 81; 2 Greenl. Ev. § 452; *Grainger v. Hill*, 4 Bing. N. C. 212; *Paddock v. Watts*, 116 Ind. 146, 18 N. E. 518; *Brooks v. Warwick*, 2 Starkie, 393; *Schmidt v. Weidman*, 63 Pa. 173; *Schofield v. Ferrers*, 47 Pa. 104; *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567.

The discharge of the plaintiff by the examining magistrate is prima facie evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary.

2 Greenl. Ev. § 455; *Cooley*, Torts, 184; *Straus v. Young*, 36 Md. 246; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106; *Frost v. Holland*, 75 Me. 108; *Smith v. Ege*, 52 Pa. 419; *Oasperson v. Sproule*, 39 Mo. 39; *Womack v. Circle*, 32 Gratt. 347; *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138.

A voluntary discontinuance of proceedings is prima facie evidence of want of probable cause.

*Stephens*, Pl. 127, note; *Cooley*, Torts, 187, note; *Collins v. Hayte*, 50 Ill. 337, 99 Am. Dec. 521; *Burhans v. Sanford*, 19 Wend. 417.

Good character of the accused stands out prominently, and is a strong fact, if known to the accuser, tending to prove want of probable cause.

*Ross v. Innis*, 35 Ill. 487; *McIntire v. Levering*, 148 Mass. 546, 2 L. R. A. 517, 20 N. E. 191; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; *Blizzard v. Hays*, 46 Ind. 166, 15 Am. Rep. 291; *Israel v. Brooks*, 23 Ill. 575; *Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693; *American Eap. Co. v. Patterson*, 73 Ind. 430; 1 Greenl. Ev. 15th ed. § 54.

Agreements founded upon the suppression of criminal prosecutions are void; they have a manifest tendency to subvert public justice.

*Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 63 L. R. A.

677; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; 1 Chitty, Crim. Law, 4; 1 Story, Eq. Jur. § 294; *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Snyder v. Willey*, 33 Mich. 483; *Collier v. Waugh*, 64 Ind. 456.

The defendant can derive no benefit from such wrongful agreement, and when he seeks to set it up as a defense, the court, on grounds of public policy, will permit the plaintiff to show its unlawfulness.

*Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 677; *Snyder v. Willey*, 33 Mich. 483; *Bryant v. Peak & W. Co.* 154 Mass. 460, 28 N. E. 678; *Worcester v. Eaton*, 11 Mass. 368; *Belding v. Smythe*, 138 Mass. 530; *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565.

Whatever agreement plaintiff entered into before the justice of the peace was void because it was made under duress.

*Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Earle v. Norfolk & N. B. Hosiery Co.* 36 N. J. Eq. 188; 10 Am. & Eng. Enc. Law, 2d ed. p. 326; *Cribbs v. Soule*, 87 Mich. 340, 49 N. W. 587.

Where there is an arrest for improper purposes without a just cause, or where there is an arrest for just cause, but without lawful authority, or where there is an arrest for a just cause and under lawful authority, for unlawful purposes, it may be construed a duress.

*Strong v. Grannis*, 26 Barb. 122; *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Fillman v. Eyon*, 168 Pa. 484, 32 Atl. 89; *Sweet v. Kimball*, 166 Mass. 332, 44 N. E. 243; *Osborn v. Robbins*, 36 N. Y. 365; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Springfield F. & M. Ins. Co. v. Hull*, 51 Ohio St. 270, 25 L. R. A. 37, 37 N. E. 1116; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Benedict v. Roome*, 106 Mich. 378, 64 N. W. 193.

*Mr. Martin B. Burris*, for defendant in error:

The mode of the termination of the alleged malicious prosecution, as disclosed by the evidence, is not such a termination as the law requires for the maintenance of such an action.

*McCormick v. Sisson*, 7 Cow. 717; *Clark v. Cleveland*, 6 Hill, 347; *Wilkinson v. Howell*, 1 Moody & M. 495; *Gallagher v. Stoddard*, 47 Hun, 101; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Rhodes v. Silvers*, 1 Harr. (Del.) 127; *Wells v. Parsons*, 3 Harr. (Del.) 505; *Anderson v. Callaway*, 2 Houst. (Del.) 324.

**Pennewill, J.**, delivered the opinion of the court:

This was an action in the superior court for Newcastle county, brought by William Craig, the plaintiff, against Benjamin F. Ginn, the defendant, for the recovery of damages for the alleged malicious prosecution of the plaintiff by the defendant. Under the instruction of the court the jury rendered a verdict in favor of the defendant, the plaintiff having declined to accept a non-

suit. The plaintiff excepted to said instructions, and took his writ of error, upon which the case has come to this court.

The declaration filed by the plaintiff contained three counts, the first of which, after setting forth the charge contained in the warrant filed before the justice of the peace, the arrest and bringing of the plaintiff before the justice, alleged "that the said defendant was then and there present, but wilfully neglected to offer any evidence whatever to support the said false and malicious charge against the said plaintiff, which said plaintiff was then and there ready and anxious to establish his innocence in that behalf; and the said defendant did then and there voluntarily desert and abandon his said complaint and prosecution without the consent of the said plaintiff; and thereupon, to wit, on the day and year last aforesaid, at Newcastle county aforesaid, the said John W. Naudain, Esq., so being such justice as aforesaid, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the said plaintiff to be discharged out of the custody fully acquitted and discharged of the said supposed offense; and the said defendant hath not further prosecuted his said complaint, and the said complaint and prosecution is wholly ended and determined, to wit, at Newcastle county aforesaid, by means of which said several premises," etc. In the second count it was alleged that "the said defendant, not having any evidence to support the said false and malicious charge, and well knowing the innocence of the said plaintiff in that behalf, then and there voluntarily neglected to bring the same on to a hearing or trial, and thereupon, to wit, on," etc., "at," etc., "the said John W. Naudain, Esq., so being such justice of the peace as aforesaid, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there ordered the said plaintiff to be discharged out of the custody, and the said plaintiff was then and there discharged, fully released," etc. The third count contained the following allegation: "And thereupon the said defendant, not having any ground or evidence to support the said false and malicious charge, then and there voluntarily withdrew his said complaint and prosecution, and abandoned the same, and then and there, to wit, on," etc., "at," etc., "the said John W. Naudain, Esq., discontinued the said prosecution, and dismissed the said case, and ordered the said plaintiff to be discharged out of custody; and the said plaintiff was then and there discharged and fully released of the said supposed offense, and the said complaint and prosecution is wholly ended and determined in favor of the said plaintiff as aforesaid," etc. It is upon the third count that the plaintiff mainly relies. In the court below the motion for a nonsuit was based upon two grounds, *vis.*: (1) That there was material and fatal variance between the averments in the declaration and the proof in respect to the termination of the prosecution for which the action was brought; (2) that the mode of termination of the alleged malicious prosecution, as disclosed by the evidence produced by the plaintiff, was not such a termination as the law requires for the maintenance of such an action. On both of these grounds the court was of opinion that the plaintiff should not be permitted to recover, and accordingly directed the jury to render a verdict in favor of the defendant. Such direction of the court is assigned as error, and it therefore becomes necessary for us to determine whether the court below was justified in disposing of the case as it did, without submitting the same to the jury.

Upon a careful examination of the record, we find that the evidence produced by the plaintiff, so far as the same is material to the question before us, consisted of the record of the justice of the peace before whom the alleged malicious prosecution was instituted, and a written agreement and indorsement, thereon, together with the oral testimony of the plaintiff, and a party named Atwell, who seems to have been acting, if not as the agent, at least as the friend, of the plaintiff. The said record is as follows: "Action on the oath of Benjamin F. Ginn this 10th day of March, A. D. 1898, charging William Craig of obtaining under false pretense from George M. D. Hart two hundred and twenty-four and <sup>10</sup>/<sub>100</sub> dollars, belonging to the said Benjamin F. Ginn, on the 16th day of February, A. D. 1898. Warrant issued to George W. Skeggs, constable, this 10th day of March, A. D. 1898, for the arrest of William Craig forthwith. George W. Skeggs, constable, returned summons same day, 10th of March, A. D. 1898, with prisoner in charge. After Benjamin F. Ginn's attorney and William Craig, consulting together, agreed to abandon the warrant, and settle by mutual consent or by referee trial, the prisoner released from said charge. Before John W. Naudain, J. P." There was written across the face of the record this entry, which is admitted by the plaintiff to be a part of the record: "Costs paid, and settled by mutual consent. Case discharged." The warrant on which the plaintiff was arrested was also admitted in evidence, and is substantially set forth in the record above given. The written agreement and indorsements thereon were as follows:

Whereas, Benjamin F. Ginn and William Craig, both of Appoquinimink hundred, are in dispute as to the amount of money due the said Ginn as proceeds of sale of wheat and corn to George M. D. Hart on the 16th day of February, A. D. 1898, and it is desired to postpone a settlement until Saturday, the 26th day of March, next, at 9:30 A. M., at the office of John W. Naudain, Esq., J. P., in order that the said Craig shall have an ample opportunity to produce his accounts: Now, therefore, we hereby agree to pay to the said Ginn whatever sum shall be ascertained to be due on said accounts at the conference aforesaid, or, in failure of their be-

ing able to agree, to pay whatever judgment that shall be obtained against said Craig in an action at law thereon. Witness our hands and seals this 10th day of March, A. D. 1898.

Wm. Craig. [Seal.]

J. W. Atwell. [Seal.]

Witness at signing: George W. Skeggs.

Indorsements:

March 26th, 1898.

The amount ascertained to be due from William Craig to Benjamin F. Ginn is one hundred and seventy dollars, and we hereby agree to pay the said Benjamin F. Ginn the said sum of one hundred and seventy dollars six months from the date hereof, with legal interest till paid. Said sum above mentioned is agreed upon as a settlement of outstanding accounts between the said Ginn and Craig in full.

Wm. Craig.

John W. Atwell.

I hereby accept the above obligation in settlement as therein stated.

B. F. Ginn.

September 28th, 1898.

Received of Mr. John W. Atwell one hundred and seventy-five dollars and ten cents in full of the above obligation.

Martin B. Burris, Pltfs.' Atty.

It appears from the oral testimony presented by the plaintiff that about the middle of February, 1898, he received from George M. D. Hart, for a part of the grain crop of 1897, the sum of \$224.92; that he was the tenant of the defendant at the time, but had made up his mind to leave the farm the 1st of the next month; that he then owed the defendant \$150. It also appears that, when the plaintiff was arrested and taken before the justice of the peace, he asked for a postponement of the case, stating "that it did not suit him to attend to the case right on that day." Defendant's counsel replied: "No; he would not. That has got to be settled to-day, and right here, or you go up the road." The agreement above mentioned was then signed by the plaintiff and Atwell, and plaintiff was thereupon discharged by the justice. It was also shown by the testimony that the costs in the case, which amounted to \$2.50, were paid by the plaintiff and the defendant in equal amounts.

Upon this state of facts, shown and admitted by the plaintiff, we shall consider and determine whether there was such a termination of the prosecution as would enable the plaintiff to maintain his action for malicious prosecution. It is essential to the maintenance of such an action that the plaintiff shall prove, among other things, that the prosecution was not only terminated, but terminated in his favor. *Rhodes v. Silvers*, 1 Harr. (Del.) 127; *Wells v. Parsons*, 3 Harr. (Del.) 505. Certainly it is not necessary to the maintenance of such an action that the criminal proceeding should have terminated in a verdict of acquittal. Such termination may be caused by the en-

try of a *nolle prosequi*, or in some other way; and it is unquestionably the law that a voluntary abandonment of the case by the party who made the complaint is such a termination. But the rule seems to be well settled that, where the termination of the prosecution has been brought about by the procurement of the party prosecuted, or by compromise and agreement of the parties, then an action for malicious prosecution cannot be maintained. *McCormick v. Sisson*, 7 Cow. 715; *Welch v. Cheek*, 115 N. C. 311, 20 S. E. 400; *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697; *Marcus v. Bernstein*, 117 N. C. 31, 23 S. E. 38; *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149; *Clark v. Cleveland*, 6 Hill, 344; *Gallagher v. Stoddard*, 47 Hun, 101; *Wilkinson v. Howell*, 1 Moody & M. 495; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Fadner v. Filer*, 27 Ill. App. 506. We think it is not at all necessary to refer at much length to the authorities cited in support of the rule, because we imagine there is not so much doubt about the correctness of the rule as there is respecting its application to the facts in the present case. In the case of *McCormick v. Sisson*, before the justice had finished the examination of the witnesses, the parties decided they would settle all matters of difficulty between them, and on that account he proceeded no further. It was held to be not such a termination as would sustain an action. This case was approved in *Clark v. Cleveland*. In the case of *Gallagher v. Stoddard*, after the plaintiff was arrested he gave the officer making the arrest \$9 in settlement of all claims against him by the complainant, officer, and justice. The court held that the action could not be maintained on these facts, and that the nonsuit granted should be sustained. In the case of *Langford v. Boston & A. R. Co.* the court said: "But our cases uniformly hold that, where *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution." It appeared from the evidence that, after the complaint against the plaintiff was entered in the superior court upon his appeal, a *nolle prosequi* was entered by the district attorney by the procurement of the attorney of the plaintiff. In the recent cases cited from North Carolina the rule laid down in the *Langford Case* was quoted and approved. In the case in 115 N. C. and 20 S. E. the important facts were that, after the plaintiff had been arrested on a charge of embezzlement, and brought before the justice, a party appeared who claimed to be a friend of all concerned, and asked for a private interview with the parties interested, whereupon they retired to a private room. After a while the justice was called in, and the mutual friend drew up and signed a paper. The plaintiff paid a part of the costs. The case was dismissed. The superior court on appeal said: "Where, however, the proceeding is dismissed by virtue of an agreement between

the parties, the principle [that is, the general rule as to the termination of the prosecution] does not apply. There was testimony in this case tending to show some arrangement between the parties under which the plaintiff paid a part of the costs, and was discharged." This case seems strikingly similar to the one before us. In the case of *Welch v. Cheek*, 125 N. C. 353, 34 S. E. 531, it was shown that the plaintiff compromised with the defendant, and agreed and consented to the ending of the action before the justice. The court said: "It is a settled rule that, before an action like the present to recover damages can be maintained, the criminal action must have terminated in some way, either by *not. pros.*, verdict, or quashing, etc. When, however, the termination has been induced and brought about by the defendant, he cannot maintain an action for damages." The case of *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149, was another in which the appellate court reversed a judgment against the defendant, declaring the plaintiff's case must fail because there was not such a termination of the prosecution in the plaintiff's favor as would afford the proper foundation for an action for malicious prosecution. In that case it appears there had been two cross complaints of assault and battery, and one complaint of larceny. After trying one of the assault and battery cases, it was arranged by counsel that the complainants should respectively be absent from court upon the days to which the proceedings in the other cases were adjourned, and each complaint thus fell for want of prosecution. The court said the "disposition of the matter was judicious and creditable to all concerned, but it was not such a termination of the prosecution as would sustain an action. In principle it was a compromise or an abandonment of the proceeding by mutual consent, and no real determination has been had. On that ground the plaintiff's case fails." We have not been able to examine the case of *Fadner v. Filer*, but from references made thereto which we have seen in different digests it distinctly appears the court held that "the compromise of a criminal prosecution does not constitute such a termination as will justify an action for malicious prosecution."

We have made a very careful examination of all the authorities cited in the argument, as well as others bearing on the question we are considering, and find no substantial conflict between them, and no dissent from the rule above stated, unless the case of *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977, be considered as an authority to the contrary. That decision, however, seems to stand alone, and is not only unsupported by any authority that we have been able to find, but appears to be in conflict with other rulings in the same state. In the case of *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565, which was cited by the plaintiff, it was held that, where a person was arrested, and subsequently, for the purpose of procuring his discharge, pays under protest a portion of

the sum claimed, he is not thereby estopped from showing the want of probable cause. The court said: "If he [the plaintiff] settled the demand understandingly and voluntarily, he is estopped from denying that the defendant had probable cause for bringing the suit." This case is not at all inconsistent with those we have given in support of the position taken by the defendant. The case of *Marous v. Bernstein*, above mentioned, may at first appear to be somewhat in conflict with the other cases we have cited. And, although a different conclusion was reached therein, yet the court said that, while inclined to agree to the proposition recognized in the *Langford Case*, they thought the facts would not admit of its application. And those facts were (1) that the plaintiff protested all the time that his arrest was malicious, and without just cause; and (2) that the defendant paid the costs of the prosecution.

From an examination of the testimony which we have above given it is perfectly clear: (1) That the defendant, Ginn, at the time the plaintiff was arrested and brought before the justice, was present, ready and anxious to proceed with the hearing, and was unwilling to consent to any postponement or delay; (2) that the plaintiff, Craig, was not ready or willing to proceed, but insisted strongly on a postponement; (3) that the agreement was then signed by the plaintiff and his friend Atwell, which terminated the prosecution; (4) that the plaintiff paid one half of the prosecution; (5) that the said agreement, as appears by its terms, was made and accepted for the accommodation of Craig, and at his instance. Can there be the slightest doubt, therefore, that the criminal prosecution was terminated, not only with the consent, but by the procurement, of the defendant therein? It is perfectly clear that the prisoner was discharged in consideration of said agreement, whereby the plaintiff and his surety bound themselves to pay whatever sum was ascertained to be due at the conference to be had between the parties, or, in the event of their failure to agree, whatever judgment might be obtained against the plaintiff in an action at law for that purpose. This is manifest, not only from the fact that the defendant had been insisting up to the time of the execution of the agreement upon an immediate hearing of the case, but also from the record of the justice, which recites that, "after Benjamin F. Ginn's attorney and William Craig, consulting together, agreed to abandon the warrant, and settle by mutual consent or by referee trial, the prisoner released from said charge." The evidence adduced by the plaintiff presents as strong a case as can well be imagined of the termination of the prosecution by the procurement and consent of the defendant therein, or by a compromise or settlement of the matters in dispute. We are clearly of the opinion, therefore, not only that the rule of law is as we have above stated, but we are equally clear that the case now before us comes fairly within its applica-

tion, unless the agreement which caused the termination of the prosecution was obtained by duress, as is contended by the plaintiff. But such contention, made by the plaintiff, seems to us inconsistent and untenable, for the reason that the agreement which he now seeks to have disregarded on the ground of duress was put in evidence by himself as a material part of his case. As appears by the record, he declared, in reply to a question asked by the court, that the paper (meaning the agreement) "was material, everything on it." It would be quite extraordinary for us to hold that the plaintiff may be permitted to impeach the evidence which he insisted upon making a part of his case, and which he stated was material thereto; and it would be, in effect, impeaching the record of the justice, which the plaintiff introduced, and upon which he relied, because it states that the prisoner was discharged by virtue of an agreement made by the parties. And manifestly this is the same agreement which it is now insisted was

obtained by duress, and should be disregarded by this court. We think such position cannot be successfully maintained. We are of the opinion that there was no evidence that should have been submitted to the jury which tended to show that the agreement in question was obtained by duress. To say that it might have been so obtained, would be, we think, but speculative, in the absence of some pertinent testimony to that effect. The question is, not what might have induced the plaintiff to make the agreement, but rather what the evidence shows, or tends to show, did induce him to make it. Our conclusion being that the determination of the prosecution before the justice was not such a termination as the law requires to sustain an action for malicious prosecution, we deem it unnecessary to consider the question of variance, which was also ably and elaborately argued by counsel.

The assignment of error is overruled, and the judgment below affirmed.

## GEORGIA SUPREME COURT.

### CENTRAL OF GEORGIA RAILWAY COMPANY, *Piff. in Err.*,

v.

### MURPHEY & HUNT.

(.....Ga.....)

\*1. A railway company, in its capacity as a common carrier, may, as the basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the "agreed valuation." But a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an "arbitrary preadjustment of the measure of damages," will not, though the shipper assents in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value.

2. Under § 2318 of the Civil Code, a carrier failing to comply with the requirements

\*Headnotes by LUMPKIN, P. J.

NOTE.—For other cases in this series as to right of carrier to limit its common-law liability in the absence of negligence, see *Little Rock & Ft. S. R. Co. v. Cravens* (Ark.) 18 L. R. A. 527, and *note*; *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 22 L. R. A. 335; *Chicago, M. & St. P. R. Co. v. Wallace* (C. C. App. 7th C.) 30 L. R. A. 161; *Kirby v. Western U. Teleg. Co.* (S. D.) 30 L. R. A. 612; *Allam v. Pennsylvania R. Co.* (Pa.) 39 L. R. A. 535.

For power to limit liability in case of negligence, see *Ballou v. Earle* (B. L.) 14 L. R. A. 433 and *note*; *Alair v. Northern P. R. Co.* (Minn.) 19 L. R. A. 764; *J. J. Douglass Co. v. Minnesota Transfer R. Co.* (Minn.) 30 L. R. A. 860; *Pierce v. Southern P. Co.* (Cal.) 40 L. R. A. 350; and *Harmar & Crockett v. Norfolk & W. R. Co.* (Va.) 44 L. R. A. 289.

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of the next preceding section, as to tracing "freight" which has been lost, damaged, or destroyed, and giving information with respect thereto, becomes liable for the negligence of a connecting carrier.

3. Where both the parties to a case move for a new trial, the granting of either motion leaves the case pending in the lower court, and while it so remains a judgment overruling the other motion cannot be lawfully brought to the supreme court for review.

(May 22, 1901.)

WRITS of error to the Superior Court for Pike County to review a judgment granting a new trial to plaintiff and refusing one to defendant after judgment in plaintiff's favor for a less sum than demanded in an action brought to recover damages for deterioration from negligence in the value of property delivered to defendant for transportation, the carrier responsible for which defendant failed to ascertain as required by statute. *Judgment granting new trial affirmed and second writ of error dismissed.*

The facts are stated in the opinion.

Mr. Robert L. Berner for plaintiff in error.

Mr. W. W. Lambdin for defendant in error.

Lumpkin, P. J., delivered the opinion of the court:

This action was founded on the provisions of §§ 2317 and 2318 of the Civil Code, which were codified from the act of October 16, 1891, commonly called the "tracing act." See Acts 1890-91, vol. 1, p. 156. In their petition the plaintiffs alleged facts bringing the case within the sections cited. The "freight" involved was a carload of grapes,

consigned to Omaha, Nebraska, which the plaintiffs delivered to the defendant at Barnesville, in this state. The bill of lading embraced a special contract, was signed by the plaintiffs and an agent of the defendant, and contained a stipulation that the company was to carry the grapes to the destination indicated, "if on its road, or to deliver to another carrier on the route to said destination, subject, in either instance, to the conditions below, which are agreed to in consideration of the rate named." Among the "conditions below" was one that the "several lines [over which the grapes were to be transported] will not be held liable for injury to, or decay of, fruit, vegetables, or melons, or any perishable freight, caused [in divers specified ways], unless such decay or injury shall be the direct result of the carrier's negligence, and the shipper, owner, and consignee hereby assume the burden of proving such negligence." The last stipulation in the bill of lading was as follows: "In consideration of the reduced rates specified above, it is mutually agreed that the value of fruit shipments under this bill of lading shall be taken at not exceeding \$500 per carload; vegetable shipments, \$200 per carload; melon shipments, \$85 per carload; and the carrier shall in no event be liable for any greater sum in case of total loss or destruction; and in case of partial loss or destruction, or destruction of a quantity less than carload, the liability shall be proportionate." The evidence introduced at the trial showed that the grapes were in good condition when delivered to the defendant; that they were not damaged on its line, but that, because of the negligence of some one or more of the other connecting carriers, they reached their destination in such a damaged condition that no more than \$265.45 could be realized from a sale of them; and that, if they had arrived at Omaha undamaged, they might have brought as much as \$700. The court, holding that under the stipulation last quoted from the bill of lading the maximum value of the grapes could in no event be placed at a sum exceeding \$500, directed a verdict for the plaintiffs for \$234.55, the difference between \$500 and \$265.45, the amount for which the grapes were sold. The plaintiffs made a motion for a new trial, the main and controlling ground of which was predicated upon alleged error in holding that, under the facts appearing, the defendant should not be held liable for the difference between \$700, the highest proven value of the grapes, and the \$265.45 which they brought. The defendant also moved for a new trial on various grounds. For a reason which will hereinafter appear, their contents need not be set forth. The court granted the plaintiffs' motion, and overruled that of the defendant. It sued out two bills of exceptions. In one, which for convenience we will designate as the "first," it alleged error in granting the plaintiffs' motion. In the other, which for a like reason we will call the "second" complaint was made of the court's refusal to sustain the defendant's motion. We will dis-

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pose of these bills of exceptions in the order indicated, and will accordingly first take up and deal with the decisive question which the defendant's exception to the granting of the plaintiffs' motion presents, and apply the ruling which we make thereon to the case in hand. The second bill of exceptions will then be in order for consideration.

1. There is in this country great contrariety of judicial opinion with respect to whether or not a common carrier can by special contract lawfully limit the amount of its liability for loss or damage which may be occasioned by its own negligence. In *Georgia R. & Bkg. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, this court held that where "the contract of shipment was not one limiting value by express agreement, but one in which there was no attempt to estimate value," the carrier would not be exempt from the liability imposed by law for loss occasioned by its own negligence. It is not necessary to repeat here the reasoning of our present chief justice, who delivered the opinion in that case, and therein cited several authorities supporting the conclusion announced; but, in view of the importance of the question, it may not be amiss to embrace the present opportunity of showing the extent to which those authorities go in sustaining the correctness of that conclusion. We also cite *infra* one very strong case from 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497 (*Moulton v. St. Paul, M. & M. R. Co.*), not referred to in the opinion just mentioned, and indicate where numerous others on the same line and *contra* may be found.

After stating that the courts have differed widely in their views upon this question, Mr. Hutchinson says that "the majority of the authorities in the United States hold that it is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants. In some of the states, on the other hand, express contracts to that effect are upheld." The author then proceeds as follows: "So, in reference to this particular question, it is held by the majority of the courts that a contract limiting the liability of the carrier to a certain sum, in case of loss,—that is, contracts designed to secure a partial exemption from liability,—while valid and conclusive where the loss is caused by something other than the carrier's neglect, cannot be allowed to operate where the loss was occasioned by the negligence of himself or his servants, but that in such a case the owner may recover the full value of the goods. To be distinguished from these cases, however,—though the distinction is not always observed,—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon. When such is the case, the Supreme Court of the United States and many of the state courts hold, to use the language of Mr. Justice Blatchford, 'that where a contract of the

kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.' That this class of cases stands upon different ground from those attempting to secure a partial liability will be evident upon consideration, and several of the decisions upon the latter class have expressly stated that the rule would be otherwise in a case of this nature. But the rule must undoubtedly be confined to those cases only which properly fall within it, which are those in which, as the basis of the carrier's charges and responsibility, the value, being called in question, has been so represented by the shipper, or so agreed upon between him and the carrier, as to estop the shipper from afterwards alleging that it was more. The rule cannot, therefore, apply to cases where the estimate of value is inserted in the bill of lading without his knowledge or consent, or by covert means, or to those in which the contract for exemption is not clear and express, as it is well settled that they will be construed most strongly against the carrier." Hutchinson, Carr. 2d ed. § 250. We make these extended extracts because they express with great force and clearness exactly what we wish to say.

In *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 8 L. R. A. 508, 24 N. E. 417,—a case in which there was an express contract,—it was held that a common carrier cannot arbitrarily fix the value of the goods delivered to him for transportation, and thereby limit his liability in case of loss. It was also in that case laid down that "if a value be fixed by the carrier, and the contract of shipment is based thereon, the amount thus fixed will ordinarily determine the liability of the carrier." An examination of the opinion of Chief Justice Shope will show that the idea intended to be conveyed by the words last quoted was that there must be an actual and bona fide agreement as to value between the shipper and the carrier, and that a mere general limitation as to the value expressed in a bill of lading will not serve to exempt a negligent carrier from liability for the true value. In the notes appearing at the end of the main case in the volume last cited are references to a large number of cases on both sides of the question. Under the heading, *Tendency of Recent Decisions to Modify Rule* (p. 596), will be found several citations of cases supporting the view we are undertaking to sustain. In *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497, Dickinson, J., said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand

also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is partially relieved from such liability. It would, indeed, be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside even by the agreement of the parties, but that one half or three fourths of this burden which the law compels the carrier to bear may be laid aside, by means of a contract limiting the recovery of damages to one half or one fourth of the known value of the property. This would be mere evasion, which would not be tolerated." Even in *Alair v. Northern P. R. Co.* 53 Minn. 160, 19 L. R. A. 764, 54 N. W. 1072, which was ruled in favor of the company, the doctrine was distinctly announced that there must be an actual contract, specifying that the value of the property shipped does not exceed a sum named, and that it must be "fairly and honestly made as a basis of the carrier's charges and responsibility." In his strong and well-written opinion, Mitchell, J., remarked that cases in which "the stipulation was purely and solely one arbitrarily limiting the amount of recovery, without regard to the value of the property, as in *Moulton v. St. Paul, M. & M. R. Co.*," were not pertinent upon the question whether or not a carrier could enforce a real contract of the nature above indicated; and he added that in the *Moulton Case* the supreme court of Minnesota "recognized the right of the parties to agree upon the value of the property, or to fairly liquidate the damages in case of loss." The words just quoted furnish the key to the whole problem; that is, the parties may actually agree on the value of the particular consignment, and thus fairly liquidate in advance anticipated damages. But this is a very different thing from a loose and general limitation as to amount appearing in a bill of lading, which manifestly could not have been and was not intended to have reference to the identical goods which the carrier thereby contracted to transport.

Take our present case: The property delivered to the defendant company, as described in the bill of lading, was: "1 car grapes,—2,000 baskets." The paragraph of the document relied on, embracing an agreement as to value, merely stipulated, in the most general and comprehensive terms, that "the value of fruit shipments under this bill of lading shall be taken as not exceeding \$500 per carload; vegetable shipments, \$200 per carload; melon shipments, \$85 per carload." Could any fair and reasonable mind ever reach the conclusion that there was, between the plaintiffs and the defendant, any agreement at all respecting the value of this particular carload of grapes, or that there was even a remote intention to make such an agreement? The bill of lading was evidently printed and prepared for use in any shipment of fruit, vegetables, or melons, and its manifest purpose was to limit liability and not to fix or agree upon values. It limited the value of all "fruit" shipments, whether consisting of grapes, peaches, ap-



ples, pears, or other fruits, or of portions of some or all of them. It declared that the value of a carload of any kind or kinds of fruit should be "taken at not exceeding \$500," not that the value of the plaintiffs' carload of grapes should be fixed at \$500 or any other specified sum. Surely, further comment as to the nature and purpose of this bill of lading would be superfluous.

We find, in some of the cases holding that the value was in fact definitely agreed upon (notably that of *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, in which Mr. Justice Blatchford delivered the opinion quoted from by Mr. Hutchinson, as appears above), that the figures in the bills of lading expressing values had evidently been printed before their actual use, and were not inserted at the time of issuing such bills to shippers. In the case just mentioned, the bill of lading stipulated "that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each; if cattle or cows, not exceeding \$75 each," etc. With the utmost respect to the memory of the eminent justice, this does not, in view of the printed words "if" and "two hundred," to our minds much resemble a fixed and definite agreement as to the value of the identical horses shipped by Hart; but much stress was laid on the words "agreed valuation," and the contract certainly related to horses only. At any rate, the case was decided on the theory that the bill of lading did embrace such an agreement; and, assuming this to be so, we have no complaint to make of the principle laid down, for our own ruling is in strict accord therewith.

2. Under § 2318 of the Civil Code, if the carrier receiving the application provided for by the preceding section fails to trace the freight and give the required information, it becomes "liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its line." The damage which the plaintiffs sustained was due to the negligence of one or more of the defendant's connecting carriers. The law, under the facts of this case, imputes this negligence to the defendant, and makes the same, in effect, its negligence. It has been clearly shown that a carrier cannot stipulate for exemption from the consequences of such negligence. It can hardly be said that the defendant company attempted to protect either itself or any other carrier from injury or damage caused by negligence. As will have been seen, the stipulation in the bill of lading which related to this matter really contemplated that liability might arise from negligence, and merely provided that it should not be presumed, but must be affirmatively proved. See, in this connection, *Savannah, F. & W. R. Co. v. Nloat*, 93 Ga. 803, 807, 20 S. E. 219. The defendant was therefore, under the statute, liable for some amount. It did not, as we have endeavored to show, limit its liability by a bona fide agreement as to valuation.

A jury could, under the evidence, have placed the value of the grapes at \$700, in which event the verdict would have been for \$434.55. The court, under an erroneous view of the law, limited the plaintiffs' recovery to \$234.55. The verdict directed was certainly not demanded, and the court properly corrected its own error by granting a new trial.

3. The second bill of exceptions was prematurely sued out, and the writ of error issued thereon must accordingly be dismissed. At the time it was certified, the case was pending in the court below; for a new trial had been granted, and the case stood upon the docket for another hearing. It was in *Duke v. Story* (Ga.) 38 S. E. 337, upon the authority of previous cases, held that, so long as a motion for a new trial in a case was undisposed of, the case itself was pending in the lower court. Certainly, then, a case is pending when a motion for a new trial therein has not only been made, but granted.

*Judgment in first case affirmed; in second case, writ of error dismissed.*

All the Justices concur, except **Simmons**, Ch. J., disqualified.

**Benton B. ECTOR**, *Plff. in Err.*,  
v.

**Ed. L. GRANT**, Admr., etc., of **Frank M. Ector**, Deceased.

(112 Ga. 557.)

\*In the distribution of the estate of an intestate, a first cousin of the half blood on the maternal side will take the estate in preference to a second cousin of the whole blood.

(January 24, 1901.)

**ERROR** to the Superior Court for DeKalb County to review a judgment overruling a caveat filed by **Benton B. Ector** to an application of the administrator of **Frank M. Ector**, deceased, for leave to sell decedent's real estate. *Affirmed.*

The facts are stated in the opinion.

**Messrs. King & Anderson and Lewis W. Thomas**, for plaintiff in error:

It will be conceded that the common law of England, as it stood at the time of the Declaration of Independence by the United States, excluded the half blood from inheritance of land.

1 Bl. Com. book 2, p. 227.

One of the first things which the people of Georgia did after declaring their independence was to make a Constitution which is known as the Constitution of February 5, 1777. This Constitution contains a clause to this effect: "All other intestate estates to be divided according to the act of dis-

\*Headnote by **COBB, J.**

NOTE.—For descent and distribution among kindred of the half blood, see *Anderson v. Bell* (Ind.) 29 L. R. A. 541, and note.

tribution made in the reign of Charles II., unless otherwise altered by any future act of the legislature." This was a complete overturning of the law as it then stood in England.

Under the statute of distributions, the degree of relationship was regulated according to the computation of the civilians, and not of the canonists, the latter having been adopted with respect to the descent of real estate.

Under the statute of distributions the half blood is admitted on an equality with the whole in the same degree.

1 Bl. Com. book 2, \*504, 505.

In 1789 the state of Georgia adopted a new Constitution, and upon the subject of estates this provision was adopted: "Estates shall not be entailed, and when a person dies intestate, leaving a wife and children, the wife shall have a child's share, or her dower, at her option. If there be no wife, the estate shall be equally divided among the children and their legal representatives of the first degree. The distribution of all other intestate estates may be regulated by law." In this Constitution, therefore, it will be seen that the people distinctly declined to make the statute of distributions the rule applying to real estate.

Without any further legislation on the subject, a court would have been compelled to construe either that there was no law on the subject, and therefore there could be no disposition of the estate (which is, of course, an absurdity), or that the rule of law of England, as it was of force at the time of the independence of the state, would control; and therefore, as to a distribution among kin more remote than wife and children, when the estate in question was land, all of the provisions of the canonical law in force in England would apply.

The present law of Georgia is that contained in the Code, and by subsec. 9 of § 3355 the rules of the canonical law have been adopted.

See *Wetter v. Habersham*, 60 Ga. 193.

*Messrs. Rosser & Carter and Thomas J. Ripley*, for defendant in error:

The Grants are first cousins of the half, Ector is a second cousin of the full, blood.

Under the common law the half blood was excluded, and if there was no kindred save of the half blood the estate was escheated to the lord.

Under the artificial system of the common law the collateral kindred of the half blood are entirely excluded from the inheritance of land.

1 Woerner, Law of Administration, 143; 2 Bl. Com. 224, 227; 24 Am. & Eng. Enc. Law, p. 369.

This exclusion, even at common law, was not so much a rule of descent as a rule of evidence. It was one of the canons of the common law that no one could inherit except those of the blood of the first purchaser. It was extremely difficult to tell who were of the first purchaser, and because those of the full blood were sure to be 53 L. R. A.

of the first purchaser the half blood was excluded.

2 Bl. Com. 228; 2 Woerner, Law of Administration, 454; *Clark v. Sprague*, 5 Blackf. 413.

Many of the fundamental rules of the common law (including the exclusion of the half blood) are violated by the statute of distribution. Its great object was equality.

*Davis v. Rowe*, 6 Rand. (Va.) 355.

The statutes of distribution were borrowed from the civil law, and the construction of and practice under them are governed by that law.

2 Kent, Com. 422, 428.

The rule of the common law excluding the half blood has but little application in the United States.

*Oliver v. Sanders*, 8 Ohio St. 506.

Independent of express statutory enactment, no distinction is admitted in the United States between the whole and the half blood.

*Gardner v. Collins*, 2 Pet. 58, 7 L. ed. 347; *Pearson v. Grice*, 6 La. Ann. 233; *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652.

Under the English statute of distribution, which simply directed distribution to be made between the next of kin of equal degree to the intestate, it was, after some contradictory decisions on the subject, finally settled in *Crooke v. Watt*, 2 Vern. 124, Show, P. C. 108, decided in 1690, that the brothers and sisters of the half blood have an equal claim with those of the whole blood.

*Burnet v. Mann*, 1 Ves. Sr. 156.

Our own statutory history demonstrates that, except in the one case of brothers and sisters, there is no distinction between the whole and the half blood.

*Cobb, J.*, delivered the opinion of the court:

E. L. Grant, as administrator of Frank M. Ector, applied to the ordinary for leave to sell land belonging to the estate of his intestate. Benton B. Ector, who claimed to be the sole heir of Frank M. Ector, filed a caveat to this application, upon grounds not necessary to be referred to in the discussion which will follow. The case was appealed to the superior court, and at the trial there it was held that Benton B. Ector was not an heir at law of the intestate, and the caveat was overruled. The claimants to the estate were Benton B. Ector, on the one side, and E. L. Grant and his brothers and sisters, on the other. According to an agreement which is contained in the record, the relationship of the different claimants, to the intestate was as follows: The grandmother of the children of Augustus Grant (the claimants), on their father's side, was married twice. The first time she married a Grant. By this marriage Augustus Grant, the father of the children now claiming the property in dispute, was born. The husband of their grandmother died, and the widow Grant afterwards married Willy

B. Ector. By this marriage there was born Eleanor Ector, who married her first cousin, Richard Ector. By this marriage there was born Frank M. Ector, the deceased so that the mother of Frank M. Ector was the half-sister of the father of the Grant claimants. Joseph Ector, the great-grandfather of Frank M. Ector, had three sons, Hugh Ector, Wily B. Ector, and Joseph Ector, Jr. Hugh married, and by this marriage there was issue, Benton B. Ector, the caveator in this case. Wily B. Ector married the widow Grant, who was the grandmother of the Grant children claiming the estate. By this marriage, Eleanor Ector was born. Joseph Ector, Jr., had a son, Richard Ector. Richard Ector married his first cousin, Eleanor Ector, and by this marriage Frank M. Ector, the deceased, was born. It was thus admitted that Benton B. Ector, the caveator, was a first cousin to both the mother and father of Frank M. Ector, the deceased. It was admitted that the deceased, Frank M. Ector, died intestate, without wife, children, brothers, or sisters, or descendants thereof, and without mother or father, uncle or aunt, surviving him; that on the Grant side there were no other living kin as near in degree as Ed. L. Grant and his brothers and sisters, and on the Ector side no other living kin as near in degree as Benton B. Ector, unless his nieces and nephews, several of whom were alive, would be entitled to be treated on an equality with him. It will thus be seen that the question to be determined in the present case is, When an intestate leaves surviving him no widow, descendant, ascendant, brother or sister, or representative of either, who is entitled to inherit the estate, —a second cousin of the whole blood, or a first cousin of the half blood on the maternal side?

At common law the half blood could not inherit land. The rule prevailing at the time Sir William Blackstone wrote is thus stated by him: "The heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for, if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded. Nay, the estate shall escheat to the lord sooner than the half blood shall inherit." 2 Bl. Com. \*227. This rule was the outgrowth of the feudal doctrine that descent must be traced from the first purchaser. "The half blood," says Chancellor Kent in his Commentaries, "was until lately entirely excluded by the English law, on the very artificial rule of evidence that the person who is of the whole blood to the person last seised affords the best presumptive proof that he is of the blood of the first feudatory or purchaser. Our American laws of descent would seem to be founded on more reasonable principles. The English rule of evidence may be well fitted to the case to which it is applied; but the necessity or policy of searching out the first purchaser is to be questioned, so long as

the last owner of the estate, and the proximity of blood to him, are ascertained." 4 Kent, Com. 14th ed. \*403. Dr. Minor, in his Institutes (vol. 2, p. 529), after stating that as a kinsman of the half blood has but one half of his ancestors above the common stock the same as those of the propositus, and therefore there is not the same probability of that requisite of the common law that he be derived from the blood of the first purchaser, says: "This is doubtless the best reason that can be given for this exclusion of the half blood, but it must be admitted to be very far from satisfactory. In the first place, it does not justify the peremptory and total exclusion of the half blood, but only its postponement; and, next, it neglects the obvious consideration, that there is or may be a greater probability that a nearer kinsman of the half blood is derived from the blood of the first purchaser, than a more remote kinsman of the whole blood." Sir William Blackstone admits that the rule has been the subject of many censures, but declares that this arose out of a misapprehension of the rule, which, he says, is not to be regarded so much as a rule of descent, but as a rule of evidence; and he enters, in his Commentaries, into an elaborate defense of the rule. See 2 Bl. Com. \*228 *et seq.* Mr. Hammond, in his notes to the Commentaries of Blackstone, says: "The exclusion of the half blood seems to rest upon a notion of relationship quite different from any we now entertain, but which is by no means unreasonable, if we rightly comprehend it." 2 Hammond's, Bl. Com. top page 374. As the personal estate of an intestate was not required to descend to one who was of the blood of the first purchaser, it would seem that the rule excluding the half blood would not be applicable to that character of property. While there are some contradictory decisions on this subject by the English courts, it was definitely settled in *Crooke v. Watt*, 2 Vern. 124, decided in 1690, that brothers and sisters of the half blood have an equal claim to personal property with those of the whole blood. See 24 Am. & Eng. Enc. Law, 1st ed. p. 376, and cases cited in note 1. "Prior to the novels of Justinian, the civil law admitted the half blood to the inheritance equally with the whole blood; but the novel or ordinance of Justinian changed the Roman law, and admitted the half blood only upon failure of the whole blood." 4 Kent, Com. 14th ed. \*406. By the statute 22 & 23 Car. II. chap. 10 (Watkins, Dig. p. 16), it was enacted that the estates of intestates, except *feme covert*s, should be distributed in the following manner: One third to the widow, and the residue in equal portions to the children; if dead, to their descendants. If there were no children or lineal descendants of such, then a moiety to the widow, and a moiety to the next of kin in equal degree. If there were neither wife nor children, then the estate was to be distributed among the next of kin in equal degree, and their descendants; but no representation was allowed

among collaterals further than the children of the intestate's brothers and sisters. The nearness or propinquity of degree was to be reckoned according to the computation of the civilians, and not of the canonists, which the law of England adopts in the descent of real estates. 2 Bl. Com. 515, 504. The half blood was not in terms excluded by this act.

It may be safely assumed that at the date the colony of Georgia was settled the half blood, under the law of England, could not inherit land, and that there was no law excluding such from a share in the personal property of intestates' estates. If this rule was ever changed by any authority authorized to make laws for the colony, our attention has not been called to such a law; nor have we been able to find in any book accessible to us any legislation on the subject during the time of the colony. The only book containing colonial laws which is accessible to us is a compilation of De Renne published under the supervision of Charles C. Jones, containing laws passed from 1755 to 1774; and, after a careful examination of this compilation, we feel safe in saying that there is nothing in relation to this subject in the same. The question now to be determined is, What changes have been made in these rules since the independence of the colony? The first Constitution of the state, adopted on February 5, 1777, declared: "Estates shall not be entailed; and when a person dies intestate, his or her estate shall be divided equally among their children; the widow shall have a child's share, or her dower, at her option; all other intestates' estates to be divided according to the act of distribution, made in the reign of Charles the Second, unless otherwise altered by any future act of the legislature." Const. 1777, art. 51; Watkins, Dig. 15; Mar. & C. Dig. 12. On February 25, 1784, an act was passed declaring that all laws which were in force and binding upon the inhabitants of the colony on the 14th day of May, 1776, "so far as they are not contrary to the Constitution, laws, and form of government now established in this state, shall be, and are hereby declared to be, in full force, virtue, and effect, and binding on the inhabitants of this state." "And also the common law of England and such of the statute laws as were usually in force in the said province, except as before excepted." Watkins, Dig. 289, 290. The Constitution of 1789 declared: "Estates shall not be entailed; and when a person dies intestate, leaving a wife and children, the wife shall have a child's share, or her dower, at her option; if there be no wife, the estate shall be equally divided among the children, and their legal representatives of the first degree. The distribution of all other intestate estates may be regulated by law." Const. 1789, art. 4, § 6; Watkins, Dig. 29. On December 23, 1789, an act was passed which declared "that the true construction of the 6th section of the 4th article of the Constitution, shall and is hereby declared to be as follows: When any person holding real and

personal estate, shall depart this life, intestate and without will, the said estate, real and personal, shall be considered as altogether of the same nature, and upon the same footing; so that in case of there being a widow and children, or child, they shall draw equal shares thereof, unless the widow shall prefer her dower; in which event she shall have nothing further out of the real estate than such dower; but shall nevertheless receive her proportionable part or share out of the personal estate. In case any of the children shall have died before the intestate, their lineal descendants shall stand in their place and stead; in case of there being a widow and no child or children, or legal representatives of children, then the widow shall draw a moiety of the estate, and the other moiety shall go to the next of kin in equal degree and their representatives. If no widow, the whole shall go to the child or children. If neither widow, child, or children, the whole shall be distributed among the next of kin in the equal degree, and their representatives; but no representatives shall be admitted among collaterals further than the child or children of the intestate's brothers and sisters. If the father or mother be alive, and a child dies intestate, and without issue, such father (or the mother, in case the father be dead, and not otherwise) shall come in on the same footing as a brother or sister would do. The next of kin shall be investigated by the following rules of consanguinity, that is to say, children shall be nearest; parents, brothers and sisters shall be equal in respect to distribution, and cousins shall be next to them. The half blood shall be admitted to a distributive share of the real and personal estate in common with the full blood." It was further provided in the act, that, "should any case arise, which is not expressly provided for by this act, respecting intestate estates, the same shall be referred to and determined by the common law of this land, as it hath stood since the first settlement of this state, except only, that real and personal estate shall be considered, in respect to such distribution, as being precisely on the same footing." Watkins, Dig. 414; Mar. & C. Dig. 216.

The above-quoted provisions of the Constitutions of 1777 and 1789 seem to be substantially the same. The word "entail," as used in these provisions, would indicate that the framers of these instruments had in mind the intention to change those rules of the English law relating to real estate by which this class of property could be made the subject of an entailed estate; and it has been sought to construe the section in each Constitution as relating exclusively to this class of property. Taking each section, however, as a whole, and in the light of the circumstances surrounding the framers of the two Constitutions, we think that the term "estate," at least when used the second time, was intended to be used in its broad sense, to include both realty and personalty. The fact that in each instance

the manner of distribution is similar to that provided by the English law in cases of personal estates is an indication that the word "estate" is to be given the broad meaning above referred to. The English rule, which provided that the land should descend to the eldest son, was not satisfactory to the framers of the Constitution, and the purpose of the provision on the subject was to abolish this rule, and provide that all children should inherit alike, at the same time making provision for the widow; giving her the right to take her dower in land, which she had under the English law, or a child's share, at her option. This rule as to realty being abolished, the manner in which the realty was to be divided was practically the same as that provided by the statute of Charles II.; and as the Constitution of 1777 distinctly provided that the estates of other intestates than those referred to in the Constitution were to be divided according to the statute of distributions passed in the reign of Charles II., and this statute referred to personal estate exclusively, it is not unreasonable to presume that the framers of the Constitution intended to lay down the rule applicable to both classes of property. If this construction of the constitutional provision of 1789 is correct, then the act of 1789, which purports to construe the Constitution, is not subject to the criticism that a constitutional provision cannot be construed by legislative enactment so as to bind the courts, for the reason that the act of 1789 appears to be declaratory of existing law, and not a construction of the section. The statute of Charles II. became a part of the law of Georgia by virtue of the adopting act of 1784; and certainly the act of 1789, so far as its provisions are consistent with this statute, is merely a declaratory statute. If, however, there is any material difference between the act of 1789 and the statute of Charles II. in any particular, there is certainly none so far as the rights of the half blood are concerned. The half blood was entitled to inherit under the statute of Charles II. equally with the whole blood. See *Crook v. Watt*, 2 Vern. 124. The Constitution of 1798 did not refer in terms to the subject of distribution of estates, but it contained a provision that "all laws now in force shall continue to operate, so far as they are compatible with this Constitution, until repealed." Watkins, Dig. 42; Mar. & C. Dig. 31.

By an act passed in 1804 it was provided that "when any person holding real or personal estate shall depart this life intestate, the said estate, real and personal, shall be considered as altogether of the same nature, and upon the same footing. If the intestate leaves a widow and child or children, they shall share equally in the estate, unless the widow elects to take dower, when she shall have nothing out of the realty, but shall have a child's part of the personalty. If any child should die before the intestate, the lineal descendants of such child shall stand in his place. In case there is a widow

and no child, or representatives of a child, the widow shall have a moiety of the estate, and the other moiety shall go to the next of kin, in equal degree, and their representatives. If children and no widow, the whole estate shall go to the children. If neither widow nor child, or legal representative of a child, the whole estate shall be distributed among the next of kin, in equal degree, and their representatives; but no representation shall be admitted among collaterals further than the child or children of intestate's brothers and sisters. If the father or mother be alive, the father, or, if he be dead, the mother, shall come in on the same footing as brothers and sisters. In case the mother intermarried, or in case the intestate be the last child, the mother shall not take any part in the estate, but the same shall vest in the next of kin on the father's side. And in case a person dying without issue, leaving brothers or sisters, of the whole and half blood, then the brothers and sisters of the whole and the half blood, in the paternal line only, shall inherit equally; but if there shall be no brother or sister, or issue of brother or sister of the whole or half blood in the paternal line, then those of the half blood and their issue in the maternal line, shall inherit. The next of kin shall be investigated by the following rules of consanguinity: *viz.*, Children shall be nearest; parents, brothers, and sisters shall be equal in respect to distribution; and cousins shall be next to them." Prince, Dig. 233; Cobb, Dig. 291; Clayton, Dig. 193. By an act approved December 14, 1859, the act of 1804 was so amended as to provide that representation among collaterals should extend to the child or children of intestates' nieces and nephews, but not further. Acts 1859, p. 35. The provisions of the Code of 1863 with reference to distribution of estates are substantially the same as those contained in § 3355 of the Civil Code. See Code 1863, § 2452. There have been some amendments since the Code of 1863, but none which are material to the present discussion. The section of the Civil Code provides substantially as follows: When the husband dies without issue, the wife is the sole heir. If there are children, or those representing deceased children, the wife has a child's part, unless the shares exceed five, when she has one fifth of the estate. If she elects to take dower, she has no further interest in the realty. Children stand in the first degree, and lineal descendants of children stand in the place of their deceased parents; and in all cases of inheritance from a lineal ancestor the distribution is *per stirpes*, and not *per capita*. The fifth paragraph of the section is in the following language; "Brothers and sisters of the intestate stand in the second degree, and inherit, if there is no widow, or child, or representative of child. The half blood on the paternal side inherit equally with the whole blood. If there be no brother or sister of the whole or half blood on the paternal side, then those of the half blood on the maternal side shall inherit. The chil-

dren or grandchildren of brothers and sisters deceased shall represent and stand in the place of their deceased parents, but there shall be no representation further than this among collaterals." The father inherits equally with brothers and sisters, and stands in the same degree. If there be no father, and the mother is alive, she shall inherit in the same manner as the father would. In all degrees more remote than the foregoing, the paternal and maternal next of kin shall stand on an equal footing. First cousins stand next in degree. Uncles and aunts inherit equally with cousins. Paragraph 9 of the section is in the following language: "The more remote degrees shall be determined by the rules of the canon law as adopted and enforced in the English courts prior to the 4th day of July, A. D. 1776." It will be seen that the provisions of the Code in reference to the right of the half blood to inherit are substantially the same as those contained in the act of 1804. Of that act, Judge Lumpkin, in *Redd v. Clopton*, 17 Ga. 232, said: "This act of distribution, it will be perceived, is almost a literal transcript of the English statute of 22 & 23 Car. II., which was borrowed from the 118th novel of Justinian." It was held in the case just cited that the word "cousins," used in the act of 1804, embraced "all cousins, maternal as well as paternal."

It is contended that the half blood on the maternal side cannot inherit in this state as long as there is any person living who is either of the whole blood or the half blood on the paternal side. We do not think this a proper construction of this section. If there is a brother or sister either of the whole blood or the half blood on the paternal side, either would take in preference to a brother or sister of the half blood on the maternal side. Or if there is a child or grandchild of a brother or sister either of the whole blood or of the half blood in the paternal line, such child or grandchild would, by representation, take the place of the deceased ancestor, and become entitled, in preference to a brother or sister of the half blood in the maternal line. But if the relatives of the whole blood or of the half blood on the paternal side are further removed from the intestate than grandchildren of brother or sister, then the half blood on the maternal side is allowed to come in competition with them for the inheritance; and which shall inherit in such a case—the remote descendant of the whole blood, the remote descendant of the half blood on the paternal side, or the brother or sister of the half blood on the maternal side, or descendant of such—is determined by ascertaining which stands nearest in degree to the intestate. And in determining this question representation is allowed to the descendants of the half blood on the maternal side to the same extent as it is allowed in other cases of collaterals; that is, to grandchildren. Paragraph 5 of the section of the Code above cited provides simply when the half blood on the maternal side

shall be allowed to come in, and does not undertake to determine the degree of relationship when those claiming the estate are further removed from the intestate than grandchildren of brother or sister. Nothing in the section provides the degree in which cousins other than first cousins shall stand. The rule to be followed in determining the relationship of cousins other than first cousins is found in paragraph 9 of the section. The rule appears for the first time in our law in the Code of 1863. In *Wetter v. Habersham*, 60 Ga. 193, it was held that if a person dies intestate, leaving no descendants or next of kin within the degrees expressly named in the Code the heirs at law are those nearest in blood to the intestate, to be ascertained according to the rules, not of the civil, but of the canon law; that is, counting from the intestate up to the common ancestor, one degree for each generation, thence down the collateral line to the contestant. The number of degrees in the longer of these two lines is the degree of kindred between the intestate and the contestant. See also the case of *Short v. Mathis*, 101 Ga. 287, 28 S. E. 918, where this rule was applied. If we apply this rule to the present case, we find that Joseph Ector was the common ancestor of Frank M. Ector and Benton B. Ector, that Frank M. Ector was removed three degrees from the common ancestor, and that Benton B. Ector was removed two degrees. Therefore they were related to each other in the third degree. The common ancestor of Frank M. Ector and Ed. L. Grant and his brothers and sisters is the wife of Wily B. Ector. Frank M. Ector is two degrees removed from the common ancestor, and the Grant children are two degrees removed from the common ancestor. The Grant children are therefore related to Frank M. Ector within the second degree, and, being one degree nearer than Benton B. Ector, are entitled to inherit in preference to him.

It is contended, however, that, because paragraph 9 of the section of the Code above referred to adopts the rule of the canon law, this is an indication that it was the intention of the legislature to keep in force all the provisions of the canon law in reference to inheritance, where a contrary rule was not expressly laid down in the statute. We do not think this position is sound. The rule of the canon law is referred to for no other purpose than to provide a method of counting the remote degrees of relationship. Under the very terms of the statute, it is not to be looked to for any other purpose. It furnishes simply the method of counting the degrees of relationship in those cases where the degrees are not fixed in the preceding paragraph of the section. But, even if this is not true, the rights of the half blood are, in our opinion, expressly provided for in the preceding paragraphs of the section, and this express provision must overcome any implication to be drawn from the ninth paragraph. The rule of the common law excluding the half blood has never met with favor in this country; and, while

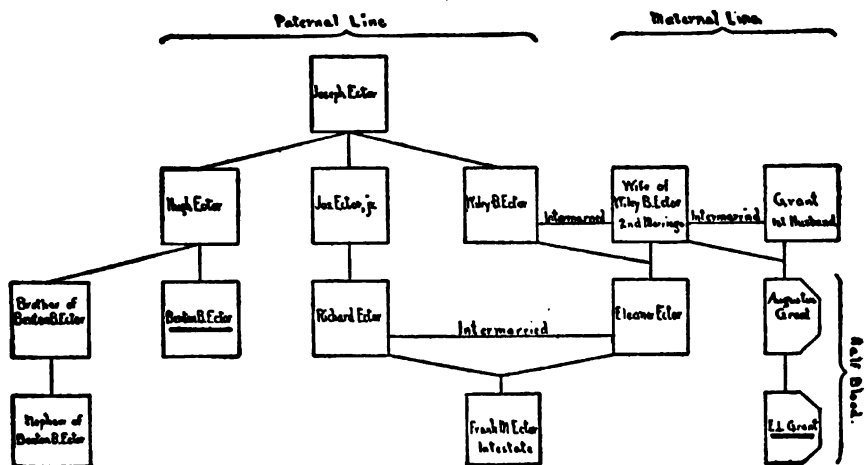
the laws of the different states are far from uniform on this subject, there is hardly a state in the Union where the half blood is not entitled to some rights in the matter of inheritance. See 4 Kent, Com. 14th ed. \*403 *et seq.*; 24 Am. & Eng. Enc. Law, 1st ed. pp. 369 *et seq.* Even in England the harsh rule of the common law has been changed by statutes, some passed in the reign of William IV., and others during the reign of the late Queen Victoria. Kinamen of the half blood are no longer excluded, but only postponed; the effect of the changes in the law being to require the collateral kinsman who is to succeed, whether of the whole or half blood, to trace his descent from the last purchaser; or if his heirs have failed, and where the land is descendible as if an ancestor had been the purchaser thereof, if his heirs have also failed, then from the person last entitled to the land. 2 Minor, Inst. 529. The reason upon which the rule excluding the half blood was founded was never applicable in this state, and he who desires to exclude the half blood from the inheritance must show a provision of law having this effect. He was entitled to a share of the personal estate under the English act of distributions. The earliest ex-

pression of our lawmakers on the subject was an effort to abolish the hardships and inequalities of the English rules of descent as to realty, and to adopt the more reasonable rules of inheritance derived from the statutes providing for the distribution of the personal estate; and the only expression to be found in our laws at the present time prejudicial to the half blood are those above referred to, which under certain conditions postpone the half blood on the maternal side to the whole blood or half blood on the paternal side.

As we have reached the conclusion that Benton B. Ector was not an heir at law of Frank M. Ector, it is unnecessary to determine the question as to whether the former's nieces and nephews are related to Frank M. Ector in the same degree as himself. This question is made in the record, but, under the view we have taken of the case, it is not necessary to decide it. The degrees of relationship between the persons who are interested in the present case and the intestate will fully appear from the diagram which follows this opinion.

*Judgment affirmed.*

All the Justices concur.



ELLA V. ROUMILLOT *et al.*, *Pliffs. in Err.*,  
v.

A. S. J. GARDNER.

(.....Ga.....)

\*Entering into possession of a portion of a cemetery lot which is inclosed by one claiming to be the owner of such por-

\*Headnote by COBB, J.

NOTE.—For a case in this series holding that use for burial of cemetery lot constitutes adverse possession, see *Hook v. Joyce* (Ky.) 21 L. R. A. 96.

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tion, and erecting a substantial iron fence, so as to divide the part so claimed from the remaining part of the lot, is, as to that peculiar character of property, an act showing adverse possession, of a public nature, totally irreconcilable with cotenancy, and amounts to an actual ouster of others claiming to be tenants in common with the possessor.

(March 26, 1901.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of defendant in an action for the partition of a cemetery lot. *Affirmed.*

The facts are stated in the opinion.

**Messrs. F. W. Capers and Simeon Hyde**, for plaintiffs in error:

The grantor of the defendant held the cemetery lot as tenant in common with two others.

There can be no adverse possession against a cotenant until actual ouster, exclusive possession after demand, or express notice of adverse possession.

Ga. Code, § 3145.

Possession for seven years is not enough.

1 Am. & Eng. Enc. Law, 2d ed. p. 803.

The grantee of a cotenant cannot set up adverse possession until actual notice of the character of the holding, even though holding under deed to what he supposed to be the entire interest.

*McClaskey v. Barr*, 47 Fed. 154.

Adverse possession against a cotenant may begin to run after actual ouster, or exclusive possession after demand, or express notice of adverse possession.

*Norris v. Dunn*, 70 Ga. 796.

A recorded deed, or the judgment of a court of record fixing the title, has been held to amount to actual notice; but these are the only exceptions.

*Norris v. Dunn*, 70 Ga. 800.

**Mr. William H. Barrett**, for defendant in error:

The paper of July 16, 1892, from George W. Marley to John M. Hays, was a good color of title.

*Beverly v. Burke*, 9 Ga. 443, 54 Am. Dec. 351, 14 Ga. 72; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Walls v. Smith*, 19 Ga. 8; *Veal v. Robinson*, 70 Ga. 809; *Kile v. Fleming*, 78 Ga. 1; *Wardlaw v. McNeill*, 106 Ga. 29, 31 S. E. 785; *Wade v. Garrett*, 109 Ga. 270, 34 S. E. 572.

Gardner did everything possible to make his possession public and adverse. He had an entry of his purchase made on the cemetery records: he buried his child on the section; he had a division fence built between his portion of the section and that on which the Marleys were buried; he had a stone step placed at the gate, with "Gardner" engraved thereon; and he has maintained it as his section ever since his purchase. His title is therefore perfect.

Ga. Code, § 3589.

**Cobb, J.**, delivered the opinion of the court:

On December 9, 1899, Ella V. Roumillot and Emma S. Chapman brought their petition against A. S. J. Gardner for the partition of a cemetery lot located in the city of Augusta. The case was submitted upon an agreed statement of facts, the substance of which was as follows: The lot in controversy was owned by John E. Marley, who died intestate, leaving as his only heirs at law the plaintiffs and George W. Marley, all of whom were residents of Charleston, South Carolina. George W. Marley entered into a correspondence with J. M. Hays, looking to a sale of a portion of the lot to him, and assuring Hays that he was "the only

heir to the place." After some correspondence Hays bought a portion of the lot, and went into possession under and by virtue of an instrument of which the following is a copy:

Charleston, S. C., July 16, 1892.

This is to certify that I have sold to John M. Hays twenty-three (23) feet of my section, fronting on Fourth avenue, known as "Marley Section," for the sum of one hundred and forty dollars (\$140.00). He is to do with said twenty-three feet as he may see fit; and he (John M. Hays) to brick in two (2) graves of the remaining part of said Marley section, and to let fence around section stay, or to have said remaining part fenced off by same fence, should a change be made.

[Signed]

Geo. W. Marley.

John M. Hays bricked in two graves in the remaining part of the Marley section,—the graves of John E. Marley and his wife. The fence around the entire section has been left as it was. In the year 1892, prior to October 14th, Hays sold and conveyed the portion of the section bought by him to A. S. J. Gardner, whose child had been previously buried thereon. A record of this transfer to Gardner was made on the cemetery records. On November 10, 1892, Gardner had erected an iron fence between the portion of the section purchased by him and the remaining portion, and at the same time had placed at the gate of the section a stone step, with "Gardner" engraved thereon. George W. Marley was buried April 27, 1899, in the one third of the section that had been fenced off from the two thirds bought by Gardner. No other person has ever been buried on that portion of the lot purchased by Gardner, except his child, and he has maintained it as his section ever since his purchase. The plaintiffs are both of age and free from any disability, and have been for more than eight years. During the period since Gardner bought, there has been no suit or claim of any kind filed against this property, until this petition for partition was served, on December 9, 1899. The court directed the jury to bring in a verdict for the defendant, and the plaintiffs excepted.

It is conceded that the certificate under which Hays went into possession operated as color of title, and adverse possession of land under color of title for seven years will give a good title by prescription. Civil Code, § 3589. But "there can be no adverse possession against a cotenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession." Civil Code, § 3145. As there is no evidence in the record of any demand for possession in title, or any "express notice" of adverse possession from either,—*Harral v. Wright*, 57 Ga. 434 (Syl., point 4),—the question to be decided is whether the facts above detailed are sufficient to show



an "actual ouster" of the plaintiffs. The right to an easement may be acquired by prescription. Civil Code, § 3590. And if the defendant simply acquired by his purchase the right of burial, and not the fee in the soil (*Jacobus v. Congregation of Children of Israel*, 107 Ga. 521, 33 S. E. 853), this would make no difference in the character of proof necessary to show actual ouster of the plaintiffs. This might not be true as to some easements, but it would be as to such an easement in a cemetery lot, which for practical purposes is equivalent to an ownership of the soil. The question whether ouster results from occupation and possession in a given case is a question of fact for the jury. *Bolton v. Hamilton*, 2 Watts. & S. 294, 37 Am. Dec. 509. In determining this question each case must necessarily be left to rest on its own facts, but regard is to be had to certain well-settled rules laid down for guidance when dealing with such matters. The presumption is that the possession is not adverse, but in common with the other owners. *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Dubois v. Campau*, 28 Mich. 316. "To constitute a disseisin [of a tenant in common by his cotenants] there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseisin are intended to be asserted against them." *Ball v. Palmer*, 81 Ill. 372. The adverse possession of the tenant must be a public one, totally irreconcilable with the cotenancy of another. *Long v. McDow*, 87 Mo. 203. "To constitute ouster of one cotenant by another in possession, some notorious and unequivocal act indicating an intention to hold adversely is necessary." *Colburn v. Mason*, 25 Me. 434, 43 Am. Dec. 292. "The adverse character of the possession must in every case be manifested to the owner. The owner must be notified in some way that the possession is hostile to his claim, or the statute does not operate on his right." *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 103. See also 1 Freeman, Cotenancy & Partition, §§ 241 *et seq.*, where it was said (quoting from *Tulloch v. Worrall*, 49 Pa. 140) that "in the cases in which one tenant in common has successfully asserted the statute against his cotenants there have been unequivocal acts such as resistance of the right of entry, confession of disseisin, selling, leasing, or improving the premises, or part of them." See also Abbott, Trial Ev. 2d ed. p. 904. While entering into possession by a cotenant under a recorded deed, and remaining in possession and exercising acts of ownership, would be a strong circumstance to show actual ouster of the other cotenants, this would not, according to many of the authorities, be conclusive, though this court seems to have taken the other view in *Horne v. Howell*, 46 Ga. 9, 14, where it was said that "possession under a title and claim to

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the whole lot is hostile to and adverse to the title and claim of those who claim a part thereof as tenants in common." See also *Norris v. Dunn*, 70 Ga. 796; *McDowell v. Sutlive*, 78 Ga. 143, 2 S. E. 937. In the present case there was no recorded deed, and the defendant can take nothing from the fact that the entry of the transfer of title to him was made in the cemetery records, as the plaintiffs were not shown to have had any notice of this entry. The plaintiffs can take nothing from the fact that they had been absent for several years in another state, and had no opportunity of observing the acts of the defendant, for the reason that the law presumes, conclusively, when actual ouster has been shown, that the plaintiffs had notice of the defendant's claim. Thus narrowed, the facts relied on by the defendant to show actual ouster of the plaintiffs are the burial of his child, fencing off the part to which he claims title, and the placing of a stone at the gate of the section, with his family name engraved thereon. The burial of his child in the portion of the lot claimed by him would not amount to an actual ouster, for the reason that such an act is not at all inconsistent with cotenancy in a cemetery lot. The placing of the stone at the gate of the section, with the name of the defendant thereon, would not amount to an actual ouster; for it appears that this stone was placed at the gate to the section, and was not placed in any such peculiar position as to indicate a claim of ownership to any designated portion of the section. The case is, therefore, in narrow limits. The question is whether, when one, the tenant in common with two others in a cemetery lot, makes claim to a certain designated part of the lot, and asserts this claim by erecting a substantial iron fence on the dividing line between the portion claimed and the remainder of the lot, he does such an act as would amount to an actual ouster of his cotenants. Ordinarily the erection of a division fence separating two parts of a lot will not amount to an actual ouster. Especially is this true as to farm and residence lots. But, on account of the peculiar character of a cemetery lot, we are of opinion that the erection of a substantial division fence cannot be other than an actual ouster of those claiming an interest in the part so fenced off. The erection and maintenance of such a fence in a cemetery lot cannot make any other impression upon the passerby than that the lot is owned by two persons or sets of persons, and the fence marks the dividing line. This is what we understand the law to mean when it says that the acts relied upon to constitute an actual ouster must be such as to indicate unequivocally an intention to hold adversely against all other claimants.

*Judgment affirmed.*

All the Justices concur.

## RHODE ISLAND SUPREME COURT.

P. Eugene SWEET  
v.  
POSTAL TELEGRAPH-CABLE COMPANY.

(.....R. L.....)

1. An agent of a telegraph company in charge of an office at which a message is tendered for transmission is not bound to know the time of closing of the terminal office, so as to charge the company with negligence in case the message is received after such office is closed.
2. A telegraph company is not liable for breach of contract to send a telegram because it was transmitted to the terminal office after it had been regularly closed for the day, and was taken from the wires by one in possession of the office for purposes of his own, and not in the employ of the company, and not its agent for the receipt of messages.

(January 18, 1901.)

**P**ETITION by defendant for a new trial after judgment in favor of plaintiff in an action brought to recover damages for failure to promptly deliver a telegram. *Direction to render judgment for defendant.*

Plaintiff was by profession an actor, whose home was in Pawtucket, Rhode Island. He had been negotiating for employment at a Boston theater. On November

**NOTE.**—*Liability of telegraph company sending message to office after hours of closing.*

- I. Nature of subject.
- II. Rules as to office hours; reasonableness.
- III. Notice to patrons.
- IV. Special contracts as to delivery.
  - a. Nature, application, and effect generally.
  - b. Excuses for noncompliance.
  - c. Contracts restricting liability.
- V. Damages.
- VI. The rule under statutes imposing penalty for delay.
- VII. Conclusion.

I. Nature of subject.

This note falls within the rules of law relating to negligence. The liability of a telegraph company, when it exists, for sending a message to an office after the hour of closing, is predicated upon the consequent delay in the delivery of the message, the question being whether, in view of the rights possessed by the telegraph company, and of all of the varying circumstances of each particular case, such delay is negligence upon its part.

II. Rules as to office hours; reasonableness.

A telegraph company, from the necessity of the case, must have power to make some regulation for the conduct of its business and the time during which its offices will be open for business, and for the transmission and delivery of telegrams; and when such regulations are reasonable, a party who contracts with the company for the transmission of a message is bound by them, provided he has notice of their existence. *Western U. Telegr. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15; *Western U. Telegr. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *Western U. Telegr. Co. v. May*, 8 Tex. Civ. App. 178, 27 S. W. 760; *Western U. Telegr. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 136; *Western U. Telegr. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Davis v. Western U. Telegr. Co.* 46 W. Va. 48, 32 S. E. 1026.

And a telegraph company which has established rules and regulations providing for reasonable hours during which it will deliver messages in a specified town is not compelled to deliver messages outside of such hours. *Western U. Telegr. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, (Tex. Civ. App.) 25 S. W. 861.

And if the sender of the message knew, or was informed at the time of sending the message, that the company did not deliver messages after a specified time, and that the message could not be delivered at night according to the 53 L. R. A.

company's office hours, the company would not be liable for delaying the delivery of a telegram which arrived at that office after office hours until the next morning. *Western U. Telegr. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439.

And a refusal to so charge, in an action for delay in delivering a telegram, is error, where there was evidence that the company had established office hours at the place to which the telegram was sent from 8 A. M. to 8 P. M. of each day, and that such office hours were reasonable for that place, and that the message in question reached that office at 7:30 P. M. *Western U. Telegr. Co. v. May*, 8 Tex. Civ. App. 178, 27 S. W. 760.

So, the reasonableness of a regulation as to the hours during which the offices of a telegraph company shall be open for the transmission and delivery of messages varies with the character of the locality where the particular office is situated. *Davis v. Western U. Telegr. Co.* 46 W. Va. 48, 32 S. E. 1026.

And it cannot be implied that, because the public service may require that the office hours of a telegraph office include a given time at one point, all other offices or places at which the telegraph company serves the public must be open and fully equipped for such service an equal length of time. *Ibid.*; *Western U. Telegr. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172.

And it is not negligence upon the part of a telegraph company to leave its office in a small town where little telegraphic business is done in the charge of one competent operator and a messenger boy, which will render it liable for delay in the transmission of a telegram which was filed for transmission at 11:55, while the operator was at dinner, but which was transmitted and delivered shortly after his return. *Behm v. Western U. Telegr. Co.* 8 Biss. 131, Fed. Cas. No. 1,234.

But where a telegraph company does not formally employ an agent of its own at one of its minor offices, and by some arrangement with a railroad company obtains the service of its agent in the business of sending, receiving, and delivering telegraphic messages, the office hours established by the railroad company, if reasonable, will be deemed to be upon the same footing with reference to the liability of the telegraph company for delay in the delivery of messages received after office hours as though they were established directly by the telegraph company. *Western U. Telegr. Co. v. Georgia Cotton Co.* 94 Ga. 444, 21 S. E. 835.

So, in *Western U. Telegr. Co. v. Henderson*, 80 Ala. 510, 7 So. 419, the court refused to justify a telegraph company for the nondelivery of a message on the ground that the business and

16, 1895, the manager of the theater delivered to defendant a telegram as follows:

Boston, Nov. 16, 1895.

To P. Eugene Sweet,  
22 Lewis street, Pawtucket, R. I.—  
Salary fifteen open Monday if affirmative  
see Harry Leighton to-night.  
(Signed) Jay Hunt.

The message was not delivered until the following morning. Leighton, having left Pawtucket the evening before, could not be seen, and therefore the contract for employment was not closed. For failure to promptly deliver the telegram this action was brought.

Further facts appear in the opinion.

**Mr. C. J. Farnsworth**, for defendant:

The company is not liable for damages

emoluments of the office to which it was sent were insufficient to justify the employment of a separate telegraph operator or a messenger boy to deliver messages, and refused to follow Behm v. Western U. Teleg. Co. 8 Biss. 131, Fed. Cas. No. 1,234, saying that this may furnish a very good reason for withholding telegraph service, or perhaps for different regulation in regard to delivery at places thus circumstanced, but that it affords no excuse for violating the terms of a contract. But the case was one in which the telegram was sent at noon, and not delivered until about 9 o'clock the next day, the places being but 5 miles apart.

Nor is it the duty of a telegraph company to keep its employees in every one of its offices in the United States informed of the time when every other office closes at night, so as to warrant holding the company liable for failure to deliver a telegram because the office to which it was sent was closed. Given v. Western U. Teleg. Co. 24 Fed. 119; Western U. Teleg. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Western U. Teleg. Co. v. Neel, 86 Tex. 368, 25 S. W. 15; SWEET V. POSTAL TEL. & CABLE CO.

And a telegraph company to which a telegram was delivered for transmission at night, which was not transmitted and delivered until 8 o'clock on the following morning, for the reason that the office at the place to which it was addressed was only open in the daytime, is not liable for failing to promptly transmit and deliver it, where the agent upon receipt of the message made repeated efforts to call up the operator at the place of destination for the purpose of sending the despatch that night, and there was no special agreement or undertaking with regard to the time of sending. Robinson v. Western U. Teleg. Co. (Tex. Civ. App.) 43 S. W. 1053.

But whether in an individual case the rules of a telegraph company as to the time during which it will receive and transmit messages are or are not reasonable, or whether the company was or was not guilty of negligence in failing to deliver a message sent after the expiration of office hours, is a question that the telegraph company cannot be permitted to decide, but is one to be decided by the court or jury, as the case may be in each individual case as it arises. Brown v. Western U. Teleg. Co. 6 Utah, 219, 21 Pac. 988.

And the reasonableness of a rule at a particular telegraph office that messages would not be received or delivered after 9 o'clock in the evening and before 8 o'clock in the morning is a question for the court, in an action for damages for delay in delivery of a telegram received be-

resulting from a delay in delivery of a telegram received after office hours.

Croswell, Electricity, §§ 421, 422; Western U. Teleg. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Given v. Western U. Teleg. Co. 24 Fed. 119; Western U. Teleg. Co. v. Neel, 86 Tex. 368, 25 S. W. 15; Western U. Teleg. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792; Western U. Teleg. Co. v. May, 8 Tex. Civ. App. 178, 27 S. W. 760; 25 Am. & Eng. Enc. Law, p. 785, and note; 2 Shearm. & Redf. Neg. § 540; Western U. Teleg. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Thomas, Neg. 1205.

A telegraph company is bound to do no more than it is paid for, and that is to transmit the message to the designated office, and then make reasonable effort to deliver within the free-delivery limits.

Western U. Teleg. Co. v. Trotter, 55 Ill.

tween such hours. Davis v. Western U. Teleg. Co. 46 W. Va. 48, 32 S. E. 1026.

But the question whether the absence of the telegraph operator while at dinner was or was not a reasonable one was one for the jury, in an action against the telegraph company for damages for delay in the transmission of a message filed in the office while the operator was at dinner. Behm v. Western U. Teleg. Co. 8 Biss. 131, Fed. Cas. No. 1,234.

And the submission of the question of the reasonableness of the office hours of a telegraph company for delivering messages at a particular station cannot be objected to by the telegraph company in an action for delay until the next morning in the delivery of a message filed for transmission at night, where it had requested a charge that if the company had reasonable office hours within which it delivered telegraph messages it was not by law compelled to deliver messages outside of such hours. Western U. Teleg. Co. v. Bryson (Tex. Civ. App.) 61 S. W. 548.

And refusal to submit the issue of the reasonableness of office hours of a telegraph company at the place to which a telegram was to be sent is error, in an action for failure to deliver a message accepted after the close of office hours on condition that it would not be delivered during the night unless the company kept a man at the receiving office, where both the pleadings and the evidence presented the issue. Western U. Teleg. Co. v. Rawls (Tex. Civ. App.) 62 S. W. 136.

### III. Notice to patrons.

The general rule is that, in the absence of a special contract to transmit a telegram immediately, or an express request for information as to its delivery, it is not obligatory upon a telegraph company to acquaint the customer with the office hours of the company at the point to which a message delivered by him for transmission is directed. Western U. Teleg. Co. v. Harding, 103 Ind. 505, 3 N. E. 172; Western U. Teleg. Co. v. Neel, 86 Tex. 368, 25 S. W. 15.

Provided such hours are established and reasonable, as the reasonableness of a regulation of the hours of business is sufficiently obvious to suggest to the sender who desires the delivery of a telegram at a different hour the propriety of making inquiry before he enters into the contract. Western U. Teleg. Co. v. Neel, 86 Tex. 368, 25 S. W. 15.

Such reasonable business hours are implied in the contract between the sender and the telegraph company, unless especially stated or understood by the parties to the contract that

App. 659; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 7 So. 419; 25 Am. & Eng. Enc. Law, p. 780.

It is to be assumed that all that was required to be done at the Boston office was done. As there was a stipulation on the message that the company would not be liable unless the message was repeated, and as the message was not repeated no damage can be claimed, because such a stipulation is one that is reasonable and valid.

Thomas, Neg. p. 1208; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098.

Such a stipulation is a reasonable precaution to be taken by the company, and is binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause, except wilful misconduct or gross negligence on the part of the company.

the service to be performed should be performed otherwise than in the usual manner, and subject to the usual rules under which the company does business. *Ibid.*; *Western U. Teleg. Co. v. Neel* (Tex. Civ. App.) 25 S. W. 681.

In *Western U. Teleg. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, *supra*, *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, *infra*, IV. a, was distinguished upon the ground that in that case the agent received the money of the sender knowing his object in sending the message, and that that object could only be attained by prompt transmission and delivery to the person addressed, so that the company could not legally urge its rules as to office hours as an excuse for not delivering the despatch until the next day, and was properly held estopped to deny that the contract was for immediate delivery. And *Western U. Teleg. Co. v. Bruner* (Tex.) 19 S. W. 149, *infra*, IV. a, was distinguished and explained, the court saying that it was apparent from the opinion that the point as to the transmission of a telegram to the office to which it was to be sent after it was closed, was not involved, but that, as the company accepted the telegram, and undertook to deliver it at about a specified time, it could not be excused for its failure to perform the contract because its office was closed,—especially where it did not appear that any effort was made to send the message until the next morning, when it was too late to accomplish its object.

There are cases, however, which, though not holding directly and squarely that notice of the office hours and rules and regulations of the receiving office must be given to the senders of a message in order to excuse the telegraph company for delay in delivering a message on account of such office hours or rules, would appear to have treated such notices as one of the constituent elements of immunity from liability.

Thus, in *Western U. Teleg. Co. v. Neel* (Tex. Civ. App.) 25 S. W. 681, it was held that the fact that a person sending a telegram, who was the agent of the person to whom it was addressed, got the telegraph operator to write the message, does not make the operator the agent of the person to whom the telegram was addressed, so as to charge her with knowledge of rules of the telegraph company with respect to reasonable office hours, and bind her to take notice of them.

So, in *Western U. Teleg. Co. v. Merrill* (Tex. Civ. App.) 22 S. W. 826, it was held that delay upon the part of a telegraph company in delivering a telegram filed at 6:40 A. M., addressed to a physician, requesting his immediate serv-

*Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Kiley v. Western U. Teleg. Co.* 109 N. Y. 231, 16 N. E. 75; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Breese v. United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526.

As the message was an unexplained message the company cannot be held liable for any damages resulting from failure to exercise more than reasonable promptness and care.

*Shields v. Washington Teleg. Co.* 9 W. L. J. 283; *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Behm v. Western U. Teleg. Co.* 8 Biss. 131, Fed. Cas. No. 1, 234; *Beaupre v. Pacific & A. Teleg. Co.* 21 Minn. 155.

When a party, by his failure to receive a telegram, loses the benefit of a contract for labor subject to be defeated by the will of

ices for the sender's wife, by reason of which medical attendance was not obtained until between 1 and 2 P. M., authorizes a recovery, where the operator at the place of transmission notified the sender that the office at the place to which it was sent would not be open until 8, only for the suffering endured by the wife after the expiration of such time as it would have taken a doctor to reach the sender's house after 8 o'clock, when it should have been transmitted.

And in *Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25, which was an action for delay in the delivery of a telegram sent on Sunday, the telegraph company having a regulation that its office would not be open from 10 A. M. until 4 P. M. on Sunday, the message being a rush message which was in fact received by the agent for transmission about 8 o'clock in the morning, it was held that a special charge that the company would not be liable for any delay occurring between these hours if the sender was informed of the regulation is as favorable a presentation of the law as the company could legally demand under the facts of the case, where there was evidence that the telegraph company was not observing the Sabbath, but, on the contrary, was allowing its wires to be used in the transmission of railway business during the greater part of the day, which caused delay in the transmission of the telegram in question. And see also *Western U. Teleg. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15; *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439, *supra*, II.; *Given v. Western U. Teleg. Co.* 24 Fed. 119, *infra*, IV. b.

#### IV. Special contracts as to delivery.

##### a. Nature, application, and effect generally.

A telegraph company which accepts a telegram, and undertakes through its agent to deliver it at a particular time at night, cannot be excused for failure to perform the contract by neglecting to send it until the next morning, by reason of which it was not delivered until about noon, by the fact that the office at the place to which it was to be sent was closed against the place of transmission,—especially where it does not appear that any effort was made to send the message until the next morning. *Western U. Teleg. Co. v. Bruner* (Tex.) 19 S. W. 149.

And where a telegraph company has received and transmitted a despatch after the expiration of office hours at the place of transmission, the measure of diligence to be applied to its conduct with reference to its delivery cannot be decided by any rules or hours that the company

the other party, only nominal damages are recoverable.

*Merrill v. Western U. Tele. Co.* 78 Me. 97, 2 Atl. 847; 25 Am. & Eng. Enc. Law, p. 852.

A telegraph company cannot be charged with damages based upon a mere possibility of profit which the addressee of a telegram may have lost by reason of delay in transmission or delivery.

*Clay v. Western U. Tele. Co.* 81 Ga. 285, 6 S. E. 813; *Western U. Tele. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457; *Curtin v. Western U. Tele. Co.* 14 Misc. 459, 36 N. Y. Supp. 1111; *Western U. Tele. Co. v. Clifton*, 68 Miss. 307, 8 So. 746; *Baldwin v. Western U. Tele. Co.* 93 Ga. 692, 21 S. E. 212; *Kenyon v. Western U. Tele. Co.* 100 Cal. 454, 35 Pac. 75; *Cahn v. Western U. Tele. Co.* 1 C. C. A. 107, 2 U. S. App. 24, 48 Fed. 810.

may have seen fit to establish. *Brown v. Western U. Tele. Co.* 6 Utah, 219, 21 Pac. 988.

And though it may be that a telegraph company can fix office hours which are reasonable, and though the hours fixed by them may not be unreasonable, where an authorized agent receives a message after such office hours, this constitutes an undertaking on the part of the company to deliver it, and it is bound to do so with reasonable diligence; and as he is acting within the scope of his agency, although not within the hours fixed for active discharge of his duties, that fact will not relieve the company from the discharge of the obligation incurred by receiving the message to be delivered out of office hours. *McPeck v. Western U. Tele. Co.* 107 Iowa, 356, 43 L. R. A. 214, 78 N. W. 63.

A telegraph company cannot keep its office open and receive messages for pay after its regular established office hours, and then when a negligent delay in the delivery service occurs, screen itself from responsibility by saying that the persons who were in its places of business, and who took the messages and received payment therefor, were not its agents. *Dowdy v. Western U. Tele. Co.* 124 N. C. 522, 32 S. E. 802.

And where a telegram is in plain, unambiguous language, and the importance of prompt action is apparent therefrom, and it is received by the telegraph company for transmission, though after office hours, the degree of diligence required in its transmission is equal to the emergency of the occasion, and this without regard to the rules and hours established by the company. *Brown v. Western U. Tele. Co.* 6 Utah, 219, 21 Pac. 988.

And omission upon the part of a telegraph company to deliver a telegram sent by a father calling for a physician to attend to his child's hand, which had been crushed, filed for transmission at 8 o'clock, though after office hours, until about 7:35 A. M. the next day, by reason of which it was alleged the hand had to be amputated, which telegram the company had received for transmission, gives rise to a question for the jury, in an action therefor, as to whether or not the telegraph company was guilty of negligence. *Ibid.*

So, a telegraph company having rules by which its telegraph lines were closed to business of the public between 7 P. M. and 7 A. M., during which time its lines were operated by railroad night officials for railroad business, which railroad officials received messages for the telegraph company filed for transmission, as a matter of accommodation, but reserved them for the 53 L. R. A.

*Mr. Peter J. Quinn*, for plaintiff:

It is the duty of telegraph companies to deliver messages without error or delay.

25 Am. & Eng. Enc. Law, pp. 779, 780, and cases cited.

It was a question of fact for the jury to say whether or not the company neglected its duty towards the plaintiff.

*Western U. Tele. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Western U. Tele. Co. v. Fenton*, 52 Ind. 1.

Stipulations upon the telegram do not deprive of a right of action a person to whom a prepaid message is directed.

*Johnston v. Western U. Tele. Co.* 33 Fed. 362; 21 Am. & Eng. Enc. Law, p. 800, and notes.

The fact that a branch office is closed is no defense in an action for negligence brought by the addressee.

*Western U. Tele. Co. v. Broeseke*, 72 Tex.

telegraph operators the next morning, cannot escape liability for failure to transmit and deliver a telegram sent by a wife to her husband after office hours, directing him to come home at once because of the sickness of their child, given to the railroad officials, on the ground that the railroad officials were not the agents of the telegraph company, where, upon a delivery of the telegram on the next day, the father was unable to reach home until after the child's death. *Dowdy v. Western U. Tele. Co.* 124 N. C. 522, 32 S. E. 802.

And the submission of the question of office hours of a telegraph company at a particular station as a controverted issue of fact, to the jury in an action for delay in delivering a message sent about 7 P. M. and delivered about 11 A. M. of the next day, is not error, though the evidence established the existence of office hours from 8 A. M. to 6 P. M., where it also appeared that the telegraph office was kept with a railroad office, and that the telegraph office was frequently kept open until 12 o'clock at night, and the call boys in the service of the railroad company delivered messages for the telegraph company, and it was the duty of the operators at such office to deliver messages themselves, and the company did not appear to have fixed any delivery hours for them. *Western U. Tele. Co. v. Bryant* (Tex. Civ. App.) 61 S. W. 548.

So, in *Bryant v. American Tele. Co.* 1 Daly, 575, it was held that a telegraph company undertaking to transmit and deliver a telegram which was important and on its face showed that its design was to secure the commencement of legal proceedings against the sender's debtor by attachment, which must be done within a certain time, the telegraph company, undertaking through its operator to transmit and deliver the message at once, is liable, where the message was filed for transmission at half past 8 in the evening, and delivery thereof was delayed until half past 11 o'clock that night by the fact that the operator at the receiving station was engaged in receiving press reports and the messenger boy had gone home, for the amount of the sender's debt, where it appeared that the debt would have been realized by the attachment had the despatch been transmitted in season.

And that a telegraph office at the place of destination of a telegram was closed at the time the agent at the sending station received a message for transmission, is no defense to a telegraph company for failing to transmit and deliver the message until the next morning, when the operator knew from the wording of the

654, 10 S. W. 734; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449, 12 S. E. 427; 25 Am. & Eng. Enc. Law, pp. 786, 787, and notes; *La Grange v. Southwestern Teleg. Co.* 25 La. Ann. 383.

Stiness, Ch. J., delivered the opinion of the court:

The plaintiff sues in trespass on the case for damages arising from the alleged negligence of the defendant in delivering a telegram addressed to him. The message was taken at the company's office in Boston at 9:10 P. M., November 16, 1895. It was sent to Pawtucket, and there received at 9:45 the same evening. The Pawtucket office closed for regular business at 9 o'clock, but a person employed by newspapers, to send and receive messages for the press, was in the office, and received the message, leaving it

message that it demanded prompt delivery, and that a delivery upon the following morning would be too late to accomplish its object, was held in *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734. But this decision was based upon the ground that, as the contract for the transmission of the telegram was made by an agent fully authorized and empowered to make it, the company could not excuse its failure to perform the contract upon the ground that another one of its servants, acting under its authority, had rendered the performance of the contract impracticable.

But the fact that a telegraph company received a message after closing hours of the place to which it was addressed, and collected a day rate for it, does not constitute the contract one for immediate delivery, for which the company would not be relieved from liability by reason of its office at the place of destination being closed. *Robinson v. Western U. Teleg. Co.* (Tex. Civ. App.) 48 S. W. 1058.

And that an operator employed by a railroad company in receiving, transmitting, and delivering telegraphic messages for a telegraph company through an arrangement between it and the railroad company frequently or habitually returned to his office after office hours established by the railroad company had expired, will not render the telegraph company liable for failure to deliver a telegram arriving at that office after business hours, upon an occasion when the operator was not there, until the following morning. *Western U. Teleg. Co. v. Georgia Cotton Co.* 94 Ga. 444, 21 S. E. 835.

And it is not obligatory upon a telegraph operator, as a matter of law, to forewarn the company employing him of the necessity of absenting himself from the office after business hours because of sickness in his family, nor upon the company to employ a substitute, to relieve it from liability for delay in the delivery of a telegram arriving during such absence. *Ibid.*

And the question whether the condition of the operator's family was such as to justify him in closing his office and absenting himself therefrom somewhat earlier than usual, though after the expiration of the established office hours, is one for the jury, and not for the court. *Ibid.*

So, a telegraph company receiving a message after the close of the office hours at the receiving office, on condition that it would not be delivered during the night unless a night man was kept at the receiving office, which message was received and transmitted by a railroad operator in the receiving office who was not employed by the telegraph company or required to take such messages, though he occasionally did so, there 53 L. R. A.

on file for the operator employed by the company, who had left the office for the night. The message was delivered the next day, Sunday, at 9:55 A. M.

The controlling question is whether the receipt of the message for transmission, after the terminal office had closed, was an act of negligence. This depends upon whether the receiving agent was bound to know the time of closing in the terminal office. The decisions on this point are practically unanimous that a receiving agent is not so bound, for the reason that in view of the great number of telegraph offices all over the country, and their variant conditions, some large and requiring constant service, others small and with infrequent calls, a requirement that every agent should know the hours of every office would be unreasonable, if not impossible. To hold a

being no night operator there, and who procured a messenger boy and himself paid for the delivery of the message, is not liable for a failure upon the part of the messenger boy to deliver it, as the negligence is the negligence of the messenger, and not of the company. The contract being to deliver that night on condition that the company had a night operator at the place of transmission, and there being none, it is not rendered liable by the fact that it sought to effect a delivery through such other agency as it might be able to induce to undertake it, such agency proving to be negligent or ineffective. *Western U. Teleg. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 186. And see *SWART V. POSTAL TEL. & CABLE CO.*

And an instruction in such an action, that if an operator at such station, who was authorized to undertake to act for the telegraph company in the premises, received the message and handed it to a messenger boy for delivery, the company would be liable for the negligence of the messenger resulting in a failure to make delivery that night, is improper, where the operator receiving the message was an operator for a railroad company having its office in the same room, who was occasionally authorized by the representatives of the telegraph company to receive messages, but who was not required to do so, as failing to call attention to the distinction between a mere occasional and voluntary service on his part, and the maintenance by the telegraph company of a night office at that place with an operator in charge. *Western U. Teleg. Co. v. Rawls* (Tex. Civ. App.) 62 S. W. 186.

#### b. Excuses for noncompliance.

No recovery can be had for delay of a telegraph company in delivering a message received after office hours, though it had contracted for immediate delivery, when the delay was not the immediate cause of the injury, or when the parties would have been in no better position had the telegram been promptly delivered. And here, as in all cases involving the question of negligence, contributory negligence will prevent a recovery.

Thus, failure upon the part of a telegraph operator to notify the sender of a message that the office to which it was to be sent was closed for the night will not render the telegraph company liable for delay in delivering the message until the next morning, where it does not appear that, if the sender had known that the office was closed, he could have provided other means for the transmission of his message in season. *Given v. Western U. Teleg. Co.* 24 Fed. 119.

company to such a duty would either require a uniform time of closing in all offices which are not constantly open, or a directory of all such offices with their various hours at different seasons of the year. The former alternative would compel a service at small stations far beyond their needs, and the latter, as Mr. Justice Miller said in *Given v. Western U. Teleg. Co.* 24 Fed. 119, would be "onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers for neglect of which it must be held liable for damages." This rule, stated in *Crowell, Electricity*, § 421, notes 1, 2, and 25 Am. & Eng. Enc. Law, p. 785, note g, is supported by cases cited.

The plaintiff relies on *Western U. Teleg. Co. v. Broesche* (1889) 72 Tex. 654, 10 S. W. 734, which went to the extent of holding that the fact that the company's office at

Burton was closed at the time its agent at Austin received the message for transmission was no defense for failing to transmit and deliver the message. But in *Western U. Teleg. Co. v. Neel* (1894) 86 Tex. 368, 25 S. W. 15, the same question came again before the court, and it was held that the company should have the right to establish reasonable hours within which their business is to be transacted, adding this very sensible conclusion: "It seems to us that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message, who desires its delivery at an unusually early hour for business, the propriety of making inquiry before he enters into the contract." This decision was affirmed in *Western U. Teleg. Co. v. May*, 8 Tex. Civ. App. 178, 27 S. W. 760, and in *Western U. Teleg. Co. v.*

And the omission by a telegraph company to deliver a despatch directing the person to whom it was sent to "come at once, mother is dying," received shortly before the close of the company's office hours at the place of its reception, until the next morning, will not render the company liable to the person to whom it was sent, where it does not appear that she could have reached the place at which her mother was before she died. *Western U. Teleg. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760.

And the question as to the negligence of a telegraph company having office hours at a particular station from 8 A. M. to 8 P. M. of each day, in neglecting to deliver a message filed for transmission at 7:30 P. M. until the next day, is one for the jury, where there was evidence that the person to whom it was addressed was at home, and would have acted in accordance with the requirements of the telegram had it reached her, and that it would have reached her in season; as the question what a person would have done under given circumstances always gives rise to an issue for the jury. *Ibid.*

So, damages will not be allowed in an action against a telegraph company for delay in the delivery of a telegram sent after office hours, for mental suffering upon the part of the person to whom it was sent because he was thereby prevented from attending his mother's funeral, where the delayed message did not inform him of the death of his mother, and was so vague and unsatisfactory that he was compelled to send repeated messages to others before he received information as to the urgency of the call. *Davis v. Western U. Teleg. Co.* 46 W. Va. 48, 42 S. E. 1026.

But the fact that a telegram might have been filed with a telegraph operator earlier in the evening than it was does not constitute contributory negligence on the part of the sender which would relieve the telegraph company from liability for delay, where the operator undertook to deliver it about 9 o'clock at night, and failed to transmit it until 8 o'clock the next morning, and to deliver it until about noon the next day. *Western U. Teleg. Co. v. Bruner* (Tex.) 19 S. W. 149.

Likewise, the conduct of a ranchman, to whom a telegram was addressed at a neighboring town, notifying him of the probable death of a brother, which was received for transmission shortly after 7 P. M., and not delivered until after 8 o'clock the next morning, and which he received upon coming to town at about 11, in going back home after receiving the message to take medicine to his sick son and change his clothes and give instructions as to his business, where at the time his son was not able to give

attention to his business, and he could not have given instructions as to its management satisfactory to himself, so that he was delayed until a later train and failed to arrive at his brother's funeral, is not so wholly inexcusable as to warrant taking the case from the jury on the ground of his contributory negligence, in an action by him against the telegraph company for delay in the transmission and delivery of the message. *Western U. Teleg. Co. v. Bryson* (Tex. Civ. App.) 61 S. W. 548.

And refusal to charge the jury to find for the plaintiff in such an action, if by reasonable expenditure of money the plaintiff could have lessened or prevented the injury, is not error, as there was something more than expenditure of money involved in the excuse for the delay. *Ibid.*

### c. Contracts restricting Liability.

A verbal contract between the sender of a telegram and the agent of a telegraph company, to the effect that the telegraph company should not be required to deliver it during the night and after office hours at the office of its destination, is valid and a defense for nondelivery of the telegram during such time. *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439.

But a stipulation requiring messages to be repeated in order to hold the telegraph company liable in damages for a delay in transmitting or delivering them beyond the cost of transmitting cannot be invoked in defense of an action for damages for delay or failure in delivering a message sent by an agent at one station to another station after the close of its office hours. *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734; *Bryant v. American Teleg. Co.* 1 Daly, 575.

And a telegraph company cannot make special regulations for the transmission and delivery of night messages by which it stipulates to relieve itself from liability for injuries flowing from its own negligence and omissions, and from those of its agents and operators, in and about the performance of its contract entered into with the sender of the message. *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452.

And the omission of a telegraph company to deliver a telegram to the person to whom it was directed, which was filed for transmission at about 7:25 P. M., and might and should have been delivered by 9 A. M. of the next day, is a breach of duty for which the company must be held responsible, though it was a night message containing a stipulation that the company should not be liable for errors or delays in the

*Wingate* (1894) 6 Tex. Civ. App. 394, 25 S. W. 439, so that we cannot regard *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, as stating the law of Texas at the present time. For the reasons stated, we are of opinion that the receipt of the telegram in Boston, without knowledge of the receiving operator or notice to the sender that the office at Pawtucket had closed for regular business, was not an act of negligence by the defendant.

It is also clear that the defendant company is not made liable by the fact that it was received by one not in its employ, and not its agent for that purpose, who was al-

lowed to remain in the office, and to use the wires of the company for other purposes.

The plaintiff also argues that, as the addressee of the message, he has a right of action different from that of a sender, because he is not a party to the contract, and hence not bound by its stipulations. However this may be, the plaintiff has no cause of action except that of the defendant's negligence. Having found that the defendant was not guilty of negligence, there is no ground for action in either case.

*Petition for new trial denied, and case remitted, with direction to enter judgment for the defendant.*

transmission or delivery or nondelivery of such messages, as it would be against public policy to permit such a stipulation to operate as an excuse for a breach of duty upon the part of the company. *Hibbard v. Western U. Teleg. Co.* 33 Wis. 568.

#### V. Damages.

General rules as to the amount of damages which may be recovered apply. The only question that seems to be peculiar to this subject is that as to whether or not exemplary or punitive damages may be recovered for delay in the delivery of a telegraphic message received or transmitted after office hours.

And the rule on this subject is that exemplary or punitive or vindictive damages cannot be allowed against a telegraph company for delay in the delivery of a telegram received after office hours, in the absence of allegation and proof that the company acted wantonly or oppressively, or with such malice as implied a spirit of mischief or criminal indifference to civil obligations. *Davis v. Western U. Teleg. Co.* 46 W. Va. 48, 32 S. E. 1026.

But the omission upon the part of a telegraph company to send a message designed to secure decent burial for the wife of the sender and to procure the presence of the parents of the deceased, which was received by the company on Sunday, and failure to deliver it until about 11 o'clock A. M. of the next day, render the telegraph company liable for whatever damage the proof may justify, over and above the sum the sender paid for the transmission of the message, and this in the way of exemplary damages if the negligence of the company in failing to deliver the message was wilful or gross; as a contract for the transmission of a message for such a purpose is one to do a work of necessity and charity, and is therefore valid. *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269.

#### VI. The rule under statutes imposing penalty for delay.

In at least two of the states, Indiana and Mississippi, there are statutes imposing upon a telegraph company a penalty for failure to receive and transmit despatches promptly and with impartiality and good faith upon the payment of the usual charges.

Such a statute, like all statutes imposing penalties, is to be strictly construed, and the penalty is not incurred unless there is a failure to receive and transmit during the usual office hours, both at the point where the message is received and that to which it is to be transmitted. *Western U. Teleg. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172.

And an answer in an action against a telegraph company for the statutory penalty for failing to transmit and deliver a telegram provided for by Ind. Rev. Stat. 1881, § 4176, stat-  
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ing that the message was promptly sent during office hours at the point where it was received for transmission, and that the delay in delivery arose from the fact that it did not reach the point to which it was sent until after the close of the usual office hours at the latter point, is good on demurrer. *Ibid.*

So, the statutory liability of a telegraph company for delay or failure in the delivery of a telegram, provided for by that statute, is predicated upon the failure to receive and transmit during office hours; and the company would not be held liable for not delivering a telegram arriving at its destination after office hours, merely because the agent, or messenger was present in the office at the time of its arrival. *Ibid.*

And a telegraph company will not be held, in an action for the statutory penalty for delay in the transmission of a message, to the duty of keeping its agents at all points informed concerning the office hours at all other points, so that the sender may be apprised of any probable delay at the place to which his despatch is to be transmitted. *Ibid.*

Under the Mississippi statute, however, it was held that failure to transmit and deliver a message which the telegraph operator accepted and agreed to send promptly, and took payment for, renders the telegraph company liable for the statutory penalty for such failure, and for the cost of the telegram, though it had no office at the place to which the telegram was directed, and kept no operator there. *Western U. Teleg. Co. v. Jones*, 69 Miss. 658, 13 So. 471.

And in *Western U. Teleg. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462, it was held that one who, desiring to send a telegram, went to the telegraph office at half past 7 o'clock P. M. with the telegram sought to be sent, and inquired of the agent if it could be sent to its destination immediately, and was informed that it could be, and paid the charges demanded by such agent, is entitled to recover the penalty of \$100 prescribed by the Indiana statute for failure to properly transmit and deliver telegrams, where the sending of the message was postponed until an hour the next morning when it was too late for it to be of any service, unless the telegraph company can show that, after receiving the message, the same could not be sent by reason of some derangement of the wires, or that the despatch was postponed in consequence of the transmission of intelligence of general public interest, or communications for and from officers of justice.

But in *Western U. Teleg. Co. v. Buskirk*, 107 Ind. 549, 8 N. E. 557, which was an action for the statutory penalty provided for by Ind. Rev. Stat. 1881, § 4176, for failure to transmit a telegraph message, it was said that if the company was at the time the message was delivered to it for transmission engaged in telegraphing for the public, or if the message was delivered at any other than usual office hours,



the failure to transmit it was not wrongful. But the decision turned upon other grounds.

#### VII. Conclusion.

Telegraph companies have the right to establish rules with reference to the time during which their offices shall be kept open for business, and cannot be held to be negligent, in the absence of special arrangement, if such rules are reasonable, for failing to forward or deliver messages sent to such offices outside of office hours until after the expiration of the period during which they remain closed to business. Whether or not these rules must be brought to the notice of the sender has given rise to some conflict of opinion, but the prevailing rule would seem that they need not, and the closing time of the different offices need not be uniform, and the operators of each office need not be kept informed as to the closing time of all the other offices.

A special contract to transmit immediately, however, though made after office hours, supercedes such rules, so that the company, in such case, will be liable for neglect to make prompt delivery; and the mere receipt and transmission after office hours, by an authorized agent, of a message showing its urgency on its face, is sufficient to constitute such a contract. But a receipt by an unauthorized person is not enough; nor is the mere receipt of the message at night, charging day rates.

But though a contract for immediate delivery had been made, the telegraph company would not be liable for delay until after the closing hours, if the object of the telegram could not have been accomplished, even though the delivery had been promptly made. And no recovery can be had if there was negligence on the part of the sender or receiver contributing to the injury. And in no case can there be a recovery for vindictive or punitive damages, unless the neglect was wanton or gross, or such as to indicate indifference to civil obligations. Contracts limiting liability for delay in the delivery of night messages, however, do not operate to relieve a telegraph company from liability for negligence in failing to deliver a telegram received after office hours for immediate delivery.

The rules under statutory provisions imposing upon telegraph companies penalties for delay in transmitting or delivering telegrams would seem to be about the same as those above set forth, the only difference being that the statute being one which imposes a penalty, is to be strictly construed; and it is held that no penalty can be incurred unless the receipt of the telegram at the sending office, its transmission, and its receipt at the office of destination were all within office hours. But even under such a statute breach of an agreement for immediate transmission to a particular place after office hours renders the telegraph company liable, though there is no office at that place.

F. H. B.

Joseph C. CHURCH, Overseer of the Poor,  
v.

Town of SOUTH KINGSTOWN.

(.....R. I.....)

**The constitutional provision for due process of law is violated by a statutory provision for charging a town with the main-**

**NOTE.**—For constitutionality of order for removal of pauper, made without judicial determination, where the question is raised by the pauper, see *Lovell v. Seebach* (Minn.) 11 L. R. A. 687.

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tenance of a pauper upon report of a commission the members of which are not required to take an oath, or authorized to administer oaths to witnesses appearing before them, or to render any judgment in proceedings brought before them, and whose report is acted upon by the court without independent investigation.

(February 2, 1901.)

**CERTIFICATION** by the Supreme Court for Washington County for the opinion of the Appellate Division of motions to quash and dismiss proceedings brought under a statute to charge the defendant town with liability for not properly caring for James E. R. Crandall, pauper. *Proceedings quashed.*

The facts are stated in the opinion.

**Mr. Thomas H. Peabody**, for complainant:

The 14th Amendment to the Federal Constitution, providing that no state shall "deprive any person of life, liberty, or property without due process of law," does not require a jury.

6 Am. & Eng. Enc. Law, 2d ed. p. 974, note 5.

It is undoubtedly competent to create new tribunals without common-law powers, and to authorize them to proceed without a jury.

*Cooley*, Const. Lim. 5th ed. p. 507; R. I. Const. art. 10, § 1.

From the settlement of the country all questions relative to the settlement or removal of paupers were heard and determined by the courts of general sessions of the peace, without the intervention of a jury.

*Shirley v. Lunenburg*, 11 Mass. 385. See *McGarty v. Deming*, 51 Conn. 422; *Mathewson v. Ham*, 21 R. I. 203, 42 Atl. 871; *Crandall v. James*, 6 R. I. 148; *Bishop v. Tripp*, 15 R. I. 469, 8 Atl. 692.

**Mr. F. C. Olney**, for respondent:

From the earliest time in the history of the colony and state, laws regarding the care of the poor are found in our statutes. In every instance the mode of enforcing the duty therein fixed is either by an action on the case or an action of debt. The old common-law action was *assumpsit*; and all these were triable by jury. In these cases there are three things to be adjudicated, viz.: Is the person a pauper? Has he a legal settlement in the town sought to be charged? Are the things furnished necessary? These are questions of fact to be determined; and under the method long practised in similar cases jury trial is the only mode in which these can be adjudicated.

11 Dane, Abr. 403; *Petersdorff*, Abr. title *Poor*.

"Due process of law" as applied to legal proceedings means a course of legal procedure according to those rules and principles which have been established by jurisprudence for the enforcement of private rights. To give any such proceeding any validity there must be a competent tribunal to pass on the subject-matter.

"Due process of law" secures to every citi-

zan, except in matters of taxation, a judicial trial before he can be deprived of life, liberty, or property.

*Clark v. Mitchell*, 64 Mo. 564; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 15, 25 Am. Dec. 677; *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Re Ziebold*, 23 Fed. 791; *Dartmouth College v. Woodward*, 4 Wheat. 579, 4 L. ed. 644; *Wright v. Cradlebaugh*, 3 Nev. 341; *Ames v. Port Huron Log Driving & Boom. Co.* 11 Mich. 139, 83 Am. Dec. 731; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 23, 1 Fed. 641; *People ex rel. Witherbee v. Essex County Supers.* 70 N. Y. 229; *Sedgwick v. Stat. & Const. L. p. 338*; *Cooley, Const. Lim. 2d ed. § 355*; 2 Kent, Com. 13, 340; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26; *Carr v. Brown*, 20 R. I. 215, 38 L. R. A. 294, 38 Atl. 9; *Merrill v. Bowler*, 20 R. I. 226, 38 Atl. 114.

Judicial functions or duties can be conferred only on courts and judicial officers.

*Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Conroe v. Bull*, 7 Wis. 408; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49.

Judicial power cannot be delegated.

*Cooley, Const. Lim. 117*; 3 Kent, Com. 12th ed. 457; *Hards v. Burton*, 79 Ill. 504; *Cohen v. Hoff*, 3 Brev. 500.

The commission contemplated by this statute is to exercise judicial functions.

**Tillinghast, J.**, delivered the opinion of the court:

This is a proceeding under §§ 18-20, R. I. Gen. Laws, chap. 79, and is now before the court on certain constitutional questions raised by the defendant. Said sections are as follows:

"Sec. 18. Whenever any pauper shall not be suitably cared for by the town to which he is chargeable, any person, upon first issuing five days' notice to any of the commissioners or overseers of the poor of the town of the situation of such pauper, and on continued neglect of the town, may complain in writing to the appellate division of the supreme court or to any justice thereof, or in vacation to any justice of the supreme court as provided in § 17 of chap. 221 and setting forth as nearly as may be the nature of the grievance complained of.

"Sec. 19. Said appellate division or such justice, as the case may be, shall, after ordering notice to the town of the pendency of such complaint, in its or his discretion, appoint a commission of not exceeding three persons, who shall visit the pauper or paupers concerning whom the complaint is made and, upon hearing the allegations and evidence of the parties, report to said court or justice, as soon as may be, whether or not said complaint is well founded.

"Sec. 20. Whenever it shall be made to appear to said court or justice, by the report of the commissioners, that said pauper is not suitably provided and cared for, said court or justice shall pass an order requiring the appropriate town authorities forth-

with to provide suitable accommodations and care for such pauper, either in the poor-house or in some private family, in the discretion of said court or justice, at the expense of the town, and to pay all expenses of the proceeding."

The travel of the case is as follows: A complaint was made by the plaintiff, under said § 18, to the effect that J. E. R. Crandall, of South Kingstown, was being improperly treated by the overseer of the poor of said town, in that he was not properly clothed and fed, and that he had been driven from the town farm in said town and left in a destitute condition, he being at the time physically incapacitated for work. The complaint shows that the overseer of the poor of said town was notified of Crandall's condition, and that he refused to furnish him any assistance. Citation was thereupon issued by a justice of this court, and, upon hearing, a commission was appointed, as provided in § 19. This commission, which was composed of three persons, namely, Nathan B. Lewis, Rowland R. Robinson, and John W. Saunders, subsequently made report to the court that they had visited said Crandall; that they held meetings at the town house in Charlestown, and also at the town house in South Kingstown, to hear the allegations and evidence adduced by the complainant and respondent, and to examine into the financial and physical condition of said Crandall; that at said hearings both parties were represented by counsel, and divers witnesses were sworn and testified as to his condition and his ability to support himself by manual labor; that the evidence showed that in 1898, while suffering from a dislocated shoulder, and being without money, he applied to the overseer of the poor of South Kingstown for permission to go to the town asylum temporarily until his shoulder should be well; that he remained at said asylum thereafter until the 18th day of June, 1900, at which time he was removed therefrom by the overseer of the poor of South Kingstown, and left to look out for himself; that the reasons given by the overseer for his removal were: First, that he considered said Crandall able to take care of himself and to earn his own living; second, that said Crandall refused to observe the rules adopted for the government of the asylum, going away to the neighboring villages and other places without permission, declaring that he would go and come when he pleased; and, third, that he made the other inmates of the asylum uneasy and discontented, by advising them that they need not work, and by refusing to work himself when requested so to do. The report sets forth that these reasons were strongly supported by the evidence of the keeper of the asylum, by a former keeper, and a former overseer of the poor, and were not materially denied by Crandall himself. The report further sets forth that in regard to the physical condition of said Crandall the evidence was inharmonious and conflicting. Then the finding of the commission was as follows: "(1) That said Crandall has a legal settlement in the town of South

Kingstown; (2) that he is without property or other means of support than his own labor, and may be fairly classed as a 'poor and indigent person;' (3) that his removal from said South Kingstown Asylum was partially justified by his own misconduct while an inmate thereof, although it may be well questioned whether it is not a case for proper discipline rather than removal; (4) that, the overseer of the poor of South Kingstown having neglected and refused for more than five days to provide for said Crandall after having received notice as aforesaid from the overseer of the poor of the town of Charlestown, the commissioners consider that there was neglect on the part of the town of South Kingstown to suitably care for said Crandall, and that said complaint is well founded." Appended to this report is a list of the fees and costs incurred by the plaintiff in connection with the trial, amounting to the sum of \$3.60, and also commissioners' fees of \$30 each, making \$90 in all, for their services and expenses. Upon the filing of the report the plaintiff moved that an order be entered requiring the defendant town to forthwith provide suitable accommodations and care for said Crandall, as provided in § 20 of said statute; and the defendant moved to quash and dismiss the entire proceeding because the statute under which it was brought is unconstitutional, in this: (1) That it is in violation of the constitutional right of trial by jury; (2) because it deprives the defendant of its property without due process of law; (3) because under said statute the commission appointed in said case exercised judicial functions, were sole judge of both law and fact, their conclusion being final, and that this is in contravention of art. 10, § 1, of the Constitution. Said motions were duly certified to this division, and are now before us for decision.

Whether the statute in question is in violation of the right of trial by jury, we do not deem it necessary to decide, although it is pertinent to remark that various questions relating to the settlement of paupers and the liability of towns for their support have been the subject of trial by jury in this state from time immemorial. But as we are of the opinion that the statute is clearly unconstitutional because it deprives the defendant of its property without due process of law, there is no occasion for us to consider any of the other constitutional questions presented by the record. "Due process of law," or "the law of the land," which terms are practically synonymous, means law in its regular course of administration through courts of justice. As recently said by this court in *Carr v. Brown*, 20 R. I. 218, 38 L. R. A. 295, 38 Atl. 10, it means "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." See also *Burke v. Mechanics' Sav. Bank*, 12 R. I. 516; *Reynolds v. Randall*, 12 R. I. 525, 526; *Greene v. Briggs*, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; *Wynehamer v. People*, 2 Park. Crim. 53 L. R. A.

Rep. 421. Under those rules there must be a court of competent jurisdiction to pass upon the subject-matter of the suit or proceeding. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. And, except in matters of taxation, there must be a judicial trial, in which those rights shall be adjudicated. *State v. Beswick*, 13 R. I. 218, 43 Am. Rep. 26. Applying those rules to the proceeding provided for by this statute, we find at once that it does not meet the requirements thereof. In the first place, the commission created by § 19, although it exercises some of the functions of a court, is not a court, for several reasons, viz.: (1) Its members are not required to take an oath; (2) it does not appear to be authorized to administer oaths to the witnesses who shall appear before it (see R. I. Gen. Laws, chap. 25, §§ 9-11; *Re Investigating Commission*, 16 R. I. 752, 11 Atl. 429); and (3) it is not authorized to render any judgment in the proceedings brought before it. Instead of rendering any judgment in a given case, the duty of the commission is to report to the court or justice which appointed it whether or not the complaint is well founded, and when this is done the power of the commission is exhausted. We think it is clear that a commission with such limited authority cannot be said to be a judicial tribunal. Indeed, it lacks every essential prerequisite of such a body. This being so as to said commission taken by itself, we are next to inquire whether when taken in connection with the court or justice to which it makes its report, and of the action which the court or justice is required to take thereon, it can be said to constitute a judicial tribunal. We do not think it can; for, even assuming that the court or justice should receive the report and pass the order provided for in § 20, the entire proceeding would not then include any judicial trial or finding; for it is apparent from the language used in said section that said court or justice is not called upon or even authorized to exercise any judicial function whatever in the premises, but simply to read the report, and, if it appears therefrom that the pauper in question is not suitably provided for, to make the order referred to. In other words, the court renders no judgment in the case, but merely performs the ministerial function of reading the report and ascertaining therefrom whether the commissioners find that the complaint is well founded or not. If they report that it is, the court, without any further proceeding, and without the right to exercise any judicial discretion in the matter, is bound to make the order called for by said § 20. All questions of law and fact which may arise during the hearing before the commission must be decided by it without any power of review in any other tribunal. and this notwithstanding it lacks all of the essential characteristics of a court. See, in this connection, *Atty. Gen. v. McDonald*, 3 Wis. 805; *Re Kindling*, 39 Wis. 58, 59. To call such a proceeding "due process of law" would be to violate all the fundamental principles upon which our judicial system is based. If the statute

had given to the defendant the right of exception to the rulings and findings of the commission, and had conferred upon the court or justice to which the report was made the power to review such rulings and findings, substantially as provided by the statute now in force relating to the rulings of district courts (R. I. Gen. Laws, chap. 250, § 12), we will not say that it might not have been enforceable; for then the proceeding would have been under the control of a legally constituted tribunal, and the order provided for by § 20 would not be made until the constitutional rights of the defendant to a judicial trial had been in some way secured to it. But no such right is given, and the result is that the finding of the commission, both as to law and fact, is final. The commission reports, and the court "shall pass an order." In this connection we deem it pertinent to say that for the general assembly to direct this court, or any justice thereof, to confirm the report of any commission or tribunal without first examining it and determining whether its findings are right or wrong, or whether the proceedings taken by the commission or tribunal in connection therewith are legal or illegal, is, as it seems to us, an unwarranted exercise of legislative authority. One of the very first principles underlying all judicial proceedings is that the court, in rendering its judgment or making its order, is to do so upon the law and the evidence presented, and that it is not bound to adopt the conclusions of any commission or inferior tribunal made in the case, unless upon examination it shall find that such conclusions are in accordance with the law and the evidence.

It is to be observed in the case at bar that at least three vital questions must be adjudicated by the commission, in support of the complaint made, before it can find against the defendant. These questions are: (1) Is the person concerning whom the complaint is made a pauper? (2) Has he a legal settlement in the town sought to be charged? And (3) has the defendant town failed in the discharge of its duty to suitably care for him? The decision of these questions may involve questions of law as well as of fact, and they are clearly such as call for a trial before some tribunal possessing ordinary judicial attributes. The decision or order is also far reaching in its effect, for under § 23 of the statute it is provided that "every town neglecting or refusing for the space of ten days to comply with any order made as aforesaid, shall be fined not less than \$50 nor more than \$300." It thus appears that the failure of the defendant town to comply with the order made upon such a proceeding renders it liable to indictment, and to be fined in the sum of \$300, thereby branding it as a criminal, and taking its property, notwithstanding it never has been legally adjudged to have committed any offense. See, in this connection, *State v. Hoyt*, 23 N. H. 355. Moreover, in a proceeding under said § 23, it may well be doubted whether the order made upon the report of the commission would not be *res*

*judicata*, and hence prevent the town from interposing any defense to an indictment found against it under said § 23.

We have examined the statutes of most of the other states relating to paupers, hoping that we might get some assistance in the determination of the questions presented from the decisions of other courts upon similar statutes, but we have been unable to find any statute like ours. It first appeared in the revision of 1857, and has remained substantially the same as there found in the subsequent revisions. And, so far as we are aware, the case before us is the first and only one which has ever been brought thereunder. We do not intend by what we have said to reflect in any way whatever upon the manner in which the commission tried and decided the questions before them. It was composed of men who were well fitted for the duties devolved upon them under the statute, and we have no doubt that those duties were intelligently and faithfully discharged. But, as they did not constitute a judicial tribunal, their finding was of no avail; and, as the finding was practically final, to enforce it would clearly be to deprive the defendant of its property without due process of law.

*We therefore decide that said statute is unconstitutional and void, and that the proceeding in question be, and the same is hereby, quashed.*

Thomas MURRAY, Exr., etc.,

v.

STATE MUTUAL LIFE ASSURANCE COMPANY.

(.....R. I.....)

**A policy containing a clause making it incontestable after two years from date of issue cannot be contested after that time, even for false and fraudulent answers in the application, since the clause merely provides a short statute of limitations within the limited period of which the fraud must be discovered, if at all.**

(March 25, 1901.)

**ON DEMURRER** by plaintiff to defendant's pleas to the complaint in an action brought to recover the amounts alleged to be due on certain life insurance policies. *Sustained.*

The facts are stated in the opinion.

*Messrs. Hugh J. Carroll and Irving Champlin* for plaintiff.

*Mr. Edward D. Bassett*, for defendant: Fraud vitiates all contracts.

Courts have, in some cases, given their as-

**NOTE.**—As to Incontestability of life insurance under provisions of the policy or of a statute, see, in this series, *Clement v. New York L. Ins. Co. (Tenn.)* 42 L. R. A. 247; *Patterson v. Natural Premium Mut. L. Ins. Co. (Wis.)* 42 L. R. A. 253; *Massachusetts Ben. Life Assn. v. Robinson (Ga.)* 42 L. R. A. 261, and *note*; *Welch v. Union Cent. L. Ins. Co. (Iowa)* 50 L. R. A. 774.

sent to a clause making policies incontestable, as similar in effect to statutes of limitation and repose, but such statutes never begin to run until the fraud is discovered.

*Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L. R. A. 247, 46 S. W. 561.

Making insurance policies an exception permits the stipulations of the parties to bind a court into a helpless compliance with the terms of the agreement, however gross the fraud.

Even if a contract of life insurance expressly provided for payment, if the assured in sound mind took his own life such a contract would be against public policy.

*Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *Holland v. Supreme Council, O. of O. F.* 54 N. J. L. 490, 25 Atl. 367.

**Tillinghast, J.**, delivered the opinion of the court:

This action is brought to recover the amounts claimed to be due on two life insurance policies issued on the same date. The plaintiff sets up in his declaration that the policies were, by their terms, incontestable after two years from the date of their issue, and that more than two years had elapsed between the date of their issue and the death of the insured. The defendant has filed several pleas in bar to the effect that certain false and fraudulent answers were made by the insured in the applications. The plaintiff has demurred to these pleas, and the case is before us on that demurrer. The "incontestable" clause in each of the policies reads as follows: "This policy shall be incontestable after two years from the date of its issue, provided the premiums are paid as agreed." The only question raised by the demurrer is whether the defendant can be permitted to set up the defense which it has interposed. Counsel for defendant insists that it can, on the broad and familiar ground that fraud vitiates all contracts; and that courts will always refuse to lend their aid in enforcing contracts tainted with fraud no matter what the agreements or stipulations of the parties may be. As to the correctness of the general proposition of law that fraud vitiates all contracts, there can be no doubt. "But, while fraud is obnoxious, and should be held to vitiate all contracts tainted thereby, courts should exercise care that fraud and imposition should not be successful in annulling a contract which provides, in effect, that, if cause be not found and charged within a reasonable and specific time, establishing the invalidity thereof, it should thereafter be treated as valid." The stipulation in the contract sued on is that "this policy shall be incontestable after two years from the date of its issue, provided the premiums are paid as agreed." This is not an absolute stipulation to waive all defenses and to condone fraud. "On the contrary," as said by the court in *Wright v. Mutual Ben. Life Assn.* 118 N. Y. 237, 6 L. R. A. 731, 23 N. E. 186, "it recognizes fraud and all other defenses, but it provides am-

ple time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose as, statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds." That the parties to a contract may stipulate for a shorter period of limitation than that provided by law as to all matters which might, in the absence of such stipulation, be set up in avoidance of the contract, would seem to be entirely reasonable; and such is the well-settled rule of law. Such an agreement is neither expressly nor impliedly prohibited by our statutes of limitations, and is consistent with the policy upon which statutes of limitations are founded. *Wilkinson v. First Nat. F. Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166. The practical, and evidently the intended, effect of the stipulation in question, was to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. It has repeatedly been held that an agreement limiting the time within which an action may be brought upon a policy of insurance is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. 2 May, Ins. 4th ed. § 478, and cases cited in note; 11 Am. & Eng. Enc. Law, pp. 349, 350. And, as said by the court in *Clement v. New York L. Ins. Co.* 101 Tenn. 28, 42 L. R. A. 247, 46 S. W. 561, "if this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts." That the company holds out the special provision in question as an inducement to people to insure, and also that it is very effectual in accomplishing that object, no one can, for a moment, doubt. It clearly gives everyone to understand that, no matter what mistakes may be made in the answers to the numerous questions propounded in the application, which answers are declared therein to be warranties, no advantage can be taken thereof by the company after the expiration of the time limited in the agreement; that his rights under the policy and the rights of those in whose favor it is drawn will then become absolute; and that the beneficiary, after the death of the insured, and perhaps long after the death of all those who knew the facts relating to the transaction, will not be forced into a lawsuit to determine whether the policy ever had any legal force or validity. The insertion of said clause in the policy of the company is virtually saying to the insured: "We will take two years in which to ascertain whether your representations are false or not, and whether you have been guilty of any fraud in obtaining the policy; and if, within that period, we cannot detect any such falsity or fraud, we will obligate ourselves to make no further inquiry, and to make no defense on account of them." To hold the company bound by such an undertaking is not to violate any rule of public

policy, but is simply to compel it to fulfil its plain and deliberately assumed obligation. In *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L. R. A. 261, 30 S. E. 918, the law is very satisfactorily stated in the following language: "Where parties enter into a contract which from its nature affords an opportunity to one party to perpetrate a fraud upon another, and it is stipulated therein that the party who is liable to be defrauded shall have a specified time in which to make inquiry as to the acts and conduct of the other party, he is on notice, by the very terms of the contract itself, that fraud may be involved in it, and the duty is upon him to commence at once an investigation into the acts, conduct, and representations of the other party; and if the time fixed is such that the information which would show that the fraud had been perpetrated could have been, by the exercise of ordinary diligence, obtained, then the parties are bound by their contract as to time, and after the lapse of that time fraud is no longer a defense. This does not violate in any way the well-settled principle that fraud is to be abhorred, vitiates everything it touches, and the person guilty of it is not to be countenanced in any way by the courts. While all this is true, it is equally well settled that a contract which has for its foundation a wilful fraud may become vitalized and enforceable by the negligence of the party who was the victim of the fraud." An examination of the reported cases bearing upon the question at issue, from that of *Wood v. Duarrie*, 11 Exch. 493, decided in 1856, which appears to be the earliest one, down to the present time, shows that there is a practical unanimity of opinion in the courts in support of the position taken by the plaintiff in this case; and, as the law as declared in said cases meets with our entire approval, there is no occasion for a further discussion of the question involved. See *Wright v. Mutual Ben. Life Asso.* 43 Hun, 61; *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L. R. A. 253, 75 N. W. 890; *Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L. R. A. 247, 46 S. W. 561; *Kline v. National Ben. Asso.* 111 Ind. 462, 11 N. E. 620; *Ma-*

*reck v. Mutual Reserve Fund Life Asso.* 62 Minn. 39, 64 N. W. 68. The cases of *Holland v. Supreme Council, O. of C. F.* 54 N. J. L. 490, 25 Atl. 387, and *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300, relied on by defendant's counsel, were decided on facts so materially different from those which are presented in the case before us, that they do not have much bearing thereon. In the former case the court found that the agreement under which it was claimed that the defendant was precluded from setting up the defense of fraud was not sufficiently clear and unambiguous to warrant the finding contended for by plaintiff, and hence the court was not called upon to decide as to the effect of such a clause as is presented in the case at bar, which is plain and unambiguous, and clearly means, and was undoubtedly intended to mean, that no defense whatever should be interposed by the company after two years, the premiums being paid according to contract during that time. In the latter case the court held that the suicide of the insured while in his sound mind avoided the policy, notwithstanding the stipulation therein that "after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed;" that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured should not be disputed; and that the party whose life was insured should always wear a suitable truss." The court said: "These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act, designed to bring about that event." What the effect of the suicide of the insured would be on a policy like those here involved, we are not called upon to decide.

*Demurrer sustained*, and case remanded for trial on the merits.

## IDAHO SUPREME COURT.

Enoch JOHNSON *et al.*, *Respts.*,  
v.  
OREGON SHORT LINE RAILROAD COM-  
PANY, *Appt.*

(.....Idaho.....)

\*1. The common-law rule that a man

\*Headnotes by QUARLES, J.

NOTE.—As to constitutionality of statute imposing absolute liability on railroad company for killing stock on track, see note to *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 25 L. R. A. 161; and *Birmingham Mineral R. Co. v. Parsons* (Ala.) 27 L. R. A. 268.

For earlier cases in this series as to liability of railroad company for injuries to animals on track because of lack of sufficient fence, see *St. Louis, I. M. & S. R. Co. v. Ferguson* (Ark.) 18 L. R. A. 110; *Moses v. Southern P. R. Co.* (Or.) 8 L. R. A. 135, and note; *Gallagher v. New York & N. E. R. Co.* (Conn.) 5 L. R. A. 737, and note; and *Kirk v. Norfolk & W. R. Co.* (W. Va.) 32 L. R. A. 416.

must confine his own domestic animals to his own inclosure has never obtained in this state.

2. The statute requiring railroad companies to fence their right of way where the same is contiguous to private property is a police regulation adopted to protect human life and property for the benefit of the general

public, and not for the sole benefit of adjoining or contiguous landowners.

3. A homestead entry, after it is entered, is private property, within the meaning of the statute requiring railroad companies to fence their track when their right of way "passes through or along, or abuts upon, or is contiguous to, private property."
4. In an action to recover damages for horses killed by a railroad company, it was clearly shown that, if the railway company had fenced its track as required by the statutes, plaintiffs' horses would not have wandered upon the railroad track and been injured. *Held*, that a verdict for plaintiffs was proper, and should not be disturbed.

(December 5, 1900.)

**A**PPEAL by defendant from a judgment of the District Court for Bannock County in favor of plaintiffs in an action brought to recover the value of certain horses alleged to have been wrongfully killed by defendant's train. *Affirmed*.

The facts are stated in the opinion.

*Messrs. F. L. Williams and F. S. Dietrich*, for appellant:

None of the land in question had passed to patent, or even to final proof, and the court properly instructed the jury that such land is not "private property."

*Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *Kneen v. Halin* (Idaho) 50 Pac. 14.

The railroad fence was intended, not only to keep stock out, but to fence the land—the ranch—in. It was to inclose the ranch so that stock would neither wander from it to the railroad, nor wander from the railroad to the ranch. It is a division,—a line fence,—with the whole burden upon the railroad.

*Enright v. San Francisco & S. J. R. Co.* 33 Cal. 230; *Jackson v. Rutland & B. R. Co.* 25 Vt. 150, 60 Am. Dec. 246; *Berry v. St. Louis, S. & L. R. R. Co.* 65 Mo. 172.

*Messrs. Winters & Guheen*, for respondents:

The railroad company has no standing whatever in its contention as to what constitutes private property.

The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract,—those which are executory, as well as those which are executed.

*King v. Gotz*, 70 Cal. 236, 11 Pac. 656; *Soulard v. United States*, 4 Pet. 511, 7 L. ed. 938.

A statute of a state imposing a duty on a railroad company to fence its track is an exercise of the police power, and is for the benefit of the public, and not the adjoining landowner only.

3 Elliott, Railroads, § 1182.

It is the railroad company that is under obligation to fence its track, and not the adjoining landowner; and if the company makes an agreement with the adjoining landowner to erect a fence, and the landowner fails to so erect it, the company is 53 L. R. A.

liable to third parties for any damages resulting from such failure.

Id. §§ 1186-1188, 1190.

Where the animals are wrongfully on the adjoining premises from which they escaped to the company's track, the company is liable.

Id. § 1190; *Missouri P. R. Co. v. Roads*, 33 Kan. 640, 7 Pac. 213; *Patrie v. Oregon Short-Line R. Co.* (Idaho) 56 Pac. 82; *Stimpson v. Union P. R. Co.* 9 Utah, 123, 33 Pac. 369.

*Quarles, J.*, delivered the opinion of the court:

This action was brought by the respondents to recover from the appellant the value of seven head of horses which the appellant's train of cars ran over, mangled, and killed. The case was tried to a jury, which found a general verdict in favor of the plaintiffs for damages in the sum of \$340. The jury also found the following special verdict:

We, the jury in the above-entitled cause, find as follows upon the special questions submitted to us:

Q. 1. Did the horses in question come upon defendant's track or right of way, last before they were struck, from government land, or from land, entry, or claim of some private person?

A. 1. Private or entered land.

Q. 2. If you answer that the horses last came upon defendant's track or right of way from the land, claim, or entry of a private person, state the name of such person.

A. 2. Gibson.

Q. 3. From which side of defendant's right of way did the horses last come upon the track before being killed?

A. 3. Northeast.

Q. 4. About where (describe where) the horses last came upon defendant's track?

A. 4. Gibson, and followed track to place of killing.

Q. 5. Were any of defendant's trainmen negligent or careless in handling or managing the train in question?

A. 5. No negligence.

Q. 6. If you answer number 5 "Yes," state which one of said trainmen.

A. 6. —.

Q. 7. If you answer number 5 "Yes," state in what respect or how such trainmen were careless or negligent.

A. 7. —.

J. B. Hicks, Foreman.

Appellant specifies three errors, to wit: (1) "The action of the court in overruling its demurrer;" (2) "the action of the court in denying its motion to strike;" (3) "the action of the court in overruling appellant's motion for a new trial." The first paragraph of the complaint alleges the corporate capacity of the appellant. The second paragraph is as follows: "That at all the times when, and at all the points where, the acts of negligence and damage herein-

after set out and complained of were committed and occurred, the track, right of way, and property of the defendant company passes and then passed through and along and abutted upon and was contiguous to private property, such that the defendant company then was and is required by law to make and maintain a good and sufficient fence on both sides of its track and property, but that said defendant has at all times failed, neglected, and refused to make or maintain a good or any fence on both or either side of its said track, property, or right of way, where the same passes and passed through said private property, except for a very short distance on the north side of its said track; that said defendant company never paid to the owners of said land, or to anyone, any price or reward for, or cost of, making or maintaining any such, or any fence; that the plaintiff Enoch Johnson then and there was, and now is, the owner of, and in the actual possession of, the north one half of the north one half of section 3 in township 9 south, of range 40 east of Boise meridian, in said Bannock county, the same being a part of the said private lands through which the said track, property, and right of way of said defendant company passes and did pass as aforesaid, and the horses of plaintiffs hereinafter more particularly described, were at the time, as hereinafter mentioned, grazing upon said land of said plaintiff Enoch Johnson by his consent and permission." The third paragraph of the complaint, after particularly describing said horses and alleging their value, then avers: "And which horses, and each of them, casually, on said date, and without any fault of the plaintiffs, or either of them, but by reason of the failure, neglect, and refusal of the defendant company to securely fence the said track and property as required by law, as hereinbefore set out, strayed in and upon the track and grounds occupied by the railroad of said defendant company, at a point near the center of the north half of section 3 in township 9 south, of range 40 east of Boise meridian, in said Bannock county, and where the said line of road of the said defendant company passes through the said lands of the plaintiff Enoch Johnson." The complaint then avers that the defendant, through its servants and agents, ran its locomotives and cars against and over the said horses, and there destroyed and killed said horses, to the damage of plaintiff in the sum of \$415. And for a second cause of action the plaintiffs, after reiterating the first three paragraphs of the complaint, further alleged as follows: "That the line of the track of said defendant company at the said point where the said horses came upon the said track is and was almost straight, there being no curves or cuts to obstruct the view of the enginemen and trainmen for several miles in either direction, and the said enginemen and trainmen could, with reasonable diligence, observe and see the said horses a sufficient distance from said train to have prevented striking

or injuring the same, but the said agents and servants of said defendant company negligently, carelessly and recklessly and without any reason therefor, so handled, managed, and ran said train, cars, and locomotives as to run and chase the said horses, and each of them, along and upon said track of defendant company for about 1 mile, and ahead of said train, and then ran said locomotives and cars against, upon, and over the said horses, and each of them, and killed and destroyed the said horses, and each of them, except the said brown mare, which was thereby maimed and bruised so as to absolutely ruin the said mare, and as a result thereof she is of no value, all of which is to the damage of plaintiffs in the sum of \$415."

To the complaint the appellant filed a demurrer upon the grounds that it did not state a cause of action; that neither the first nor second causes of action stated facts sufficient to constitute a cause of action; that paragraph 2 in the first cause of action is ambiguous and uncertain, in that it does not clearly show whether defendant's right of way passed through or abutted upon private property, or that it was the duty of the defendant to fence both sides of its right of way at the point or points in question,—and pointed out other particulars in which it claimed that said complaint was uncertain. This demurrer was overruled by the court, and this action of the court is the basis of appellant's first assignment of error. Upon this point it is argued by counsel for the appellant, with much force and earnestness, that the statutes requiring railroad companies to fence their right of way where it runs through or abuts upon private property is not a police regulation, but enacted for the benefit solely of abutting landowners. Counsel for appellant argues with much seriousness that the demurrer should have been sustained because the complaint did not state with certainty, at the points upon the appellant's right of way in question, whether the abutting lands were owned by private parties in fee simple, or whether said lands were public lands in the possession of, and inclosed by, private individuals. This contention of counsel appears to us to be purely technical. But, to understand the grounds of this contention, we must keep in mind the provisions of the statute relating to fencing of rights of way of railroad companies, viz., § 2679, Rev. Stat., which is as follows, to wit: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track or property, whenever the line of their road at any time passes through or along, or abuts upon, or is contiguous to, private property or inclosed land in the actual possession of another. Railroad corporations paying to the owner of the land through or along which their road is located, an agreed price, for making and maintaining such fence or paying the cost of such fence with the award of damages allowed for the right of way for such railroad are relieved and exonerat-



ed from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employees." We will consider the first and third assignments of error together, as both raise the question, not only of the sufficiency of the complaint, but as well that of the special verdict and the agreed evidence in the case.

We think the averments of the complaint, as well as the special verdict, make it clear that the point where said horses strayed upon appellant's track is upon private property, within the meaning and intent of said statute. It is equally clear, from the allegations of said complaint and from said special verdict, that at said point the appellant had not fenced its right of way as required by the statute. From the map made by the engineer of the appellant company, which was used upon the trial, and which is brought here by appellant by the consent of respondents, it appears that said horses came upon appellant's right of way at a point marked "11" on said map, which is upon the homestead entry of James A. Gibson, and which was entered October 22, 1898; that from this point said horses proceeded along the right of way of the appellant some 2 miles or more, in an easterly direction, near a cattle guard, where they were killed. It is argued on behalf of the appellant that private property does not include a homestead entry prior to patent. We cannot agree with this contention. The laws of this state recognize such entry as private property, and make the certificate of entry primary evidence that the holder thereof is the owner of the lands therein described. See Rev. Stat. § 5983. The words "private property" in § 2679, Rev. Stat., quoted above, have no reference to the title as between the private owner and the government of the United States, but relate solely to the railroad corporation and the private owner. As between the railroad company and the homestead entryman, the latter, after entry, is the owner, and the homestead entry is private property.

Nor can we agree with the contention of the appellant that said statute (Rev. Stat. § 2679), was enacted solely for the protection of private abutting owners of lands. We have carefully examined the authorities cited upon this point by the appellant, and do not regard them as establishing the rule contended for. It is true that the supreme court of California, in *Enright v. San Francisco & S. J. R. Co.* 33 Cal. 230, seems to hold to this rule. But the other authorities cited by appellant, to wit, *Pierce, Railroads*, 344; *Redf. Railways*, 373; *Hurd v. Rutland & B. R. Co.* 25 Vt. 116; *Tombs v. Rochester & S. R. Co.* 18 53 L. R. A.

Barb. 583,—do not sustain this contention. The decision in *Hurd v. Rutland & B. R. Co.* 25 Vt. 116, is based largely upon the old English common-law rule that every man must confine his own cattle to his own land,—a rule that has never obtained in this state. These authorities hold that where, by contract with the railroad, or for other reason, it has become the duty of the abutting or contiguous owner to fence, as between him and the railroad, his neglect in that respect does not relieve the railroad from its duty to fence when required by statute, but does relieve it from damages for stock of such abutting owner killed through his neglect to fence, or to make a sufficient fence. Mr. Pierce, in his work on *Railroads* (one of the authorities cited by counsel for appellant), at pages 414 and 415, says: "The statute may, however, be construed to be a general police regulation, designed, not merely for the benefit of adjoining owners, but for the protection of property in domestic animals generally, and for the safety of passengers who would be exposed to peril of collisions with cattle coming upon the track. When the statute is deemed to be of this character, the company is held to be under a general obligation to the public, and not under a limited obligation to adjoining landowners; and, when in default for not complying with the statute, it is liable for injuries to cattle unlawfully on the adjoining land, and coming therefrom upon its track. It is held chargeable with a breach of public duty, and liable to all persons suffering injury from its default." Mr. Redfield says: "The building of fences along the line of a railway track is, no doubt, in regard to the security of travel thereon, to be regarded as a matter of police, and a duty which the companies cannot shift upon others by contracts to maintain such fences." 1 *Redf. Railways*, 404. Mr. Elliott, in his work on *Railroads*, vol. 3, § 1182, says: "The running of railway trains and locomotives is necessarily attended with many dangers. This results from the great force used, the large bodies placed in motion, and the rapidity with which trains are run. The object of a railway being the carrying of passengers and freight from place to place, and as the performance of such an object is necessarily attended with many dangers, it follows that every practicable safeguard should be used and every precaution taken to prevent injury to persons or property carried. One of the sources of danger to railway trains is from collisions with animals on the track. Such danger has been recognized by nearly all our state legislatures, and their statutory enactments are for the purpose of reducing this danger as much as possible. Where any particular kind of property is inherently dangerous, or the operation of certain property is necessarily dangerous, it is within the power of the state, under what is called its police power, to prescribe such regulations in the use of such property as will render consequent danger small as possible. Since im-

posing upon railway companies the duty of fencing their tracks is for the sole purpose of lessening the danger in running trains, it is held that the enactment of such fencing statutes is a valid exercise of the police power, and it is upon that power that such statutes rest." And at § 1190 of the same work Mr. Elliott further says: "Statutes requiring railway companies to erect and maintain fences along their rights of way rest, as we have heretofore seen, upon the police power of the state. The exercise of the police power of the state by the enactment of police regulations is for the benefit of the whole public, as a general rule. And, since statutes imposing the duty to fence upon railway companies rest upon the police power, it follows that they are for the benefit of the general public, and to this effect is the almost unanimous weight of judicial authority. Such statutes are not intended merely for the protection of the adjoining landowners, unless it clearly and unmistakably appears from the language used that it was the intention of the legislature to protect only such owners. Where the animals are unlawfully on the adjoining premises, from which they escape to the company's track, there is some conflict in the authorities as to whether or not the company is liable to the owner of such animals. The weight of authority is to the effect that the company may be liable in such cases, and this we believe to be the correct rule, although there are some authorities which hold that the company is not liable. Where the animals are on the adjoining premises by consent of the owner of such premises, there is no question as to the liability of the company." Under the authorities, we do not feel authorized to hold that the statute requires fencing merely for the protection of adjoining landowners. When the statute was enacted, Idaho was a sparsely settled territory. Large sections were unsettled, with practically no cattle or stock running at large. The legislature evidently thought it would be too great a hardship to compel railway companies to fence their tracks through the territory, and only required it in the settled portions, where horses and cattle would be found in large numbers. When we passed into statehood through the provisions of the Constitution, we continued the statute in force. We cannot conclude that the legislature exercised this police power, which is so necessary for the protection of human life and private property, for private abutting or contiguous landowners only, but must conclude that it was enacted for the good of the general public.

We think that it sufficiently appears from the complaint in this action, from the special verdict of the jury, and from the agreed facts, and that part of the evidence which is in the record before us, that the loss sustained by the respondents was occasioned by the neglect of the appellant to fence its track at points where it is required by the statute to fence. It is true that the evidence fails to disclose whether the land at

the particular point where the horses were killed was private property, or public lands of the United States. Yet it clearly appears that the private lands of the respondents jointly, by their own fences and connecting fences of William Banks and James A. Gibson, inclosed all of the respondents' lands north of appellant's track, with the exception of the southerly side thereof, adjoining said railroad track, and that, if the appellant had fenced its track as required by said statute, respondents' lands, jointly with those of said Gibson, north of said track, would have been entirely inclosed; hence it is apparent that the loss of respondents resulted primarily from the neglect of the appellant to fence its track at points where it is required by law to fence. If the appellant had obeyed the police regulation adopted by the statute,—had fenced its track with a sufficient fence as required by the statute,—this loss would not have been sustained by the respondents. For these reasons, the verdict should not be disturbed.

The case at bar is very much like the case of *Patrie v. Oregon Short-Line R. Co.* decided by this court, and reported in 56 Pac. 82, and, we think, should be determined by the rules therein enunciated. In that case this court said: "The controlling contention is whether, under the facts, the defendant is liable in damages because of its failure to fence its track at the points where said horses were killed. The provisions of the statutes controlling this matter are found in § 2679, Rev. Stat. . . . Counsel for appellant contend that the legislative intent in the enactment of said § 2679 was to require railroad corporations only to fence their roads whenever, on either side, the same are contiguous to private property which is inclosed, or to land which is not actually owned by the one who is using it, or is in the actual possession thereof and has it inclosed. . . . If the provisions of said section require the defendant corporation to fence its track wherever and whenever it runs through land owned by private persons, the judgment must be sustained. The intent of the legislature in enacting said section must be arrived at from a literal construction, if such construction would not result in an absurdity or inconsistency. The statute declares that a railroad corporation must make and maintain a good and sufficient fence on either or both sides of their track or property, wherever the line of road passes through or along, or abuts upon, or is contiguous to, private property or inclosed land in the actual possession of another. The record shows that said track passes through private property, and we think the statute, as applied to the facts of this case, is too clear to require any construction. To hold that it does not require the defendant corporation to fence its track except when and where a private person may fence his land would be injecting language into said section that is not found there, and could not be put there by a fair implication and reasonable construction. We think the record fairly

shows that if the said track had been fenced where it passes through said sections 29, 20, and 17, said horses would not have been killed. It may be said that building a fence on the east side of said track, where it passes through said private property, would be no protection to stock; that stock could pass around the ends of such fence and get upon the track. The fencing of the railroad track, when required by statute, where it passes through private property, as in this case, implies the construction of sufficient cattle guards at the ends of such fences. 3 Elliott, Railroads, § 1198, and notes. We think the record shows that said horses would not have been killed where and when they were killed if the defendant had maintained such a fence as the law requires. It is contended by counsel for appellant that there is no proof that said horses came upon the track at a point where the company was required to fence. It is admitted that they were killed on the track at points where it was the duty to fence, and the presumption is, in the absence of proof, that the animals came upon the track at such points." In the case at bar, plain-

tiffs turned their horses upon their own lands, where, as it appears from the record, they would have remained if the appellant had fenced its track at points where it is required by law to fence. Hence we are constrained, under the authorities, to hold the appellant responsible in damages for the killing of said horses.

What we have said disposes of the first and third assignments of error. The second assignment of error relates to the action of the court in refusing to strike from the complaint certain matters. This assignment of error, however, is not discussed in appellant's brief, but what we have hereinbefore said virtually disposes of it. Some other questions are discussed in appellant's brief, which are outside of the assignments of error contained therein, and which we do not deem it necessary to consider.

For the foregoing reasons, *the judgment and the order denying a new trial are both affirmed.* Costs of appeal awarded to the respondents.

Huston, Ch. J., and Sullivan, J., concur.

## INDIANA SUPREME COURT.

Allison A. WALKER *et al.*, Appts.,

v.

Edward E. TOWLE.

(156 Ind. 689.)

1. The power to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, is impliedly granted to cities incorporated under Burns's Rev. Stat. 1894, §§ 3541, 3615, 3616 (Horner's Rev. Stat. 1897, §§ 3106, 3154, 3156), providing that the common council of a city may enact ordinances for the protection of life, health, and property.
2. An ordinance requiring all dogs to be securely muzzled, and declaring any dog found running at large without a muzzle to be a nuisance, and that it shall be the duty of the marshal and policemen to kill any such dog, is a valid exercise of the power to enact ordinances for the protection of life, health, and property, granted by Burns's Rev. Stat. 1894, §§ 3541, 3615, 3616 (Horner's Rev. Stat. 1897, §§ 3106, 3154, 3155).
3. No delegation of legislative power is made by an ordinance requiring that whenever the mayor may apprehend that there is danger of the existence or spread of hydrophobia within or near the city he shall issue a proclamation requiring all persons possessing dogs to confine or securely muzzle them for a period of not less than thirty nor more than ninety days, and providing a penalty of not less than \$3 nor more than \$25 for failure to obey the proclamation, since the

mayor acts merely as the agent of the common council, and the ordinance is enforceable according to its own provisions for the term fixed by the proclamation.

4. The killing, by police officers, of an unmuzzled dog when running at large upon the city streets, unattended by any person, at a time when there is danger of hydrophobia and an ordinance requires dogs to be muzzled or confined, is justified by Burns's Rev. Stat. 1894, § 2857, the substance of which is re-enacted in Burns's Supp. Rev. Stat. 1897, §§ 2864a-2864c (Acts 1897, p. 178).

(January 4, 1901.)

**A**PPREAL by defendants from a judgment of the Circuit Court for Porter County in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's dog. *Reversed.*

The facts are stated in the opinion.

Mr. Peter Crumacker for appellants.

Mr. A. F. Knotts, for appellee:

A thing not a nuisance *per se* cannot be declared such by the city.

*St. Louis v. Heitzberg Pkg. & Provision Co.* (Mo.) 64 Am. St. Rep. 516, and note.

Whatever power the common council of cities in this state may have is delegated power, and cannot be again delegated. Neither can the power be extended by intentment, or exercised in any other way than in the mode laid down by the statute (*St. Paul v. Laidler*, 2 Minn. 190, Gil. 159, 72 Am. Dec. 89; *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686), and it must be strictly construed.

*Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Dill. Mun. Corp.* §§ 60, 103, and notes; 15 Am. & Eng. Enc. Law, p. 1043.

NOTE.—For ordinance providing for the summary destruction of dogs found running at large, see Hagerstown v. Wiltmer (Md.) 39 L. R. A. 649, and cases in note on page 674.

For property right in dogs, see *Graham v. Smith* (Ga.) 40 L. R. A. 503, and note.

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*Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 722; *Robinson v. Franklin*, 1 Humph. 153, 34 Am. Dec. 627; *Tiedeman*, Mun. Corp. 148; *Minneapolis Gaslight Co. v. Minneapolis*, 36 Minn. 159, 30 N. W. 450; *Smith v. Morse*, 2 Cal. 524.

And when doubt arises as to the right to exercise a certain power it must be resolved against the corporation and in favor of the general public.

*Horr & B. Mun. Pol. Ord. §§ 17, 52*; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

*On petition for rehearing.*

It has never been the law, and ought not to be the law now or in the future, that the common council of a city in this state can pass any ordinance and have the same go into effect or become operative upon the mayor's apprehending the existence of some fact. To find the existence of a fact, and to apprehend its existence, are very different. The law applicable to the authority of Congress and to city councils is not the same.

*M'Culloch v. Maryland*, 4 Wheat. 421, 4 L. ed. 605; *Ruggles v. Collier*, 43 Mo. 353.

A dog running at large when there is danger of the spread of hydrophobia may be a nuisance, but a dog running at large when someone shall apprehend the spread of hydrophobia is not a nuisance, and cannot be declared to be such.

On delegation of powers, see 15 Am. & Eng. Enc. Law, p. 1042; *St. Louis v. Russell* (Mo.) 20 L. R. A. 721, and note; *Chicago v. Stratton* (Ill.) 53 Am. St. Rep. 325, with notes; *Eureka City v. Wilson* (Utah) 62 Am. St. Rep. 904, with notes; *Blair v. Waco*, 21 C. C. A. 517, 41 U. S. App. 496, 75 Fed. 800.

**Monks, J.**, delivered the opinion of the court:

Appellee brought this action against appellants to recover damages for killing appellee's dog. A hearing by jury resulted in a verdict, and, over a motion for a new trial, judgment in favor of appellee.

It is assigned for error that the court erred in sustaining appellee's demurrer to appellants' second paragraph of answer. Said second paragraph of answer is, in substance: That the city of Hammond, on a public street of which appellee's dog was killed, is and was a duly incorporated city in this state. That appellants, Mott and Walker, were, at the time Walker shot said dog, the mayor and marshal, respectively, of said city. That at the time of the killing of said dog there was in full force and effect an ordinance in said city as follows:

"Sec. 1. Be it ordained by the common council of the city of Hammond that whenever the mayor of said city may apprehend that there is danger of the existence or the spread of hydrophobia within or near said city, he shall issue a proclamation ordering and requiring all persons owning, possessing, or harboring, or having the care of any animal of the dog kind within the limits of said city, either to confine or muz-

zle such animal for a term not less than thirty nor more than ninety days ensuing the date of such proclamation, and upon the issuing of such proclamation it shall be the duty of all persons owning, possessing, or harboring, or having the care of any animal of the dog kind during the term mentioned in said proclamation to confine such animal securely within such house or structure or to some substantial fastening upon his or her premises, so as to prevent such animal from biting or being bitten by other animals, or to cause such animals to be securely and effectually muzzled; and no muzzle shall be deemed sufficient unless it be of such form and strength and so attached and fastened as will effectually prevent any such animal from biting. During the time mentioned in such proclamation any animal of the dog kind which may be found running at large within the city without being muzzled is hereby declared to be a nuisance. Any person failing to comply with the provisions of this section shall be fined in any sum not less than \$3 nor more than \$25.

"Sec. 2. Upon the issuing of any such proclamation by the mayor in pursuance of the preceding section of this ordinance, it shall be the duty of the marshal and policemen respectively, to kill any animal of the dog kind found running at large within the city during the time mentioned in such proclamation, without being securely muzzled as required by this ordinance. And it shall be lawful for any person or persons to kill any and all such unmuzzled dogs during such time."

It was further alleged in said paragraph that appellant Mott, acting as mayor of said city, apprehended that there was danger of the existence and spread of hydrophobia within and near said city, and did, then and there, on the 19th day of June, 1895, issue his proclamation, ordering all persons to confine or muzzle their dogs from June 21, 1895, to September 1, 1895, pursuant to the terms of said ordinance; that the dog when killed was within the city limits, and was found then and there running at large upon the public highways, and was not then and there muzzled, and was unprovided with any means whatsoever to prevent him from biting, and was then and there roaming about over the country unattended by its owner or any agent of its owner; that appellant Walker, being then and there the marshal of said city, and finding said dog under said circumstances, shot and killed said dog as he lawfully might. Copies of said ordinance and proclamation are set out in said paragraph. It is insisted by appellee that said ordinance is invalid, because the common council had no power to pass an ordinance providing for the killing of dogs.

Municipal corporations possess, and can only exercise, such powers as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. No incidental powers can be implied except such as are essential

to the accomplishment of the purposes of their creation and for their continued existence. *Pittsburgh, C. O. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 422, 35 L. R. A. 684, 45 N. E. 587, and authorities cited.

Under the provisions of Burns's Rev. Stat. 1894, §§ 3541, 3615, 3616 (Horner's Rev. Stat. 1897, §§ 3106, 3154, 3155), the common council of a city has the power to enact ordinances for the protection of life, health, and property. These are among the purposes and objects of the creation of such corporations. It is true that the power to declare what shall constitute a nuisance is not granted in express words, but the exercise of such power is essential to the powers granted in express words, and also essential to the objects and purposes of the creation of such municipal corporations. It is evident, therefore, that the cities incorporated under said act have the power to declare by ordinance what shall constitute a nuisance, and prevent, abate, and remove the same, and enact ordinances for the preservation of the public health, and to carry out and enforce all sanitary regulations. *Baumgartner v. Hasty*, 100 Ind. 579, 50 Am. Rep. 830. A city is not, however, authorized to declare that to be a nuisance which is not so in fact. *Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161, 45 N. E. 1054. It is settled in this state that municipal corporations having such powers may pass ordinances requiring owners of dogs to securely muzzle the same, or keep them upon their own premises, and directing the marshal to kill all dogs found running at large in violation of such ordinance, and that, if such officer kills a dog running at large in violation of such ordinance, no action can be sustained against him for such act. *Haller v. Sheridan*, 27 Ind. 494. See also 2 Tiedeman, State & Federal Control of Persons & Property, 839-847; Ingham, Animals, 141, 142; 18 Am. & Eng. Enc. Law, p. 755; *Lovell v. Gathright*, 97 Ind. 313; *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Tower v. Tower*, 18 Pick. 262; *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310; *Morey v. Brown*, 42 N. H. 373; *Cranston v. Augusta*, 61 Ga. 572; *Hagerstown v. Witmer*, 86 Md. 293, 39 L. R. A. 649, 37 Atl. 965; *Nehr v. State*, 35 Neb. 638, 17 L. R. A. 771, 53 N. W. 589; *Hubbard v. Preston*, 90 Mich. 221, 15 L. R. A. 249, and note, 51 N. W. 209; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689, 30 Pac. 760; *Leach v. Elwood*, 3 Ill. App. 453; *Julienne v. Jackson*, 69 Miss. 34, 10 So. 43.

It is next insisted that said ordinance is invalid because it attempts to delegate legislative powers to an executive or administrative officer.

In *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444, it was held that the provisions of the act of Congress of August 2, 1886, defining butter, and imposing a tax upon the manufacture, etc., of oleomargarine (24 Stat. at L. 209, chap. 840), that the marks, brands, and stamps required by the act to be placed on packages of oleomargarine, and the omission of which is made

by the act a criminal offense, shall be designated by the commissioner of internal revenue, involve no unconstitutional delegation of power to determine what shall be criminal, since the criminal offense is fully and completely defined by the act, and the designation of the marks, brands, and stamps is merely the discharge of administrative functions needful to the operation of the machinery of the law.

In *United States v. Ormsbee*, 74 Fed. 207, it was held that the act of Congress of August 8, 1894, granting to the Secretary of the Navy authority to prescribe such rules and regulations for the use, administration, and navigation of canals, etc., owned and operated by the United States, as in his judgment public necessity may require, was not invalid as a delegation of legislative power, and the rules made pursuant thereto have the force of law, so that persons violating the same, by drawing off water from a canal, are subject to criminal punishment under the provisions of said act. It was said by the court in said case (page 209): "The legislature cannot delegate its power to make the law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

In *People ex rel. Akin v. Kitley*, 171 Ill. 44, 41 L. R. A. 775, 49 N. E. 229, it was held that an act known as the "Civil Service Act," which empowered the civil service commissioners to promulgate rules, and provide that any person who should violate any of said rules should be punished by fine or by imprisonment in the county jail, did not delegate legislative powers to said commissioners by authorizing them to make such rules. The same doctrine was declared by this court in *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 56 N. E. 89, 92-94.

It was insisted in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, that § 3 of the tariff act of 1890, known as the reciprocity section of the McKinley tariff act, was unconstitutional, for the reason that it delegated legislative powers to the President. The part of said section against which said objection was urged is as follows (26 Stat. at L. 612):

"Sec. 3. That with a view to secure reciprocal trade with the countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production

of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely."

The court in that case, after quoting at length from the authorities sustaining such legislation, and citing a number of acts of Congress conferring like powers upon the President, said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of the government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed—that is, which he found to be—reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides produced by, or exported from, such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words 'he may deem,' in the third section, of course implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises, except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was sim-

ply in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department, to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself, as it left the hands of Congress, that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides from particular countries, should be suspended in a given contingency, and that in case of such suspensions certain duties should be imposed. 'The true distinction,' as Judge Ranney, speaking for the supreme court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Oincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 88. In *Moers v. Reading*, 21 Pa. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's Appeal*, 72 Pa. 491, 498, 13 Am. Rep. 716: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of the legislature.' What is said by the court in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, is applicable to the objections urged to said ordinance, and fully answers all the objections urged against the same by appellee, and is decisive of the case at bar.

Under the provisions of said ordinance, it was the duty of the mayor to ascertain whether or not there was danger of the existence or spread of hydrophobia in or near said city, and, if he found there was such danger, it was his imperative duty to issue the proclamation provided for, stating the time during which said ordinance would be enforceable, not less than thirty nor more than ninety days. When such proclamation was issued, it was in obedience to the command of the ordinance. In obeying the

command of said ordinance the mayor did not exercise legislative power. He only declared the period during which the same should be enforced, as provided by the law-making power of the city, and in so doing he was the agent of that body. Said ordinance was enforceable after said proclamation, for the term fixed, within the limits named, according to its own provisions. *State ex rel. Columbus v. Hauser*, 63 Ind. 155, and *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395, cited by appellee, are not, therefore, in conflict with what we decide in this case.

The allegations of said paragraph of answer were also sufficient to justify the killing of said dog, under Burns's Rev. Stat. 1894, § 2857 (Acts 1891, § 2, p. 453), the substance of which was re-enacted in 1897 (Acts 1897, p. 178, Burns's Supp. Rev. Stat. 1897, §§ 2864a-2864c).

It follows that the court erred in sustaining the demurrer to the second paragraph of appellants' answer.

*Judgment reversed*, with instructions to overrule the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

Rehearing denied.

Walter H. RANSEDEL *et al.*, Appts.,  
v.  
David MOORE *et al.*

(153 Ind. 393.)

1. A letter written by one who has taken the title to real estate under a parol promise to carry out the trusts which the owner desired to establish in regard to it, to one of the beneficiaries, which by means of reference to other papers sets out the terms of the trust, the beneficiaries, and the property subject to it, is sufficient to authorize the court to carry out the trust against the trustee's heirs, in case he dies without executing it.
2. An antenuptial agreement that at the death of the intended wife certain of her property shall go to her brothers is a sufficient consideration for a promise by the husband, when his wife is on her deathbed, to hold the property in trust for them, so that they may enforce the trust, although they are mere volunteers.
3. The vesting of the title to real property of a married woman in her husband at her death, because of his refusal to procure someone to draw her will, by which she wished to devise the land to third persons, is sufficient consideration for his promise to hold it in trust for them, so that they may enforce the promise.
4. The consideration for an express trust need not be set forth in the writings, but may be proved by parol.
5. When one person agrees with another, on a sufficient consideration, to do a thing for the benefit of a third person, such

NOTE.—As to sufficiency of letter to create express trust, see *Hamer v. Sidway* (N. Y.) 12 L. R. A. 463.  
53 L. R. A.

third person may enforce the agreement if it is not rescinded before acceptance.

6. Equity will establish and enforce the trust where an heir prevents the execution of a will by a promise to convey the property to a third person according to the intention of the ancestor.

(May 9, 1899.)

**A** PPEAL by plaintiffs from a judgment of the Circuit Court for Clinton County in favor of defendants in a suit to establish an alleged trust in certain real estate. *Reversed*.

The facts are stated in the opinion.

*Messrs. M. E. Clodfelter and Ralston & Keefe*, for appellants:

When title to property, real or personal, has been obtained under any circumstances, or set of circumstances, which renders it unconscientious for the holder of the legal title to retain and hold the beneficial interest, equity impresses a constructive trust on the property so acquired, in favor of anyone who is truly entitled to the beneficial interest.

*Towles v. Burton*, Rich. Eq. Cas. 146, 24 Am. Dec. 409; *Thomson v. White* (Pa.) 1 Am. Dec. 252, and notes; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53; *Dowd v. Tucker*, 41 Conn. 197.

It is not even necessary, to bring a case within this rule, that the transaction should be tainted with fraud, or that a fraudulent act should be shown to have been committed by the person who thus obtained the legal title; but it is sufficient to bring the case within the rule, if the transaction would result in a fraud upon the grantor.

*Talbott v. Barber*, 11 Ind. App. 8, 38 N. E. 487; *Wood v. Rabe*, 96 N. Y. 425, 48 Am. Rep. 640; *Ballard*, Real Prop. § 733.

The statute of frauds and trusts cannot be used to consummate a fraud.

*Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18.

If Willis E. Moore, occupying, as he did, the close relationship of confidence, of husband of Elizabeth A. Moore, had on the deathbed of his wife induced her to execute a deed of conveyance to him for the real estate in controversy, under a promise that he would reconvey to the brothers after her death, there can be no question that the real estate by implication of law would be impressed with a trust in favor of the brothers, and they would be the owners of the beneficial interest.

*Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; 4 *Ballard*, Real Prop. § 733.

Even where there is no active fraud, if a fraud would result, this is sufficient to take the case out of the statute of frauds, and admit parol proof of the transaction.

*Talbott v. Barber*, 11 Ind. App. 8, 38 N. E. 487; *Catalani v. Catalani*, 124 Ind. 58, 24 N. E. 375; *Towles v. Burton*, Rich. Eq. Cas. 146, 24 Am. Dec. 409.

The arrangement for the brothers to have

the land in controversy dates back prior to the marriage. This arrangement was acquiesced in by the husband during the life of the wife, and a sacred promise made by him to her, on her deathbed, that he, the husband, would receive the title to the land in trust for the use of the brothers. Under this state of facts, even considered apart from the written instrument and letters, the husband, Willis E. Moore, by construction of law, on the death of his wife became the trustee of the land in controversy for the use and benefit of the three brothers.

*Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 30 N. E. 318; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 20; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Catalani v. Catalani*, 124 Ind. 54, 24 N. E. 375; *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810.

The consideration was ample, and the agreement cannot be questioned upon that ground.

*Wolford v. Powers*, 85 Ind. 294; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106; *Puterbaugh v. Puterbaugh*, 131 Ind. 293, 15 L. R. A. 341, 30 N. E. 519; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244; *Hamer v. Sidway*, 124 N. Y. 538, 12 L. R. A. 463, 27 N. E. 256.

Willis E. Moore in his lifetime put a construction upon this contract, which construction neither he in life, nor his heirs after his death, can now dispute.

*Reissner v. Osley*, 80 Ind. 584; *Creamer v. Sirt*, 91 Ind. 366; *Bement v. Claybrook*, 5 Ind. App. 197, 31 N. E. 556.

It would be a gross fraud to permit the heirs of Willis E. Moore now, or Willis E. Moore in life, to repudiate his obligation in reference to the trust created.

*Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810; *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 30 N. E. 318; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 20.

The written agreement prepared by Willis E. Moore, having by its own provisions required him to manage, sell the farm, and make the division of the proceeds, made him the trustee of the money derived from mortgaging the land; and after sale of the land and receipt of proceeds, even in the absence of the written agreement, had the same kind of an agreement been made by parol, the statute of frauds would not prevent plaintiff from collecting the money from the administrator.

27 Am. & Eng. Enc. Law, p. 26; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244.

In case it should be argued that the written agreement is not properly signed by all the parties, it may be said that where a contract is signed by only one of the contracting parties, and is accepted by the other, and acts are done by him under it, the latter is bound.

27 Am. & Eng. Enc. Law, p. 52; *Midland R. Co. v. Fisher*, 125 Ind. 25, 8 L. R. A. 604, 24 N. E. 756; *Street v. Chapman*, 29 Ind. 53 L. R. A.

142; *Indianapolis Natural Gas Co. v. Kibbey*, 135 Ind. 357, 35 N. E. 392; *Fairbanks v. Meyers*, 98 Ind. 92; *Harlan v. Logansport Natural Gas Co.* 133 Ind. 323, 32 N. E. 930.

Willis E. Moore made himself trustee of the land by his agreement with his wife on her deathbed, by an imperfectly declared trust.

*Rankin v. Barcroft*, 114 Ill. 441, 3 N. E. 97; *Fast v. McPherson*, 98 Ill. 497.

Preventing Mrs. Elizabeth A. Moore from making a will would raise a constructive trust in Willis E. Moore.

Underhill, Trusts, p. 88; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 778; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 20; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810.

*Mr. Ira M. Sharp* for appellees.

**Monks**, Ch. J., delivered the opinion of the court:

This action was brought by appellants against appellees to enforce a trust in real estate. Appellees' demurrer for want of facts was sustained to the fourth and fifth paragraphs of the complaint, the other paragraphs having been withdrawn; and, appellants refusing to plead further, judgment was rendered against them. The action of the court in sustaining said demurrer is called in question by the assignment of errors. It is alleged in the fourth paragraph: That "Elizabeth A. Rodgers, the sister of appellants, was the owner of real estate in Clinton county, Indiana [describing it], of the value of more than \$6,000. That she also owned a large amount of real estate and personal property in Boone county, Indiana, of the value of more than \$10,000. That appellants, brothers of said Elizabeth A. Rodgers, were and are of very moderate circumstances, and that appellant Thomas B. Ransdel was and is very poor financially, and a cripple, having lost both an arm and a leg before the marriage of said Elizabeth Rodgers to said Willis E. Moore. That in 1876 said Elizabeth A. Rodgers became engaged to marry one Willis E. Moore, who was possessed of an estate of very limited value, to wit, of the value of not exceeding \$500; that the said Elizabeth A. Rodgers was a widow without children or their descendants living, and both her father and mother were dead, and she greatly desired that a large portion of her property should, at her death, vest in appellants, her brothers, and especially that they should become the owners in fee simple of her real estate in Clinton county, Indiana, which fact she made known to said Willis E. Moore before their marriage, and it was agreed between them that said Elizabeth A. should, either by will or deed, vest the title to said Clinton county real estate in her said brothers. That after said agreement said Elizabeth A. and the said Willis E. Moore were, in the year 1878, lawfully married. That no children were born of such marriage, but that said Willis E. Moore had three children by a previous marriage, to wit, these appellees.



That in 1894 said Elizabeth became sick, and recognized the fact that she could not recover from said sickness, and, knowing and believing that she would certainly die, requested her husband Willis E. Moore, to procure an attorney or other competent person to make and prepare a deed or will for her signature and execution, to carry out her purpose and wish to vest the title to said real estate in appellants. That she was of sound mind and memory, but physically unable to leave the house. That her husband promised her he would do so, but failed and neglected to secure a person to draft such deed or will as requested by her. That she constantly grew worse, and shortly afterwards, in 1894, knowing and believing that she would certainly die, she called her husband, Willis E. Moore, to her bedside, and as a last request asked him that some person competent to draft a deed or will be sent for, in order that she might carry out her desire of vesting the title to said real estate in appellants, but that said Willis E. Moore again postponed her, telling her that she was then unable to make a will, but to rely on him, and that he would see that her brothers, the appellants, should have said real estate, in case she should die without having made a will or conveyed the same to them. That he would, in that event, receive the title to said real estate in trust for them, and see that the title thereto was properly vested in them. That at the time of making said several requests the said Elizabeth A. Moore was of sound mind, able and competent to make and execute a deed or will,—a fact well known to said Willis E. Moore; but said Elizabeth A. Moore, having full faith and unbounded confidence in her said husband, acquiesced in said statement of her husband, and relied upon him, in case of her death, to receive and hold said real estate in trust for the use and benefit of appellants, and that they should become the owners thereof in fee simple. That said Elizabeth A. constantly grew worse, and a short time thereafter died, without making a will or deed, and without in any way conveying said real estate to appellants, except as hereinbefore set forth. That soon after her death the said Willis E. Moore, with the intention of carrying out the wishes of his deceased wife, and for the purpose of manifesting the trust imposed upon him by her, called the three brothers together for the purpose of vesting the title to said real estate in them, by executing to them a deed or deeds of conveyance. That appellant Walter H. Ransdel at that time resided in the state of Missouri, and the other brothers resided in different parts of the state of Indiana. That in response to said request said appellants went from their several homes to Thorntown, Indiana, and met the said Willis E. Moore, who thereupon proposed, in accordance with said trust, to execute a deed or deeds to appellants, conveying said real estate to them, but the said Walter H. Ransdel, being a resident of Missouri, expressed a desire that said Willis E. Moore, instead of executing a deed for said

real estate to appellants, should take the charge and management thereof, and continue to hold the same in trust for them, and as early as possible find a purchaser for and sell the same, and divide the proceeds among appellants. That appellants consented to said arrangement, and said Willis E. Moore, in order to evidence said trust and arrangement, prepared and delivered to appellants a written memorandum in the words and figures following, to wit: 'Know all men by these presents, that we, the undersigned names, being brothers of Elizabeth A. Moore, deceased, are willing, when the farm is sold, and all the money furnished each of them by Willis E. Moore, her surviving husband, and all other expenses are taken from the proceeds of the sale of the land, that the remainder be equally divided among the brothers, while Walter H. Ransdel agrees that Thomas and William shall each have \$100 of his interest when paid. The sale and division, together with the management of the land, to be done by said Willis E. Moore. This 11th day of April, 1894. Walter H. Ransdel. Thomas B. Ransdel. William M. Ransdel.' That the farm land referred to in said written memorandum was and is the real estate above described in Clinton county, Indiana, and the said Walter H., Thomas B., and William M. Ransdel mentioned in said written memorandum were and are the appellants. That immediately after the said written memorandum of agreement had been so prepared, executed, and delivered to the appellants, the said Willis E. Moore took possession of said real estate for the use and benefit of appellants, and proceeded to execute said trust, by trying to sell said real estate for the use of appellants. That soon after he took possession of said real estate as such trustee, not being able to find a purchaser therefor, he applied to the Union Trust Company of Indianapolis, Indiana, for a loan of \$1,500 on a portion of said real estate, for use and benefit of appellants, which sum he received in cash from said trust company about February 7, 1895, executing in his own name a mortgage to said trust company on said real estate. That on or about April 16, 1896, he applied to one Mary Douglass for a loan of \$500, which sum he also received in cash for the use and benefit of appellants, and executed to her a mortgage on a portion of said real estate to secure the same. Soon after he so received the money, he, as such trustee, made a partial distribution thereof among appellants. The exact amount paid to each appellant they are now unable to state. That after the death of Elizabeth A. Moore the said Willis E. Moore at all times admitted said trust. That soon after receiving the money from said trust company as aforesaid, he sent to appellant Walter H. Ransdel a check for \$300 thereof, and at the same time wrote a letter to him, in which he admitted said trust, which letter is in the words and figures following, to wit: 'Thorntown, Ind., March 4th, 1895. Mr. W. H. Ransdel, North Fork, Mo.—Dear Brother: I received your letter of the 1st, and was

glad that you and yours were well, as usual; and we have a man here now soliciting aid for the Nebraska sufferers, and it seems a deplorable affair, but we hope for better things in the next crop. Enclosed please find check for \$300. I failed to make a sale of the land on account of the condition of things, so I got some abstracters to look the matter up completely, and have got the title in shape that an Eastern company made a loan on it for \$1,500, and the agreement reads, after dividing the proceeds equally between you three brothers, you give Thomas and William each \$100 of your third and on this amount they each get \$600 and you \$300, and what you and they get in the future will be equally divided between you and them. I am going to make the farm and my other income pay the loan off as fast as possible, and if I meet with a chance to sell before it is all paid the purchaser will assume the balance as part payment. I have rented the farm for one half of everything raised on it, delivered at the railroad station there, and he fixes the fences, and cleans out the bushes off the farm. William has moved to Thorntown, and will farm 5 acres of land I have south of town with 1 acre where he lived. I built Thomas an addition to his house last summer for a kitchen, bedroom, and pantry, and moved the one they had back for a summer kitchen. George and Lizzie are still keeping house for me, and we are getting along fairly well, and will continue awhile yet at least. Write soon and often. Yours, truly, W. E. Moore.

On top of the second page of this letter is the following: 'Elizabeth wanted to help the boys some, and it seems it could not of come in a more needy time than now, and we hope what you can help them to now will be appreciated.' That the real estate and farm land referred to in said letter is the real estate in Clinton county, Indiana, above described. That the said William referred to in said letter is the appellant William M. Ransdel, and the said Thomas referred to in said letter is the appellant Thomas B. Ransdel. That afterwards, on September 24, 1896, said Willis E. Moore, while so holding said real estate in trust for appellants, died intestate in Boone county, Indiana. That he never at any time denied or renounced his trust, but at all times admitted the same. That appellees are the only children and heirs of said Willis E. Moore by a former marriage, and they each claim an interest in said real estate, adverse to the title and interest of appellants. That they have no interest or title whatever to said real estate or in the matter in controversy."

It is settled law that under Burns's Rev. Stat. 1894, § 3391 (Horner's Rev. Stat. 1897, § 2969), concerning trusts, that an express trust may be established by any writing or writings under the hand of the party to be charged, or of the party who is by law enabled to declare the same, provided the fiduciary relations and the terms and conditions of the trust are set forth with sufficient certainty. *Kintner v. Jones*, 122 Ind. 53 L. R. A.

148, 151, 23 N. E. 701; *Gaylord v. Lafayette*, 115 Ind. 423, 428, 17 N. E. 899, and cases cited; *Wright v. Moody*, 116 Ind. 175, 178, 179, 18 N. E. 608; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; 1 Perry, Tr. 4th ed. §§ 79-83; 2 Pom. Eq. Jur. §§ 1008, 1007; Lewin, Tr. 1st Am. ed. by Flint \*55, 57, and notes; 27 Am. & Eng. Enc. Law, pp. 46, 57, and notes; Browne, Stat. Fr. 5th ed. § 97. Letters, receipts, memoranda, or other writings signed by the trustee may be sufficient to establish a trust, but, if the terms of the trust are collected from several papers, it is not necessary that all of them should be signed, but it is sufficient if they are so referred to and connected with the paper that is signed that they may be identified and read as genuine papers, and a part of the transaction. *Gaylord v. Lafayette*, 115 Ind. 423, 17 N. E. 899; 1 Perry, Tr. 4th ed. § 83; Browne, Stat. Fr. 5th ed. §§ 97, 105, 350, 355; Lewin, Tr. 1st Am. ed. by Flint \*55, 57, and notes; *Denton v. Davies*, 18 Ves. Jr. 503; *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257; *Newkirk v. Place*, 47 N. J. Eq. 477, 21 Atl. 124; *Hamer v. Sidway*, 124 N. Y. 538, 12 L. R. A. 463, 27 N. E. 256; *McCandless v. Warner*, 26 W. Va. 754, 780; *Tawney v. Crowther*, 3 Bro. Ch. 161, 318; *Forster v. Hale*, 3 Ves. Jr. 696, 5 Ves. Jr. 308, 315; *Morton v. Tewart*, 2 Younge & C. Ch. Cas. 67. In such case oral evidence may be admitted to show the position, situation, and surroundings of the parties at the time, in order that the writings may be read and construed in the light of such facts, and the circumstances of the case. *Wills v. Ross*, 77 Ind. 1, 12, 13, 40 Am. Rep. 279, and cases cited; *Packard v. Putnam*, 57 N. H. 43, 51; *Mead v. Parker*, 115 Mass. 413, 20 Am. Rep. 110; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Dorr v. Clapp*, 160 Mass. 538, 542, 36 N. E. 474, and cases cited; *Uran v. Coates*, 109 Mass. 581, 584; *Oliver v. Hunting*, L. R. 44 Ch. Div. 205; *Newkirk v. Place*, 47 N. J. Eq. 477, 21 Atl. 124; *McCandless v. Warner*, 26 W. Va. 780; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; Beach, Modern Law of Contracts, § 581, and cases cited; 1 Greenl. Ev. §§ 286-288, 295a; 2 Wharton, Ev. §§ 940-943; Wood, Stat. Fr. §§ 395, 396, 440, and notes. This is upon the principle that the court may be placed, in regard to the surroundings and circumstances, as nearly as possible in the position of the parties whose writings are to be interpreted. The settlor, under the allegations of the fourth paragraph, was Elizabeth A. Moore, and the trustee was her husband. *Brooke's Appeal*, 109 Pa. 188; Browne, Stat. Fr. 5th ed. §§ 97, 98. She did not promise to create the trust; she created it. If a writing or writings setting forth the terms of the trust had been signed by her, this would have supplied the evidence to establish the trust. The trust was therefore created by her for the benefit of appellants, and, although not in writing, was not void, but could not be established except by the proper evidence in writing. *Hadden v. Johnson*, 7 Ind. 394, 397; *Mather*

v. *Scoles*, 35 Ind. 1, 3; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Wills v. Ross*, 77 Ind. 6, 7, 40 Am. Rep. 279; *Browne*, Stat. Fr. 5th ed. §§ 104, 115a. By her death the legal title vested in her husband, the trustee, and no further act or conveyance on her part was necessary to give effect to the trust. It was not executory, so far as she was concerned. All that was required to vest the legal title to the land in controversy in appellants was a deed by the trustee conveying the same to them. If Mrs. Moore had delivered to her husband the value of said trust in money, to be paid by him to appellants, as a gift from her, the legal title to said money would have vested in appellants when the trustee delivered the same to them. Nothing would be required of the court in either case, in an action to enforce such trusts, but to give effect to said trust, if the same could be established by the proper evidence; which, in the case of an express trust of real estate, the law requires to be in writing, signed by the proper person, and in the case of money parol evidence would be sufficient. *Browne*, Stat. Fr. 5th ed. § 82; 2 Story, Eq. Jur. § 912; 1 Perry, Tr. 4th ed. § 86. As there was no written declaration of said trust, and the terms thereof, signed by Mrs. Moore prior to the time the land vested in her husband by her death, by which said trust could be established, the same may be proved by any writing or writings which contain the necessary facts, signed by her husband, the trustee. *McCandless v. Warner*, 26 W. Va. 780; *McVay v. McVay*, 43 N. J. Eq. 47, 50, 51, 10 Atl. 178; *Tanner v. Skinner*, 11 Bush, 120; *McClellan v. McClellan*, 65 Me. 500, 506; *Moore v. Pickett*, 62 Ill. 158; 1 Perry, Tr. 4th ed. § 82, pp. 66, 67, § 83, p. 71; 2 Pom. Eq. Jur. § 1007; *Browne*, Stat. Fr. 5th ed. §§ 98, 101, 104; 27 Am. & Eng. Enc. Law, pp. 50, 51; *Hill, Trustees*, 4th Am. ed. 96, 100. The letter of March 4, 1895, signed by said Willis E. Moore, to one of the appellants, refers to the written memorandum of April 11, 1894, signed by appellants, and so connects the letter with said memorandum, the abstract of title, and the mortgage executed by him on said real estate that the same must be read as a part of the letter. Reading these writings together, in the light of the surroundings and circumstances alleged in said paragraph, the object and nature of the trust, the persons who are to take as *cestuis que trust*, and the proportions in which they take, as well as their connection with the subject-matter of the trust, are set forth with sufficient certainty. When such facts appear from the writings, the trust will be enforced. 1 Perry, Tr. 4th ed. § 83; *Tanner v. Skinner*, 11 Bush, 120.

It is insisted, however, by appellees that said writings do not show a perfectly created trust, for the reason that, to give effect to the trust, the real estate was to be sold by Moore, and the money divided among appellants; that it was therefore executory, and that the same was without consideration, and appellants were mere volunteers, 53 L. R. A.

and could not enforce the trust. It is true that when there is no sufficient consideration, and the trust is executory, a voluntary settlor cannot be compelled to complete the trust; but when there is a sufficient consideration he may be compelled to do so. 1 Perry, Tr. 4th ed. §§ 95-97; *Gaylord v. Lafayette*, 115 Ind. 428, 17 N. E. 899, and cases cited. It would seem that said trust was perfectly declared under the rule stated in *Gaylord v. Lafayette*, 115 Ind. 429, 17 N. E. 899, and, if so, it could be enforced by appellants even if there was no consideration, and they were mere volunteers. It is not necessary, however, to determine whether or not the express trust shown by said writings was perfectly created, or was only executory, for the reason that, if it be conceded that said trust is executory, so far as the trustee is concerned, it does not follow that the same is not supported by sufficient consideration. The antenuptial agreement between Elizabeth A. Moore and Willis E. Moore was that the real estate in Clinton county, described in the complaint, should at her death be the property of appellants, either by will or deed; in other words, that the said husband should in such case have no interest in said real estate on the death of his wife. This agreement, although not in writing, was supported by a valuable consideration,—that of marriage. 1 Perry, Tr. 4th ed. § 110, and cases cited; 6 Am. & Eng. Enc. Law, 2d ed. pp. 724, 726, and cases cited; *State ex rel. Harrison v. Osborn*, 143 Ind. 671, 677, 678, 42 N. E. 921, and cases cited; *Marmon v. White*, 151 Ind. 445, 51 N. E. 930. The agreement of said Moore, made with his wife on her deathbed, to hold said land in trust for appellants and convey the same to them, and his acts, after her death, in carrying out said agreement, were in compliance with, and to accomplish the purpose of, said antenuptial agreement. Said antenuptial agreement, although not in writing, being supported by a valuable consideration, constituted a sufficient consideration for the promise of said Moore to hold the real estate in controversy in trust for appellants. *Wills v. Ross*, 77 Ind. 1, 6-10, and cases cited, 40 Am. Rep. 279; *Brown v. Rawlings*, 72 Ind. 505, 510; *Thomas v. Merry*, 113 Ind. 83, 88, 15 N. E. 244; *Post v. Losey*, 111 Ind. 74, 88, 60 Am. Rep. 677, 12 N. E. 121. Moreover, the vesting of the title to said real estate in said Moore under the facts alleged was alone sufficient consideration to support his agreement to hold the same in trust for, and convey the same to, appellants. *Woodward v. Wilcox*, 27 Ind. 207, 214; *Miller v. Billingsly*, 41 Ind. 489; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Rep. 723; [*Ellison v. Ellison*, 6 Ves. Jr. 656] 1 White & T. Lead. Cas. in Eq. 4th Am. ed. 432, 433. It is not required that the consideration for an express trust be set forth in the writings; the consideration may be proven by oral testimony. *Wills v. Ross*, 77 Ind. 12, 40 Am. Rep. 279; *Arms v. Ashley*, 4 Pick. 71, 74. It is clear, therefore, that the facts alleged show that there was a sufficient consideration for the trust

shown by said writings. Since the decision of *Bird v. Lanus*, 7 Ind. 615, it has been the settled rule, under our Code, that when one person agrees with another, on a sufficient consideration, to do a thing for the benefit of a third person, such third person may enforce the same if not rescinded before acceptance. *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590, and cases cited; *Henderson v. McDonald*, 84 Ind. 149, and cases cited; *Gwaltney v. Wheeler*, 26 Ind. 415, 417. The rule at law was otherwise based upon the ground that there was no privity of contract between parties. *Farlow v. Kemp*, 7 Blackf. 544, 546. It is not necessary that any consideration move from the third party; it is enough if there is a sufficient consideration between the parties who make the agreement for the benefit of the third party. *Gwaltney v. Wheeler*, 26 Ind. 415, 417; *Miller v. Billingsly*, 41 Ind. 489; *Matthews v. Ritenour*, 31 Ind. 31, 33, 34. In *Miller v. Billingsly*, 41 Ind. 489, one Hays gave to Miller a draft on a firm in Cincinnati, Ohio, for \$1,000, and it was agreed between them that when Miller received the money he was to retain \$300 as a loan, and pay the remainder to three persons, one of whom was named Billingsly, fixing the amount to be paid to each person. Miller, a few days after receiving the money upon the draft, paid two of the persons the amounts agreed to be paid them. Miller failed and neglected to pay the money to Billingsly, the other person named, nor did he inform Billingsly that he had the money for him. The money sent to Billingsly was intended as a gift, and Miller was directed to say to Billingsly, when he delivered the money to him, that it was sent as a present to him by Hays. About two years after Miller received the money, and after the death of Hays, Billingsly was informed of the facts, and demanded the same of Miller, who refused to pay it. It was held that he could recover. The court (at p. 492) said: "In the above cases the person making the promise or receiving the money or article is treated as a trustee for the person for whose benefit the promise was made, or for whose use the money or article of value was received." As we have heretofore shown, there is no difference between the creation and enforcement of an express trust as to real and personal property, except that in case of real estate the same can only be established by a writing or writings signed by the proper person, while the trust as to personal property may be established by parol evidence. *Browne*, Stat. Fr. 5th ed. § 82; 2 Story, Eq. Jur. § 912; *Perry*, Tr. 4th ed. § 86.

Appellees insist that under the rule declared in *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608, appellants cannot maintain this action on the facts alleged in said fourth paragraph. What was said in that case must be limited to the facts there stated. In that case there was no writing signed by anyone manifesting any trust, and it was sought to establish the trust by oral testimony alone, when the same, even if it had been in writ-

ing, was merely executory on the part of the settlor. It is true it was said in that case (at p. 179, 116 Ind., and p. 610, 18 N. E.) that, "when two persons, for a valuable consideration, between themselves covenant to do some act for the benefit of a volunteer, the latter cannot enforce the performance of the covenant against the two, although each one might as against the other." All the cases cited to sustain this proposition, except the first, are predicated upon the old idea of want of privity of contract on the part of the person for whose benefit the act was to be done, which has long since been repudiated in this state. The first case cited—*Gaylord v. Lafayette*, 115 Ind. 428, 17 N. E. 899,—only decides that, when property has been conveyed upon a trust, the precise nature of which has been imperfectly declared, or when the donor has manifested his purpose ultimately, at a time and in a manner thereafter to be determined by himself or by the trustee, to bestow the property upon the person named, the trust is incomplete and executory, because it has not passed beyond the control of the donor, and courts of equity will not aid a volunteer to carry into effect an imperfect or an executory trust. It is sufficient to say, however, that this is not a case where two persons, for a valuable consideration between themselves, covenanted to do some act for the benefit of a third, and the latter is seeking to enforce the covenant against the two, but where one person orally promised another, for a sufficient consideration, to hold real estate, vested in the promisor by the promisee, in trust for third persons, who are seeking to enforce the trust upon writings subsequently signed by the person making the promise. Concerning such a case the American editors of *White and Tudors' Leading Cases in Equity* 4th ed. vol. 1, at page 432, say: "Where real estate is conveyed with an express or implied agreement that it shall be held for the use of a third person, equity will fasten a trust on the conscience of the grantee. The trust arises from the breach of confidence on the part of the grantee, and a declaration of it in writing, and under his hand, is evidence which he will not be permitted to contravene." [*Ellison v. Ellison*]. Whatever the rule may be elsewhere, in this state, under the Code, it has been held, since the decision of *Bird v. Lanus*, 7 Ind. 615, that such third persons may enforce any contracts made for their benefit upon a sufficient consideration, whether they paid or furnished any part thereof or not. It follows that appellants are entitled to enforce said trust against appellees, and that the court erred in sustaining the demurrer to said fourth paragraph.

The question presented by the demurrer to the fifth paragraph of complaint is whether or not a trust can be enforced against a man who, when his wife is on her deathbed, by his promise prevents a deed or will or other writing being made by her in favor of her brothers, and on the death of the wife the real estate intended for the brothers is inherited by said husband, he be-

ing her only heir at law. The rule established by the authorities is that when an heir or devisee in a will prevents the testator from providing for one for whom he would have provided but for the interference of the heir or devisee, such heir or devisee will be deemed a trustee, by operation of law, of the property, real or personal, received by him from the testator's estate, to the amount or extent that the defrauded party would have received had not the intention of the deceased been interfered with. This rule applies also when an heir prevents the making of a will or deed in favor of another, and thereby inherits the property that would otherwise have been given such other person. *Hill, Trustees*, 4th Am. ed. 234; 1 *Perry, Tr.* 4th ed. §§ 181, 182; 1 *Story, Eq. Jur.* §§ 256, 781; *Pom. Eq. Jur.* §§ 430, 919, § 1054, p. 1305, and cases cited in notes; 1 *Redf. Wills*, 4th ed. pp. 511, 512; *Gilpatrick v. Glidden*, 81 Me. 137, 2 L. R. A. 662, 16 Atl. 464. It is not essential to the creation of such a trust that the fraud be actual, it may be actual or constructive. *Meredith v. Meredith*, 150 Ind. 299, 301, 50 N. E. 29; *Giffen v. Taylor*, 139 Ind. 573, 578, 37 N. E. 392, and authorities cited; *Cox v. Arnsmann*, 76 Ind. 210, 212, 213; 2 Washb. Real Prop. 5th ed. 520. An actual fraudulent intention on the part of the heir or devisee is not necessary to the creation of a trust of this nature. The great weight of authority in England and in this country in such a case is that, after the death of the testator or intestate, equity will convert the devisee or heir into a trustee, whether when he gave his assent he intended fraud or not; the final refusal of himself if living, or, if dead, of his heirs or devisees, to execute such trust, having the effect to consummate the fraud. It was said in *Cox v. Arnsmann*, 76 Ind. 212: "And whenever property is acquired by fraud, or where, though originally acquired without fraud, it is against equity that it should be retained by the party, there equity raises a constructive trust, which is held not to be within the statute (2 Washb. Real Prop. p. 482, 5th ed. p. 520), and which may be proved by parol. . . . So, in the case of *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Rep. 52, it was held that, if a testator be induced to make a devise by the promise of the devisee that it should be applied for the benefit of another, equity, upon these facts, would create a constructive trust, which might be established by parol." As said in § 155, *Pom. Eq. Jur.*: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is, in good conscience, entitled to it, and who is considered in equity as the beneficial owner." This has been the doctrine of the English courts for more than two hundred years. In *Rookwood's Case* 53 L. R. A.

(1590) *Cro. Eliz.* pt. 1, p. 164, a father intended to charge his land with £4 per annum for each of his two youngest sons, but the eldest son promised that, if the father would not do so, he would pay the same to them. Said promise was enforced. In *Dutton v. Pool* (1678) *Vent.* 318, 2 *Lev.* 210, and *T. Jones*, 102, the father of plaintiff's wife being seised of a wood, which he intended to sell to raise portions for younger children, the defendant, being his heir, promised the father, in consideration of his forbearing to sell it, to pay plaintiff's wife £1,000. The promise was enforced. In *Chamberlaine v. Chamberlaine* (1678) *Freem. Ch.* 34, 2 *Eq. Cas. Abr.* 43, where a father, being about to change his will lest there might not be assets enough besides the lands settled upon his son to pay certain legacies to his daughter, was assured by the son that he would pay them in case of deficiency of assets if the will were not changed, the son was held to his promise; the chancellor remarking that it was the constant practice of the court to make such decrees on such promises. In 1684, where her son promised the executrix that if she would obtain a new will, naming him as executor, he would hold it in trust for her, which she did, the lord keeper decreed the trust, notwithstanding the statute of frauds. *Thynn v. Thynn*, 1 *Vern.* 296. And in 1689, where a copy holder, intending to leave the greater part of his estate to his godson, was persuaded by his wife, on her promise to carry out his intention, to give the whole to her, the court, notwithstanding the statute, enforced the trust. *Devenish v. Baines*, *Prec. in Ch.* 3. In *Oldham v. Litchfield* (1705) 2 *Vern.* 506, 2 *Eq. Cas. Abr.* 44, lands were charged with an annuity on proof that the testator was prevented from charging the lands therewith in his will by a promise of payment by the devisee. In 1747, a testatrix, having given a bond for £360 to the plaintiff, afterwards by a new will gave it to another, on the latter's promise to give it, at her decease, to the plaintiff; and the performance of the promise was decreed against her representatives against the interposition of the statute of frauds. Lord Chancellor Hardwicke said: "I know no case where the court has not decreed it, whether such an undertaking was before the will has been made or after. . . . This is not setting up anything in opposition to the will, but taking care that what has been undertaken shall have its effect. A will being ambulatory, if the testatrix has a conversation with a legatee and the legatee promises that, in consideration of the testator's disposition in favor of her she will do an act in favor of a third person, and the testatrix lets the will stand, it is very proper the person who undertook to do the act should perform, because, I must take it, if she had not so promised, the testatrix would have altered her will." *Drakeford v. Wilks*, 3 *Atk.* 539. In *Reech v. Kennegal* (1748) 1 *Ves. Sr.* 123, 1 *Ambl.* 67, and 1 *Wills.* 227, a residuary legatee, who satisfied the testator that he need not change his will in or-

der to give a nephew £100, for he himself would pay it, was held trustee, and a trust imposed on the residue of the assets. Lord Chancellor Hardwicke said: "The court will not suffer the statute to protect it [fraud] so as that anyone should run away with a benefit not intended. . . . There is a breach of promise, but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will." In 1796, instead of changing his will with the avowed intention of increasing the annuity to his wife, the testator told his residuary legatee he would "leave it to his generosity to pay it as he promised," and a trust was imposed on the residue of the assets. The master of the rolls said: "The word 'generosity' cannot be construed to take away the effect of a solemn desire of the testator, coupled with the promise of the defendant. The defendant had no intention of fraud at that time, for he desired the testator to make a new will. Leaving it to his generosity! It is leaving it to his honor and conscience. . . . The question is whether, by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him that, if he did not put it in his will, he would not do it: instead of that, he promised to do it, upon which the testator refused to make a new will." *Barrow v. Greenough*, 3 Ves. Jr. 153. In 1804, Lord Eldon said: "If a father devises to his youngest son, who promises, that if the estate is devised to him, he will pay £10,000 to the eldest son, this court would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000." *Stickland v. Aldridge*, 9 Ves. Jr. 518. The like result is brought about by the silent assent of the devisee to a like proposal of the testator. *Byrn v. Godfrey*, 4 Ves. Jr. 6, 10; *Paine v. Hall*, 18 Ves. Jr. 475. In *Podmore v. Gunning* (1836) 7 Sim. 644, 654, natural children of the testator alleged, in substance, in their bill, that the testator's wife promised, in consideration of his giving to her the whole estate, to leave it to them at her decease, upon the faith of which he did it. Shadwell, V. C., said: "My opinion is that, if it were perfectly clear that that state of circumstances took place which the plaintiffs represent upon their bill they would be entitled to the relief that they ask." In 1852 a residuary estate was devised with an oral intimation by the testator to the devisee that he had confidence that he would carry out the testator's intentions, which devisee well knew, and assented to, and the devisee was held a trustee. Lord Justice Turner, V. C., in discussing the question of the devisee's undertaking, said: "The true test to the answer to this question is this: Would the testator have left his property to the defendants if the defendants had stated, in answer to that question, that they would not carry out the disposition which the testator intended to effect through the medium

of the trust which he had declared in the instructions? No one can doubt that, if these defendants had stated that they would not carry out the intention of this testator, this disposition in their favor would not have been found in this will." *Russell v. Jackson*, 10 Hare, 204, 211. In the case of *Wallgrave v. Tebbis*, 2 Kay & J. 321, the joint devisees of real estate denied that they ever knew anything of the testator's intentions till after his decease; but an unsigned letter, written by him, expressed his confidence in their application of the devised property in accordance with his desires. Wood, V. C. (then Lord Hatherly), upheld the trust, saying: "Where a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to the faith of that promise or undertaking, it is, in effect, a case of trust; and in such a case the court will not allow the devisee to set up the statute of frauds,—or, rather, the statute of wills, by which the statute of frauds is now, in this respect, superseded; and for this reason: the devisee, by his conduct, has induced the testator to leave him the property; and, as Lord Justice Turner says in *Russell v. Jackson*, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute; but for the same end, namely prevention of fraud, it ingrafts the trust on the devise. . . . in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it." In 1867, in *Jones v. Badley*, L. R. 3 Eq. 635, 652, Lord Romilly, M. R., quoted the foregoing extract entire, and declared the law to be therein very "accurately and very comprehensively stated." On the appeal in 1868, Lord Cairns quoted the same extract, and pronounced it "the clear and felicitous exposition of the law." *Jones v. Badley*, L. R. 3 Ch. 362. And in 1878, in *Roubootham v. Dunnett*, L. R. 8 Ch. Div. 430, 436, Malins, V. C., made the same quotation, and pronounced the law "correctly laid down," but dismissed the bill for want of proof. In 1869, in *McCormick v. Grogan*, L. R. 4 H. L. 82, where, under the circumstances of the case, no trust was decreed, some of the language of Lord Westbury in his opinion, where he says the court "must see that personal fraud—a *malis animus*—is proved," etc., has sometimes been urged as requiring more than the authorities already cited; but when it is considered in connection with the facts before him, and with his own illustrations in the same opinion, that erroneous view vanishes. After discussing the principle of dealing with the statute of frauds and of wills, he said: "If an individual on his deathbed, or at any other time, is persuaded by his heir at law or his next of kin to abstain from making a will; or if the

same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer, which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents to it, either expressly or by any mode of action which the donee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir at law in the one case and the donee in the other will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud." In 1873 the same view was expressed by Sir James Bacon, V. C., in *Norris v. Frazer*, L. R. 15 Eq. 318, 330, where a husband and wife were devisees of the bulk of the property of a testator, who expressed a desire that an annuity of £300 should be provided for a third person which the wife testified she promised, and the husband assented to. The vice chancellor said: "He [Mr. Swanston] has read particularly from Lord Westbury's judgment in *McCormick v. Grogan* the conditions as to what the court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud. . . . If the statement made by Mrs. Frazer [one of the devisees] be true, then a more direct—a more distinct—personal fraud could not be committed than for Mrs. Frazer to refuse to perform that promise which she made to the testator on his deathbed." To the same general purport are *Riordan v. Banon*, Ir. Rep. 10 Eq. 469, and *Fleetwood's Case*, L. R. 15 Ch. Div. 594, 606, decided in 1880. In the latter case, Hall, V. C., after reviewing numerous cases, said: "The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise." In 1884, in *Boyes' Case*, L. R. 26 Ch. Div. 531, 535, in speaking of this class of cases, Kay, J., said: "In these cases the court has compelled discovery and performance of the promise, treating it as a trust binding on the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is presumed that, if it had not been for such promise, the testator would not have made or would have revoked the gift;" citing cases *supra*. The following English cases are to the same effect: *Sellack v. Harris* (1709) 2 Eq. Cas. Abr. 46, 5 Vin. Abr. p. 521, pl. 31; *Bulkley v. Wilford* (1834) 2 Clark & F. 177, 8 Bligh, 111; *Segrave v. Kirvan* (1828) Beatty, 157; *Nanney v. Williams* (1856) 22 Beav. 452.

The doctrine declared in England has been adopted and recognized in a number of states. In *Broune v. Broune*, 1 Harr. & J. 430, a father was induced to make no will, and let his property in Maryland descend to his eldest son, on the latter's promise to convey the same to his youngest brother, pro-

vided, as was expected, he himself succeeded to certain property in Scotland, which he did subsequently inherit; and the court enforced the promise. In *Owings' Case*, 1 Bland, Ch. 370, 388, 17 Am. Dec. 311, a brother declared his intention to devise his estate to his sister, whereupon his mother dissuaded him by promising that, if he would leave his estate to another sister, she (the mother) would provide for the first intended devisee. Upon the faith of this promise the brother made his will as requested by his mother. After the death of the testator, the mother acknowledged the promise. Held that the same could be enforced. Bland, C., after approving the English doctrine of enforcing oral promises in such cases, said: "But if the individual who has been so disappointed of an express provision by the deceased, could not have the promise enforced, his loss would be altogether irretrievable. The heir or person making it would be suffered to frustrate the intention of the deceased, to practise a fraud with perfect impunity; and the statute of frauds, if it were allowed to apply, would be made to operate for the protection instead of the prevention of fraud." In *McLellan v. McLean*, 2 Head, 684, a testator who had no children gave all his estate to his wife on her verbal promise to divide it by her will equally among his and her relatives. She disposed of the estate contrary to her promise. Held enforceable after her death. In *Dowd v. Tucker*, 41 Conn. 197, after a testatrix had given all of her estate to the defendant, she changed her mind, and wanted to so alter her will as to give plaintiff her half of certain real estate, whereupon defendant said to her: "You are weak, and need not execute a codicil in order to give plaintiff what you desire. Let the will stand, and I will deed this real estate to her. Held, that the defendant held said real estate in trust for the plaintiff, and was bound to convey the same to her. In *Brook v. Chappell*, 34 Wis. 405, a testator who had given his whole estate to James, believing himself in *extremis*, called James to his bedside, and in the presence of several witnesses told him there were several persons to whom he wished to give something, and directed James to write them down, naming them, which he thereupon did, and finally charged James to carry out these directions as faithfully as the ones contained in the will, to which request James made no response, or perhaps said "Well." Held, that James was chargeable with the payment of the sums mentioned. In *Gilpatrick v. Glidden*, 81 Me. 137, 2 L. R. A. 662, 16 Atl. 464, the husband expressed to his wife his intention of devising all his property to his own heirs, but was induced by her to sell and will it to her in form absolute, upon her assurance that she would use it during her natural life, and at her death would devise it to his heirs. The wife survived the husband, but died without performing her agreement; and it was held that the heirs of the husband could enforce the trust against the heirs of the wife. The court said: "Ap-

plying the principle to the facts in this case, Mr. G. was persuaded by his wife to change his intention of leaving his property to his own heirs, and to give it to her, by reason of her express promise to give the remainder to his heirs, which she omitted to do. His will was regularly probated, and the legal title passed thereby to her. His heirs claim that remainder because her conduct operated as a fraud upon her husband as well as upon them, and that by reason thereof she held the property impressed with a trust, and she made a trustee. Equity does not interfere with the will; that remains unchallenged. Nor does it assume to set aside the statute of frauds, which the defendants invoke. But, on account of her conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it, or its proceeds, for her own exclusive benefit, and imposes upon her conscience the obligation to hold all she did not use during her life for the benefit of her husband's heirs (plaintiffs), as the equitable owners thereof, and the additional obligation of perfecting their ownership by will or otherwise. But, as she has deceased, equity can reach the personal, or the proceeds of both real and personal, in the hands of her personal representatives, and any of the real estate in the hands of any subsequent holder, who is not a bona fide purchaser thereof, without notice holding it relieved of the trust. Pom. Eq. Jur. §§ 431, 1053. We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor; for the great current of English authority during the last two centuries, as well as that of this country, holds that if, either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect, and the latter, by any words or acts calculated to, and which he knows do, in fact, cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement,—equity will decree a trust, and convert the devisee into a trustee, whether when he gave his assent he intended a fraud or not,—the final refusal having the effect of consummating the fraud." In *Parker v. Urie*, 21 Pa. 305, Thomas Urie, on his deathbed, requested his father, his only heir at law, to pay Thomas D. Parker \$500 out of his estate, which the father promised to do. The father survived the son, but died without complying with his promise. Held, that the promise could be enforced against his estate. The court said: "Where one on his deathbed expresses a wish to his heir at law that certain persons, whom he names, shall receive of his estate specified articles and sums of money, as gifts from him, and the heir promises him that his request shall be fulfilled, the necessary im-

plication is that the promise is to be performed after the death of the promisee, and that the consideration is that the promisor shall succeed to his estate under the intestate laws. . . . If the promisee, relying on the promise, make no other provision by will, or otherwise, for the objects of his bounty, but die intestate, thus leaving his estate to fall into the hands of the heir, to an amount greater than the specific donations, the heir is bound, in conscience and in law, to fulfil the contract. If the promise be made by a father to a son, the moral obligation is strengthened, by reason of the existing relation, and the confidence which the one would naturally repose in the other." The English doctrine, declared in the foregoing cases has also been adopted and approved in the following cases: *Williams v. Fitch*, 18 N. Y. 546; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53; *Hoge v. Hoge*, 1 Watts, 163, 215, 216, 26 Am. Dec. 52, and note p. 60; *Jones v. McKee*, 3 Pa. St. 496, 45 Am. Dec. 661, and note p. 665; *McKee v. Jones*, 6 Pa. 425; *Church v. Ruland*, 64 Pa. 432; *Schultz's Appeal*, 80 Pa. 396; note to *Thomson v. White* (Pa.) 1 Am. Dec. 258; *Glass v. Hulbert*, 102 Mass. 24, 39, 40, 3 Am. Rep. 418; *Olliffe v. Wells*, 130 Mass. 221, 224, and cases cited; *Towles v. Burton*, Rich. Eq. Cas. 146, 24 Am. Dec. 409, and note pp. 413-417; *Williams v. Vreeland*, 29 N. J. Eq. 417, 32 N. J. Eq. 135, 734, and cases cited in note, pp. 135-145; *Ragsdale v. Ragsdale*, 68 Miss. 92, 11 L. R. A. 316, 8 So. 315, 24 Am. St. Rep. 256 and note, p. 257; *Curdy v. Berton*, 79 Cal. 420, 5 L. R. A. 189, 21 Pac. 858; note to *Gilpatrick v. Glidden* (Me.) 2 L. R. A. 662; note to *Dowd v. Tucker* (Conn.) 14 Am. L. Reg. N. S. 482; note to *Gore v. Clarke* (S. C.) 20 L. R. A. 465-471. See authorities cited in *Orth v. Orth*, 145 Ind. 197, 198, 32 L. R. A. 298, 42 N. E. 277, 44 N. E. 17. See also *Arnold v. Cord*, 16 Ind. 177; *Teague v. Fowler*, 56 Ind. 569; *Hunt v. Elliott*, 80 Ind. 258, 41 Am. Rep. 794; *Scheffermeyer v. Schaper*, 97 Ind. 70, 73; *Rector v. Shirk*, 92 Ind. 31, 33, 34; *Butt v. Butt*, 91 Ind. 305, 307-310; *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626; *Wood v. Rabe*, 96 N. Y. 426, 49 Am. Rep. 640; *Ryan v. Dow*, 34 N. Y. 307, 90 Am. Dec. 696; *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 30 N. E. 318, 33 Am. St. Rep. 229, and note, p. 233; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599; *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689; *Cutler v. Babcock*, 81 Wis. 195, 51 N. W. 420, 29 Am. St. Rep. 882, and note, p. 890; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738, and note, p. 740; *Morey v. Herrick*, 18 Pa. 128, 129; *Beegle v. Wentz*, 55 Pa. 373, 374, 93 Am. Dec. 762, and cases cited; *Faust v. Haas*, 73 Pa. 300, 301; *Boymton v. Housler*, 73 Pa. 457; *Wolford v. Herrington*, 74 Pa. 311, 313, 15 Am. Rep. 548; *Brown v. Doane* (Ga.) 11 L. R. A. 381, and note; *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143.

Appellees cite *Orth v. Orth*, 145 Ind. 184, 32 L. R. A. 298, 42 N. E. 277, 44 N. E. 17, as holding to the contrary. In that case it was held that the letter written by the tes-



tator to his wife did not, with reasonable certainty, define the character and limits of the trust, and that said letter was merely advisory, and left everything to her discretion, and that, therefore, her promise was merely to exercise her discretion, and that the letter and promise of the wife raised no trust. In that case the general doctrine heretofore stated was expressly recognized. The court (at p. 201, 145 Ind., p. 307, 32 L. R. A., and p. 282, 42 N. E.) said: "If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property." We

are not required to approve all the cases cited, nor all that is said in many of them, in order to sustain the fifth paragraph of complaint. It is sufficient that said paragraph is good under the rule stated as being established by the authorities.

*Judgment reversed*, with instructions to overrule the demurrer to the fourth and fifth paragraphs of complaint, with leave to file amended complaint or additional paragraphs of complaint if desired, and for further proceedings not inconsistent with this opinion.

Rehearing denied November 2, 1899.

## IOWA SUPREME COURT.

STATE of Iowa, *Appt.*,  
v.  
C. F. SANTEE.

(111 Iowa, 1.)

1. The legislature cannot confine the use of low-test petroleum products for illuminating purposes to apparatus of one maker, where there is other apparatus on the market designed for the same use, which is equally safe and secures the same results, and where the Constitution prohibits the grant to any citizen of privileges or immunities which upon the same terms shall not equally belong to all citizens.
2. A statutory limitation of the use of low-test petroleum products for illuminating purposes to the Welsbach hydrocarbon incandescent lamps cannot, to uphold the statute, be held to refer to lamps as a class operated on the principle of the one specified, where at the time of the passage of the statute at least one other lamp operated on that principle was on the market.
3. A statute prohibiting the use of the lighter products of petroleum for illuminating purposes, except when the gas is generated outside of the building, or when they are used in a particular lamp, is not wholly void because of the unconstitutionality of the latter exception.

(April 12, 1900.)

**NOTE.**—*Constitutionality of statute attempting to grant a monopoly.*

While the Federal Constitution, and many of the state Constitutions, contain no reference to monopolies *eo nomine*, there are undoubtedly in all of the state Constitutions general provisions that are sufficient to reach and condemn any monopoly in a natural right, except the monopoly created by a patent right or trademark, that cannot be justified as an exercise of the police power. Thus, the constitutional provision, under which the statute involved in *STATE v. SANTEE* was condemned, to the effect that the legislature shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens, seems to have been generally regarded as sufficient for such purpose, though it has often been unsuccessfully invoked because the particular statute assailed has been regarded as a legitimate exercise of the police power. 53 L. R. A.

**A**PPEAL by the state from a judgment of the District Court for Polk County in favor of defendant in a prosecution for using gasoline in illuminating a building without the use of a Welsbach hydrocarbon incandescent lamp in violation of the terms of a statute. *Reversed*.

The facts are stated in the opinion.

Mr. Milton Remley, Attorney General, for appellant:

The statute is plain and unequivocal, and is not susceptible of two meanings. It refers to the Welsbach hydrocarbon incandescent lamp.

It does not say "a Welsbach hydrocarbon incandescent lamp," as if Welsbach hydrocarbon incandescent lamp were the general term designating a variety of lamps constructed upon the principle invented by Welsbach.

Words and phrases shall be construed according to the context and the approved usage of the language.

Code, § 48, ¶ 2.

They are to be understood in their natural, plain, and ordinary signification.

*Equitable L. Ins. Co. v. Gleason*, 56 Iowa, 47, 8 N. W. 790.

Where the enacting clause is general in its language and objects, and a proviso is

Other, and even more general, constitutional provisions have been invoked, those, for instance, that declare that "all men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property, and the pursuit of happiness." (*State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, 51 N. W. 858, where it was held that an act limiting the banking business to corporations was in violation of such provision); or those that in effect deny the right of the legislature to deprive one of life, liberty, or property without due process of law (*Ibid.*). See also dissenting opinions in *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 894; or those that prohibit the denial of the equal protection of the laws (see dissenting opinions in the *Slaughter-House Cases*).

It is not deemed practicable to make an exhaustive collection of the cases on the broad question as to the power of the legislature to

afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall clearly within its terms.

*United States v. Dickson*, 15 Pet. 141, 10 L. ed. 689; *Ryan v. Carter*, 93 U. S. 83, 23 L. ed. 809; *Epps v. Epps*, 17 Ill. App. 196; *Sutherland*, Stat. Constr. § 222.

If one seeks to bring himself within a special exemption, he must show himself to be clearly within the terms and conditions of such exemption.

*McClain*, Crim. Law, § 90; *State v. Intoxicating Liquors*, 68 Me. 187; *Carson v. State*, 60 Ala. 235; *Woods v. State*, 36 Ark. 36, 38 Am. Rep. 22; *Com. v. Kimball*, 24 Pick. 366; *State v. Brown*, 31 Me. 522; *State v. Stapp*, 29 Iowa, 551; *State v. Curley*, 33 Iowa, 359; *State v. Miller*, 53 Iowa, 84, 4 N. W. 838.

The courts will not enlarge the language of the exception so as to take in other cases or acts which are similar, or which may come within the spirit of the exception, and thus exempt them from the operation of the general statute.

*Epps v. Epps*, 17 Ill. App. 196; *State v. Douglas*, 5 Sneed, 608.

*Mr. Thomas F. Stevenson*, for appellee:

If the exception is unconstitutional, that makes the entire prohibitory part of the section void.

If the legislature has the power to prohibit or regulate the use of petroleum as an illuminant, it has that power only because of its power to enact police regulations.

It must be presumed that the legislature will not intend to prevent the people of the state from using a useful article of merchandise that can be used with a proper degree of safety.

grant monopolies, since the cases that would be in point cover a wide range of subjects that can be treated more advantageously in separate notes wherein all the matters relating to each subject may be appropriately set forth. Some of these subjects have already been treated in previous notes.

For distinction between franchise and monopoly, see *note* to *Montgomery Gaslight Co. v. Montgomery* (Ala.) 4 L. R. A. 616; for regulation of markets and market houses see *note* to *Jacksonville v. Ledwith* (Fla.) 9 L. R. A. 69; for market regulations restricting sales, see *note* to *State v. Sarradat* (La.) 24 L. R. A. 584; for constitutionality of statutes prohibiting private banking, see *note* to *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 177; for statutes against ticket brokerage or scalping, see *note* to *Burdick v. People* (Ill.) 24 L. R. A. 152; for monopoly in contract for removal of garbage, see *note* to *Smiley v. MacDonald* (Neb.) 27 L. R. A. 540; for adoption of textbooks for public schools, see *note* to *Campana v. Calderhead* (Mont.) 38 L. R. A. 277; for municipal power over slaughter-houses as nuisances, see *note* to *Ex parte Lacey* (Cal.) 38 L. R. A. 646. The power of the legislature to create a governmental monopoly in the liquor traffic is discussed in *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410, 19 S. E. 458; *State ex rel. George v. Alken*, 42 S. C. 222, 26 L. R. A. 845, 20 S. E. 221; and *Plumb v. Christie*, 103 Ga. 686, 42 L. R. A. 181, 30 S. E. 53 L. R. A.

The legislature clearly intended that one using Welsbach lamps should not be punished.

If any part of the statute falls, the whole must go also.

*Keokuk v. Keokuk Northern Line Packet Co.* 45 Iowa, 196; *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988.

It is the duty of the court to give if possible, such construction to the statute as will render it not obnoxious to the Constitution.

*Henderson v. Robinson*, 76 Iowa, 607, 41 N. W. 371; *Owen v. Sioux City*, 91 Iowa, 190, 59 N. W. 3; *State v. Botkin*, 71 Iowa, 87, 60 Am. Rep. 780, 32 N. W. 185; *Fidelity Loan & T. Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039.

If there was a patent on the Welsbach lamp, would the defendant not be liable for appropriation of the rights of the patentee? Of this there would seem to be no question.

If, then, in a civil action, defendant would be found to be using a Welsbach lamp, certainly in a criminal action the same evidence would fail to show beyond a reasonable doubt that he was not using that same lamp.

*Burr v. Duryee*, 1 Wall. 531, 17 L. ed. 650; *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 568, 42 L. ed. 1147, 18 Sup. Ct. Rep. 707.

If one does a thing which the state says in a statute he may do, can the state itself turn and say to him, You have committed a crime, because others were not granted the same privilege, and you shall be punished?

The state passed this law, and can it be heard to say that a man who complies with it is a criminal?

759, involving the constitutionality of what are known as "Dispensary Acts."

It will be observed that the opinion in *STATE v. SANTEE* does not deny the right of the legislature to create a monopoly, if absolutely necessary to insure the safety of the people. The position here taken seems to suggest the true criterion for determining the validity or invalidity of statutes creating monopolies in common rights,—at least when tested by constitutional provisions that do not condemn monopolies *co nomine*, viz., the necessity, or otherwise, of the monopoly to the accomplishment of some legitimate police purpose. The justices who dissented in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394 (which involved the constitutionality of a statute granting to a corporation thereby created the exclusive privilege of conducting and carrying on the livestock landing and slaughter-house business within a large district including the city of New Orleans), while condemning the monopoly in question, did so, not because, in their view, a monopoly could not be valid under any circumstances, but because the creation of the monopoly in question was not necessary to the accomplishment of any purpose within the domain of the police power. In this connection, Justice Field, referring to the police power, said: "That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects,

*Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 350; *Hansford v. Barbours*, 3 A. K. Marsh. 515; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186, 65 N. W. 818; *Cooley*, Const. Lim. 4th ed. 312.

A law that would permit one to use a lamp of a certain description, and would make one using a lamp in all respects substantially the same a criminal, would discriminate unjustly and be in violation of the Constitution as against this defendant. And the violation of the Constitution acquits defendant, instead of convicting him as claimed.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

*Messrs. Cummins, Hewitt, & Wright*, also for appellee:

If the legislature passes an act ostensibly for the health of the public, and thereby takes away personal rights or private property, it is then for the courts to scrutinize the act and determine whether it relates to or is appropriate for the purpose for which it was passed.

*Black*, Const. Law, 325; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

There are, of necessity, limits beyond which the legislature cannot rightfully go, and it is the duty of the courts to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its power.

*Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273.

If the parts of the statute or ordinance are necessarily connected and dependent, the whole must fall with the void part.

*Keokuk v. Keokuk N. L. Packet Co.* 45 Iowa, 196, 95 U. S. 80, 24 L. ed. 377; *Dubuque v. Chicago*, D. & M. R. Co. 47 Iowa, 196; *Geebrick v. State*, 5 Iowa, 491; *Allen*

and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal." He took the view, however, that the monopolistic feature of the statute was unnecessary, and did not aid in the accomplishment of its ostensible purpose, the preservation of the public health. In this connection he said: "The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice." Again, he said in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929, that none of the judges who dissented in the *Slaughter-House Cases* contended that the 14th Amendment interfered in any respect with the police power of the state. The dissenting opinion of Mr. Justice Bradley in the *Slaughter-House Cases* clearly shows that he, also, condemned the monopoly because it was unnecessary and unsuitable to the accomplishment of any legitimate police purpose, and not upon the ground that a monopoly can never be justified, under any circumstances, as an exercise of the police power. The Minnesota supreme court, in *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781, in speaking of the extent of the police power, said: "It is, at least, settled that if it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right, as well as the 53 L. R. A.

*v. Louisiana*, 103 U. S. 80, 20 L. ed. 318; *Virginia Coupon Cases*, 114 U. S. 269, sub nom. *Poindeexter v. Greenhow*, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Prosser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763.

If the exception of the statute means, when used in any lamp constructed upon the same principles as the *Welsbach*, operating in the same manner, attaining the same results in the same way, and therefore equally safe, the whole statute can be preserved, the regulation of the subject can remain, and the safety and convenience of the people can be accomplished.

It is the duty of the court to give to a statute such construction, if possible, as will maintain it, rather than one which will render it unconstitutional.

*Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State ex rel. Weir v. Davis County Judge*, 2 Iowa, 280; *Duncombe v. Prindle*, 12 Iowa, 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796, 32 S. W. 5.

In determining the constitutionality of a statute, its scope and effect are as proper for consideration as its language.

*Pleasant Twp. v. Aina L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215.

In construing the terms of a statute, especially when the legislation is experimental, the court must take notice of the history of the legislation, and out of the different possible constructions must select the one that best comports with the genius of our institutions.

*Texas & P. R. Co. v. Interstate Commerce*

duty, of the court to pronounce it invalid as in excess of legislative power." The New York court of appeals, in discussing, in *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006, the question of the power of the legislature to create a monopoly in the sale of transportation tickets, said: "It is the duty of the courts to examine legislation complained of as in violation of the rights secured to the citizens by the Constitution for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment." If the necessity and reasonable adaptation of the monopoly to the accomplishment of a legitimate police purpose furnish the true criterion, it would seem that, before applying these general constitutional provisions to a statute creating a monopoly, it is necessary to determine, independently of them, whether or not the monopoly is necessary and reasonably adapted to the accomplishment of a legitimate police purpose. These constitutional provisions furnish no aid in answering that question. They only operate when, and after, the question has been answered in the negative. On this account especially the question of monopoly in any particular matter seems to be best treated as a separate question, since each subject-matter must, with reference to the operation of the police power, be necessarily considered as in some respects different from any other.

*Commission*, 162 U. S. 107, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

It must be presumed that the legislature intended to pass a valid law, and an admissible construction which supports the law must be given it.

*State v. Haring*, 55 N. J. L. 327, 26 Atl. 915.

A statute which will admit of two interpretations, one just and valid, the other unjust and invalid, will ordinarily receive the former. It is no part of the duty of the court to be astute in order to invalidate a statute; it will rather strive to so interpret it as to sustain its validity and give effect to the intention of the legislature.

*Ferguson v. Stamford*, 60 Conn. 432, 22 Atl. 782; *Black*, Interpretation of Laws, 94; *Duncombe v. Prindle*, 12 Iowa, 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Bailey v. Com.* 11 Bush, 688; *Owen v. Sioux City*, 91 Iowa, 190, 59 N. W. 3; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487.

In the present instance the intent of the legislature was to provide for the safety of the public, and not to grant an exclusive privilege to the Welsbach company. It being true that the lamp of the defendant was constructed upon the same principle, was the mechanical equivalent of the Welsbach, and equally safe, it follows that the legislature intended to allow the use of all lamps manufactured upon the Welsbach principle, and not to limit the use to the one particular lamp manufactured by the Welsbach company.

*United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740; *Noble v. State*, 1 G. Greene, 325.

Where the statute will operate unjustly, or absurd consequences will follow if a literal meaning is taken, the intention as gathered from the whole will prevail.

*Dilger v. Palmer*, 60 Iowa, 117, 10 N. W. 763, 14 N. W. 134; *Crabell v. Wapello Coal Co.* 68 Iowa, 751, 28 N. W. 56; *State ex rel. Missouri Mut. L. Ins. Co. v. King*, 44 Mo. 283; *Pennington v. Cox*, 2 Cranch, 33, 2 L. ed. 199; *Riddick v. Walsh*, 15 Mo. 529; *Schultz v. Pacific R. Co.* 36 Mo. 13; *Boicars v. Smith*, 111 Mo. 45, 16 L. R. A. 754, 20 S. W. 101; *Baker v. Payne*, 22 Or. 335, 29 Pac. 787; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243.

A statute intended to prohibit an offense will not be applied to an innocent and lawful act, and an act which is within the prohibitory words of the statute may still be shown to be lawful and innocent.

*State v. Botkin*, 71 Iowa, 87, 60 Am. Rep. 780, 32 N. W. 185.

In construing a statute the object to be reached must be considered.

*Parker v. Parker*, 102 Iowa, 500, 71 N. W. 421; *Fidelity Loan & T. Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039; *Long v. Schee*, 86 Iowa, 619, 53 N. W. 331; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98; *Wheelock v. Madison County*, 75 Iowa, 147, 39 N. W. 243.  
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*Deemer, J.*, delivered the opinion of the court:

The material part of the statute under which defendant was prosecuted reads as follows: If any person "sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than 105 degrees, standard Fahrenheit thermometer, closed test, . . . except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum . . . when used in the Welsbach hydrocarbon incandescent lamp, . . . he shall be punished," etc. Code, § 2508. It is agreed that the defendant used gasoline of a quality that would emit a combustible vapor at temperature of less than 105° for illuminating purposes, that the vapor was not generated in closed reservoirs outside the building, and that he did not use it in Welsbach hydrocarbon incandescent burners. It is further agreed that the lamp used by the defendant was constructed on the same principle as the Welsbach, though not manufactured by the same company, and that it was constructed substantially as the Welsbach; that results were reached in substantially the same way, and by the same means; and that the lamps were the mechanical equivalents of each other. The attorney general contends that the exception or proviso found in the statute as to the character of lamp to be used in the use of the lighter products of petroleum means that the lamp must be the identical one therein referred to, and that defendant is guilty, on the admitted facts. He further contends that even if the proviso be found to be unconstitutional, as creating a monopoly, still the defendant is guilty, under the conceded facts, for the reason that if the proviso be eliminated, then defendant had no right to use gasoline for illuminating purposes unless the vapor was generated outside the building that was to be lighted, while the defendant contends that the proviso in question relates, not to the Welsbach lamp, by name, but to any lamp constructed on the same general principles, and accomplishing the same general results with equal safety to the public; that, if this be not true, the proviso is unconstitutional, and, if unconstitutional, then the whole act must fall; and that there is no prohibition against the use of the lighter products of petroleum. If the proviso does refer to a specific lamp by name, it is undoubtedly unconstitutional, as obnoxious to article 1, § 6, of the Constitution of Iowa, which provides that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities, which upon the same terms shall not equally belong to all citizens." Special privileges and monopolies are always obnoxious, and discriminations against persons or classes still more so. The Constitution of the United States forbids legislation by the states, that shall abridge the privileges or immunities of the citizens of the United States, or deny to any

persons within their jurisdiction the equal protection of the laws. If the attorney general's contention as to the proper construction of the words found in the proviso under consideration be correct, it is clear that such provision violates both the Federal and state Constitutions. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273. Exclusive privileges and franchises may, no doubt, be granted when absolutely necessary to insure safety to the people, but not otherwise. See *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394. In this case the parties agreed, however, that there are other lamps, operated on the same general principles as the Welsbach, that are equally safe, and that secure the same results. This being true, the legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the state, but the legislature cannot under this guise create a monopoly. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Hudson v. Thorne*, 7 Paige, 261; *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 19. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not depend primarily on governmental permission. Defendant would have the right to use any lamp and kind of gas or vapor he chose for the purposes of lighting his building, in the absence of some police regulation imposed by the legislature; and a law that required him to use a particular lamp, when others equally safe were in the market, would be a violation of his constitutional rights, and would also give to the manufacturer special privileges over others producing equally meritorious lamps. If the state had bestowed a right on defendant, the prosecution of which was not a common, natural right, it might create a monopoly in this right; for with the abolition of the monopoly thus created would disappear all right to carry on the trade. *Coolcy, Torts*, 77, 278. These views in no manner conflict with the rules announced in *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602. There a mere privilege was granted by a city in the use of its streets. No question of natural right was involved. In the grant of special privileges, no doubt, a monopoly may be created without violating the constitutional inhibition. Do the words contained in the statute, "the Welsbach hydrocarbon incandescent lamp," mean that particular lamp, or a lamp constructed on the same general principles, and reaching results in substantially the same manner? In construing the language of an act that is claimed to be unconstitutional, that interpretation will be adopted, if possible, which will not render it obnoxious to the Constitution. But

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courts may not by construction import words into an act, nor make a statute read otherwise than as the legislature intended. In order to arrive at the legislative intent, a rule of construction is provided by Code, § 48, ¶ 2, which reads as follows: "Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning." In the stipulation of facts it is agreed that there is a lamp known to the trade as the "Welsbach Hydrocarbon Incandescent Lamp," and that there is another lamp, not so known, but constructed on the same general principles, and reaching results in substantially the same manner. Viewing the language of the statute in the light of these facts, it seems clear that the legislature had in mind the lamp known as the "Welsbach Hydrocarbon Incandescent," and not some other lamp, although operated on the same principle. To hold otherwise would be to import into the language used some other words, and give it an effect that was evidently not intended by the legislature. It does not appear how many lamps operated on the same general principles as the Welsbach were in existence when the act in question was passed, but the reasonable inference from the agreed statement of facts is that there was at least one other kind known to the trade. To avoid holding a statute unconstitutional, we are not warranted in forcing on its language a meaning which, upon a fair test, is repugnant to its terms. *French v. Teschemaker*, 24 Cal. 518; *Bigelow v. West Wisconsin R. Co.* 27 Wis. 478. It is only where the language of the act will bear two constructions that a court is justified in applying a rule that will sustain the act, rather than one which will defeat it. There is no room for interpretation when the language used is plain and admits of but one meaning. Consideration of the preceding acts of the legislature gives emphasis to the thought that the legislature, in passing the law in question, had reference to a particular lamp, and not to a principle. By § 8 of chapter 185 of the Acts of the 20th General Assembly, no person was permitted to use the lighter products of petroleum for illuminating purposes, "provided that nothing in this act should be so construed as to prevent the use of machines or generators constructed on the same principle of the Davy safety lamp." This same language was carried into the proposed revision of the laws recommended by the Code commission. See pages 507, 508, of their proposed Code. For some reason the legislature did not adopt their recommendation, but, on the contrary, struck out the principle of a certain appliance, and specifically named the lamp by which the lighter products of petroleum might be burned. This, in connection with the language used, is convincing evidence that a particular lamp, rather than a principle, was referred to. There is nothing to indicate a contrary

view, save the rule of construction to which we have heretofore referred. But this rule of construction cannot be used for the purpose of adding to or taking from the plainly expressed language of the legislature. *Lake County Comrs. v. Rollins*, 130 U. S. 662, 22 L. ed. 1060, 9 Sup. Ct. Rep. 651. None of the cases cited by appellee are in conflict with these rules. Without exception, those cases relate to acts that were susceptible of two constructions, one of which would render them obnoxious to the Constitution, and the other in harmony with it. The latter construction was, of course, adopted. Here there is no room for construction for the language is as clear as words can make it.

2. Finding, as we do, that the exception contained in the act is unconstitutional, the next inquiry is, What effect does this holding have on the act as a whole? Does it destroy it *in toto*, or does the act remain, with the exception expunged? "It has been held to be a sound construction of a statute that when one section thereof is void and others valid, yet, if it evidently appears that one section is a compensation or inducement for another, and the connection between them is such as to warrant the belief that the valid part would not have been passed alone, then the whole should be held void." *Dubugue v. Chicago, D. & M. R. Co.* 47 Iowa, 196; *Slauson v. Racine*, 13 Wis. 398. Again, it has been held that an act void in part is not necessarily void *in toto*. If sufficient remains to effect its object without the aid of the invalid portion, the latter only shall be rejected, and the former shall stand. *Warren v. Charlestown*, 2 Gray, 84; *Virginia Coupon Cases*, 114 U. S. 270, *sub nom. Poindester v. Greenhow*, 20 L. ed. 185, 5 Sup. Ct. Rep. 903, 902; *Santo v. State*, 2 Iowa, 205, 63 Am. Dec. 487; *Fisher v. McGirr*, 1 Gray, 1; *Huntington v. Worthen*, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469; *Com. v. Kimball*, 24 Pick. 361, 35 Am. Dec. 326; *Clark v. Ellis*, 2 Blackf. 10. Some courts have said that, if an unconstitutional clause of a statute cannot be rejected without affecting the intent of the legislature, the whole statute must fall (*Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988), and that the two parts must be capable of separation, so that each may be read by itself, else the unconstitutional part will carry with it that which is constitutional. With these rules in mind, we turn now to the statute in question, and find that the legislature, in virtue of its police power, prohibited the use of the lighter products of petroleum for illuminating purposes, for all purposes whatever. Two exceptions to the general rule of prohibition are contained in the act, one of which is clearly valid, and the other is invalid. Is it likely that it would have passed an act containing the general prohibition, independent of this invalid exception? The two parts of the act

are not dependent in terms. In other words, they may be separated, and the first may stand and is complete in itself without reference to the exception. If the act is to be declared null and void because of the unconstitutional provision, it must be on the theory that the act would not have passed, except as an entirety, and that the general purpose of the legislature will be defeated if the general prohibition be held valid and the exception invalid. To solve this question, we should look to the history of the enactment. The 14th General Assembly passed an act prohibiting the sale of the lighter products of petroleum, without exception. See chapter 47. This act was carried into the Code of 1873 as § 3901. The 17th General Assembly amended this law, and provided for the appointment of inspectors. See chapter 172. But the selling of the lighter products of petroleum was prohibited, without exception. The 20th General Assembly also amended the law by prohibiting the sale or use of the lighter products of petroleum for illuminating purposes, but introduced two exceptions,—one permitting the use of such products when generated outside of the building, in closed reservoirs, and the other permitting the use of machines or generators constructed on the principle of Davy's safety lamp. See chapter 185. So far, there is no right to use the lighter products of petroleum when the gas or vapor is generated in the building, unless, perhaps, it be in machines constructed on the principle of Davy's safety lamp. The exception now found in the statute that we hold contrary to the Constitution was introduced by the General Assembly that passed the Code. From this hasty review of the different statutes, it will be observed that the general intent of the legislature was to prohibit the use of the lighter products of petroleum for illuminating purposes. That it had the power to pass a law which would accomplish this end there can be no doubt, and that such was its intent is equally clear. It will not do to say, therefore, that it would not have passed the act in question without the exception. To so assume would be to say that it intended to permit the sale or use of the lighter products of petroleum without let or hindrance. Such construction would be contrary to the legislative policy existing for more than twenty-five years. The exceptions introduced into the acts from time to time do not indicate that the legislature intended to repeal pre-existing laws in the event these exceptions were held invalid. They were not the inducement that led to the passage of the general prohibitory laws. On the contrary, they were permissions granted under certain conditions, and, if these provisions proved ineffectual, there is no ground for saying that the whole act was destroyed. The general prohibition was capable of enforcement, without reference to the exception, and the invalidity of the exception does not destroy the entire act. As sustaining our conclusions, see *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Mar-*

*shall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Willard v. People*, 5 Ill. 461; *Bells v. People*, 5 Ill. 498; *Santo v. State*, 2 Iowa, 205, 63 Am. Dec. 487; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *State v. Amery*, 12 R. I. 64. We are of opinion that the defendant is not using the lamp authorized by law, and that if the exception found in the statute is unconstitutional, as it clearly is, still there is a general prohibition against the use of the lighter products of petroleum for illuminating purposes when the gas or vapor thereof is generated inside the buildings to be lighted, and that, under the agreed statement of facts, defendant was guilty. While we cannot, by reversing the case, in any manner affect the status of the defendant, yet, in order that a correct rule of law may be established, we are constrained to disagree with the learned trial judge, and his order directing a verdict is reversed.

Rehearing denied.

H. BODDY

v.

B. F. HENRY *et al.*, *Appts.*

(.....Iowa.....)

1. Liability for deceit on the part of a landowner making false representations as to the quantity in the tract, on which a purchaser relies to his injury, cannot be predicated upon the fact that, from the means of knowledge accessible to him, he might have known the statements to be false, if he in fact believed them to be true.
2. Officers of a corporation who are its principal stockholders, and who contemplate trading their stock for other property, owe no duty to the other party to the transaction, which will take their representations as to the corporate property out of the general rule that knowledge of falsity of representations is necessary to support an action of deceit for making them.
3. Stockholders of a corporation are not liable for false representations as to the amount of the corporate property by an agent of the corporation in charge of the property with power to sell it, upon which reliance is placed by a third person in purchasing the interest of such stockholders.
4. The right of one who trades property for corporate stock to recover for false representations by the owners of the stock as to the amount of the corporate property is not affected by the fact that some of the stock is taken in the names of various members of his family, and does not stand in his own name.
5. Any documents in possession of owners of corporate stock, which will charge them with knowledge of the amount of its property, will likewise charge one who is

NOTE.—As to liability for misrepresentations made in good faith, see *McKinnon v. Vollmar* (Wis.) 6 L. R. A. 121; *Davis v. Nuzum* (Wis.) 1 L. R. A. 774; *Cameron v. Mount* (Wis.) 22 L. R. A. 512; *Nash v. Minnesota Title Ins. & T. Co.* (Mass.) 28 L. R. A. 753; *Kountze v. Kennedy* (N. Y.) 29 L. R. A. 360; and *Gerner v. Mosher* (Neb.) 46 L. R. A. 244.

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about to purchase the stock with like knowledge if put into his possession.

6. The measure of damages for false representations by stockholders as to the amount of corporate property, made for the purpose of effecting a sale of the stock, and which are relied upon by the purchaser, is the difference between the actual value of the stock and what it would have been worth had the representations been true.
7. Upon the question of falsity of representations as to the quantity of land in a ranch owned by a corporation, made by stockholders for the purpose of effecting a sale of their stock, witnesses may testify as to whether or not the lands embraced by the ranch were all embraced by documents in possession of the parties, and as to whether land once owned had been sold by the corporation, but conclusions of witnesses as to the quantity of land in the ranch, based on the documents, are not admissible.
8. Testimony by the parties as to what they believed and intended and relied upon is admissible in an action for false representations in effecting a sale of property.
9. Stockholders of a corporation, charged with making false statements as to the corporate property in effecting a sale of their stock, may testify as to the circumstances of their acquisition of the stock, and their knowledge or want of knowledge of the company's business, and as to the custody of the documents from which true information might have been obtained.
10. Upon the measure of damages for making false representations as to the amount of property owned by a corporation, for the purpose of effecting a sale of its stock, opinion evidence is not admissible as to how much less the property is worth than it would have been worth if it had been as represented.

(April 12, 1901.)

**A**PPEAL by defendants from a judgment of the District Court for Franklin County in favor of plaintiff in an action brought to recover damages for injuries caused by alleged fraudulent representations made by defendants to effect an exchange of land. *Reversed.*

Statement by McClain, J.:

Plaintiff sues to recover damages sustained by reason of false and fraudulent representations made by the defendants as to the quantity of land contained in a certain ranch in Texas, which ranch constituted the principal property of a stock company, the shares of which were transferred by defendants to plaintiff in exchange for lands of plaintiff in Iowa. There was a verdict of \$5,000 for plaintiff, and from judgment rendered thereon defendants appeal.

*Messrs. W. A. Powell, E. P. Andrews, and W. D. Evans*, for appellants:

A vendee of a farm cannot recover for false representations as to the number of acres contained therein, where such representations did not purport to be based upon a survey, and he made examination of the land itself.

*Banks v. Lagerlof* (Iowa) 75 N. W. 661; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W.

614; *King v. Brown*, 54 Ind. 368; *Marvin v. Bennett*, 26 Wend. 169.

The vendee cannot charge his vendor with false and fraudulent representations in relation to the subject-matter of the sale, where he made investigation for himself, and was not prevented by the vendor from making such investigation.

8 Am. & Eng. Enc. Law, p. 643; 14 Am. & Eng. Enc. Law, 2d ed. pp. 114, 128; *Bell v. Byerson*, 11 Iowa, 233, 77 Am. Dec. 142; *Longshore v. Jack*, 30 Iowa, 298; *Lucas v. Crippen*, 76 Iowa, 507, 41 N. W. 205; *Merritt v. Dufur*, 99 Iowa, 211, 68 N. W. 553; *Armstrong v. Breen*, 101 Iowa, 9, 69 N. W. 1125; *Brown v. Zachary*, 102 Iowa, 433, 71 N. W. 413; *Ladner v. Balsley*, 103 Iowa, 675, 72 N. W. 787.

Where the purchaser undertakes investigation of his own, and the vendor does nothing to prove it from being as free as he chooses to make it, he cannot allege that the vendor made misrepresentations.

*Beatty v. Benton*, 135 U. S. 247, 34 L. ed. 124, 10 Sup. Ct. Rep. 747; *Grauel v. Wolfe*, 185 Pa. 83, 39 Atl. 819; *Wheeler v. Robinson*, 86 Hun, 561, 33 N. Y. Supp. 921; *Slaughter v. Gerson*, 13 Wall. 383, 20 L. ed. 628; *Farr v. Peterson*, 91 Wis. 182, 64 N. W. 863; *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179; *Wood v. Boynton*, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42; *Mosher v. Post*, 89 Wis. 602, 62 N. W. 516; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Bankson v. Lagerlof* (Iowa) 75 N. W. 661.

Means and opportunities of acquiring knowledge of fraudulent representations inducing the sale of land are equivalent to knowledge.

*Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Wren v. Monroe*, 95 Va. 369, 28 S. E. 588; *Lawson v. Floyd*, 124 U. S. 108, 31 L. ed. 347, 8 Sup. Ct. Rep. 409.

A vendee cannot recover for false representations, where it is shown that he received greater value than he paid.

*Hale v. Philbrick*, 47 Iowa, 217.

The plaintiff must show, not only that the representations were false, but that the defendants knew them to be false when they made them.

*Holmes v. Clark*, 10 Iowa, 423; *Avery v. Chapman*, 62 Iowa, 144, 17 N. W. 454; *Courtney v. Carr*, 11 Iowa, 295; *Gates v. Reynolds*, 13 Iowa, 1; *Hallam v. Todhunter*, 24 Iowa, 166; *McKown v. Furgason*, 47 Iowa, 636; *Allison v. Jack*, 76 Iowa, 208, 40 N. W. 811; *Sylvester v. Henrich*, 93 Iowa, 489, 61 N. W. 942.

*Messrs. F. M. Williams and Albrook & Lundy*, for appellee:

The parties were on unequal footing; defendants had full knowledge of what the records and papers showed, while plaintiff did not get that knowledge until some time after the exchange, and then only when he got his first tax receipt, when he found the ranch far short of what defendants represented it to contain.

If parties are on an unequal footing it is 53 L. R. A.

a question of fact whether fraud or deceit has been practised.

8 Am. & Eng. Enc. Law, p. 644; *Schwoenk v. Naylor*, 102 N. Y. 683, 7 N. E. 788; *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. 702.

An allegation in a complaint that the defendant "falsely and fraudulently represented" is a sufficient statement of *scienter*.

*Thomas v. Beebe*, 25 N. Y. 244; *Miller v. Barber*, 66 N. Y. 584; *Stevens v. New York*, 84 N. Y. 306; *Bank of Montreal v. Thayer*, 2 McCrary, 1, 7 Fed. 622; *Lingsdale v. Gorton*, 51 Ind. 99; *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382.

Representations, if false and made to deceive and mislead, are sufficiently fraudulent.

*Mills v. Collins*, 67 Iowa, 167, 25 N. W. 109; *Cotes v. Davenport*, 9 Iowa, 238.

If one of the parties to a contract refers the other to a third person for information as to the subject-matter, he makes such person his agent, and is responsible for his statements as if made by himself.

*Withersaw v. Riddle*, 121 Ill. 140, 13 N. E. 545; *State v. Cadwell*, 79 Iowa, 435, 44 N. W. 700.

There are circumstances under which knowledge of falsity or *scienter* will be inferred. Such is the case where officers of a corporation misrepresent the assets to subscribers or purchasers of stocks. If they assert that of their own knowledge the assets are so and so, with record books and papers at their command to so ascertain, then they are bound to know what said record books and papers show, and will be bound by the fact; and where said papers show the statement to be false, said officers will be presumed to know that it is false, or, in other words, it will be presumed, and that is what the instructions say, and it is the law.

*Hubbard v. Weare*, 79 Iowa, 686, 44 N. W. 915; *Cook, Stock & Stockholders*, 1st ed. §§ 147, 148.

The true measure of damages is the difference between what the property as received was worth and what it would have been worth if as represented.

*Gates v. Reynolds*, 13 Iowa, 1; *Moberly v. Alexander*, 19 Iowa, 162; *White v. Smith*, 54 Iowa, 233, 6 N. W. 284.

The liability of the vendor arises from his own fraud and falsehood, and is not affected by the question of diligence on the part of the vendee.

*Hale v. Philbrick*, 42 Iowa, 81.

A vendor who induces his vendee to purchase land by falsely and fraudulently representing that the title is perfect is liable to the vendee for such fraud, even though the contract of purchase provided for, and the sale was consummated by, a quitclaim deed only.

*Ballou v. Lucas*, 59 Iowa, 22, 12 N. W. 745; *Kimball v. Saguin*, 86 Iowa, 192, 53 N. W. 116.

Independent investigation does not bar a party from recovering if it appears that, without fault on his part, he did not learn



the truth, and he relied upon the representation.

14 Am. & Eng. Enc. Law, p. 112; *Meek v. Keene*, 47 Ind. 77; *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Oloott v. Bolton*, 50 Neb. 779, 70 N. W. 366.

The conduct of a party which tends to conceal or suppress material facts is frequently as effective in deceiving another as actually false representations.

*Beardsley v. Duntley*, 69 N. Y. 581; *Stewart v. Wyoming Cattle Rancho Co.* 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101; *Gee v. Moss*, 68 Iowa, 318, 27 N. W. 268.

A partial disclosure of facts is equivalent to fraud if a false impression is conveyed.

*Coles v. Kennedy*, 81 Iowa, 360, 46 N. W. 1088; 14 Am. & Eng. Enc. Law, 2d ed. p. 83.

Knowledge of the falsity of a representation may be implied where the party occupied a special situation, or possessed such special means of knowledge as made it his duty to know the truth or falsity of the representation.

14 Am. & Eng. Enc. Law, 2d ed. p. 95; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *Thorne v. Prentiss*, 83 Ill. 101; *Ruff v. Jarrett*, 94 Ill. 479; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241.

In order to recover for a deficiency in the number of acres sold it must be shown that the defendants falsely and fraudulently represented the number of acres in the tracts described, or that they purchased the land by the acre, and the amount paid by them was in excess of the sum they agreed to pay.

*Lane v. Parsons*, 108 Iowa, 241, 79 N. W. 61; *Hosleton v. Dickinson*, 51 Iowa, 244, 1 N. W. 550; *Belknap v. Sealey*, 14 N. Y. 151, 67 Am. Dec. 120; *Ward v. Dean*, 69 Minn. 466, 72 N. W. 710; *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67; *Pickman v. Trinity Church*, 123 Mass. 1, 25 Am. Rep. 1; *Noble v. Googins*, 99 Mass. 235.

The true rule is to allow the purchaser compensation for the deficiency according to the average value of the lands sold, at the time of purchase.

*Stow v. Bozeman*, 29 Ala. 397; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600.

The measure of plaintiff's damage is such sum as will compensate him for that which he lost by reason of fraud. The loss would be the reasonable market value of the land lost, at the time of failure of title.

*Stewart v. Jack*, 78 Iowa, 156, 42 N. W. 633; *White v. Smith*, 54 Iowa, 238, 6 N. W. 284; *Devin v. Himer*, 29 Iowa, 298; *Likes v. Baer*, 8 Iowa, 368; *Hahn v. Cummings*, 3 Iowa, 583.

Defendants will not be allowed to show that the property plaintiff received was equal to what he conveyed, the question being, Did he receive what he bargained for?

*Mitchell v. McDougall*, 62 Ill. 506.

*On petition for rehearing.*

When a fraud is committed in the name and under cover of a corporation, by persons having the right to speak for it, for their personal gain and benefit, they are bound to answer personally for their wrongful acts. Their tongues uttered the false

words, and their purses should pay the damages.

*Teachout v. Van Hoesen*, 76 Iowa, 120, 1 L. R. A. 664, 40 N. W. 96.

The corporation owed the plaintiff the same duty as to diligence and disclosure in transferring to him all the stock that it would have owed had it transferred a portion only.

*Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915.

The corporation, and not the stockholders, own and control the assets.

*Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667; *Smith v. Hurd*, 12 Met. 384, 46 Am. Dec. 690.

As against the corporation, the books of the company are admissible in evidence.

*St. Louis & C. R. R. Co. v. Eakins*, 30 Iowa, 282; *Cormac v. Western White Bronze Co.* 77 Iowa, 34, 41 N. W. 480.

Knowledge of the agent is knowledge of the principal.

*McClelland v. Saul* (Iowa) 84 N. W. 1034; *Gensburg v. Marshall Field & Co.* 104 Iowa, 604, 74 N. W. 3; *Huff v. Farwell*, 67 Iowa, 298, 25 N. W. 252; *Thompson v. Merrill*, 58 Iowa, 419, 10 N. W. 796; *Jones v. Bamford*, 21 Iowa, 217.

**McClain, J.**, delivered the opinion of the court:

The defendants, being the president and secretary, respectively, of the Clay County Land & Cattle Company of Texas, and the owners of 2,450 shares out of the entire stock of the company, consisting of 2,500 shares, in March, 1897, advertised a Texas ranch for sale as a part of the property of the company. This advertisement came to the notice of plaintiff, who resided in Franklin county, Iowa, and owned a tract of land in that county of 1,760 acres, which he had listed with the real-estate agents at Burlington, Iowa, for sale. Plaintiff and his agents corresponded with defendants with reference to exchanging the Franklin county land for the Texas ranch, and subsequently had personal negotiations with them, which resulted in the transfer to plaintiff of defendant's stock in the corporation, and the conveyance by plaintiff to defendants of his Franklin county land. The defendants, at the time of the commencement of these negotiations, had only recently acquired any considerable interest in the Texas company, and become its officers, and neither of them had seen the Texas ranch. During the course of the negotiations the plaintiff and defendant Henry both visited the Texas ranch, the plaintiff on three different occasions. Defendants referred plaintiff to one Butcher, who was in charge of the ranch as agent for the company, and some of plaintiff's interviews with reference to the property were with him. The sole issue in the case is whether, in the course of these negotiations, false and fraudulent representations were made by defendants, or by said Butcher as their agent, on which plaintiff relied and had a right to rely, with reference to the amount of land included in

the ranch. It may be said that there is no controversy as to the fact that the boundaries of the ranch were correctly referred to and pointed out, but the controversy is as to what was represented with reference to the area included, and whether such representations, if erroneous, were false and fraudulent; it being contended that defendants represented the ranch as containing about 17,000 acres, whereas, in fact, its contents fell short of that quantity by more than 2,000 acres. Although defendants transferred to plaintiff their share of stock in the company, and not directly the ranch itself, yet there is no question but that the principal capital and property of the corporation consisted in this ranch, and that the actual value of the stock depended to a large extent on the amount of land included in the ranch, so that any false and fraudulent representations as to its area would be so far material in the transaction as to render the defendants liable in the same way as though they had directly conveyed the ranch itself in exchange for plaintiff's land.

The foregoing are the facts necessary for an understanding of the questions of law involved in the case. The general legal proposition on which plaintiff's action rests is that false and fraudulent representations made, with knowledge of their falsity, by one person to another, and relied on by the latter to his injury, render the person making such representations liable to him in damages for the injury thus resulting. The necessary elements of this legal wrong, for which a court of law gives redress in an action for deceit, are: (1) False representations by defendant, upon which plaintiff had the right to rely; (2) knowledge of their falsity on the part of defendant; and (3) injury to plaintiff resulting from his reliance thereon.

The court instructed the jury that, in determining whether or not defendants knew that the representations alleged to have been made by them as to the quantity of land were false, the jury had the right to consider the fact that defendants were stockholders and officers of the company, and had in their custody and control maps, abstracts, tax receipts, and other papers or books belonging to the company, and pertaining to said land, which contained information as to the acreage of the ranch as well as personal knowledge of the number of acres on the part of defendants, and all means of said knowledge and all other facts and circumstances as may have been shown by the evidence bearing on and pertaining to said knowledge; also that such officers would be presumed to have known that which it was their duty to know, and that, before making representations as to the amount of land, it was their duty to use reasonable diligence to know that the representations were true, and that they would be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them; also that, though defendants did not know the representations to be false, yet if they made them as true, and of their per-

sonal knowledge as to truth or falsity, and had the means at hand as such officers to know their truth or falsity, and had assumed such knowledge, then, under the law, they were presumed to have known such representations were false. In effect, the court thus authorized the jury to hold defendants liable without any proof of knowledge of falsity of these statements on the part of defendants, if, from the means of knowledge accessible to them, they might have known the statements to be false, even though, as a matter of fact, they believed them to be true. Unless defendants were chargeable with some duty to plaintiff by reason of their being officers of the company, this direction was plainly contrary to the rule long recognized by this court with reference to the necessity of proof of *scienter* in actions for deceit. The rule uniformly recognized by this court is that the plaintiff must show by competent testimony that the representations were false and fraudulent, within the knowledge of the party making them. It is not enough that they were made through mistake, ignorance, or carelessness, or without reason to believe that they were true. *Holmes v. Clark*, 10 Iowa, 423; *Courtney v. Carr*, 11 Iowa, 295; *Hallam v. Todhunter*, 24 Iowa, 166; *Avery v. Chapman*, 62 Iowa, 144, 17 N. W. 454; *Allison v. Jack*, 76 Iowa, 205, 40 N. W. 811; *Phelps v. James*, 79 Iowa, 262, 44 N. W. 543; *Sylvester v. Henrich*, 93 Iowa, 439, 61 N. W. 942.

There is an intimation in *McKown v. Furgeson*, 47 Iowa, 636, that the representation of a matter as truth of personal knowledge, of which the person making the representation had no knowledge whatever, is a false representation, and this qualification of the rule is supported by authorities from other states. *Kountze v. Kennedy*, 147 N. Y. 124, 29 L. R. A. 360, 41 N. E. 414; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168; *Loddell v. Baker*, 1 Met. 193, 35 Am. Dec. 358; *Cooper v. Schlesinger*, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360; *Griswold v. Gebbie*, 126 Pa. 363, 17 Atl. 673; *Heater v. Bast*, 125 Pa. 52, 72, 17 Atl. 252; *Rouell v. Chase*, 61 N. H. 135.

But even this statement of the law would not help out the instructions which we are now considering. There are cases decided by other courts extending the rule of liability beyond that recognized in this state. See *Holcomb v. Noble*, 69 Mich. 398, 37 N. W. 497; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 361; *Foard v. McComb*, 12 Bush. 723; *Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 56. But these cases are wrong in principle. The question is not whether defendant has made representations which amount to an implied warranty, or whether the contract ought to be rescinded in equity, or whether the defendant has attempted to gain an unconscionable advantage; for these matters are subject of investigation and redress in different forms of action. *Stone v. Denny*, 4 Met. 151; *Cameron v. Mount*, 86

Wis. 477, 22 L. R. A. 512, 56 N. W. 1094; *Smith v. Bricker*, 86 Iowa, 285, 53 N. W. 250; *Hunter v. French League Safety Cure Co.* 96 Iowa, 573, 65 N. W. 828.

In the case of *Kountze v. Kennedy*, 147 N. Y. 129, 29 L. R. A. 363, 41 N. E. 414, it is said: "Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit. The law affords remedies for the consequences of innocent misrepresentation. A contract induced thereby may in many cases be avoided, and the equitable powers of courts are frequently interposed for the rescission of contracts or transactions based upon mistake or innocent misrepresentation. While the common-law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not by construction be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other. We have referred to a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, as sufficient to sustain the action if the representation was in fact untrue. The making of a representation to influence the conduct of the person to whom it was made carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation." In this action the sole question is that of deceit; that is, whether, by statements which are intentionally and morally wrong, defendant has deceived the plaintiff to his injury. *Pasley v. Freeman*, 2 T. R. 51, 2 Smith, Lead. Cas. 9th ed. 75; *Fisher v. Mollen*, 103 Mass. 503; *Nash v. Minnesota Title Ins. & T. Co.* 163 Mass. 574, 28 L. R. A. 753, 40 N. E. 1039; *Erie City Iron Works v. Barber*, 106 Pa. 125, 139, 51 Am. Rep. 508; *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Ball v. Lively*, 4 Dana, 369; *Webb's Pollock, Torts*, 355, 362.

To hold that defendant, in an action of deceit, is liable for false statements, the falsity of which he might have known by investigation, but which he in fact believed to be true, is to put a liability on one for what he says in good faith, under circumstances not making it his duty to make any statement whatever. The lack of uniform-

ity in the rules on this question, recognized by courts which have departed from the old and established landmarks, is warning that certainty in the law is only to be preserved by adhering to the requirement that the complaining party shall show knowledge of the falsity of the statement complained of. If liability in such cases is to be predicated on the question whether the party making the representation might have known of its falsity, then the greatest uncertainty must result as to how much opportunity for knowledge is necessary to render him liable and there would be no definite rule possible without adopting the broad proposition that every statement made by one person to another with regard to a business transaction involves a warranty of its truthfulness, which is further than we feel justified in going, either on reason or authority.

It seems to us that the rule in this state has not been departed from or enlarged in *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; but, on the contrary, is there fully recognized. That, however, was an equitable action, and therefore it was competent for the court to consider what evidence was sufficient, in its judgment, to show knowledge of the falsity of the statements relied upon. It is one thing to hold as a matter of fact that from certain evidence the court will find knowledge to have existed in a particular case, and, on the other hand, to charge the jury with such facts as matter of law render the defendant liable, without a finding of knowledge as a fact. *Atkins v. Ellwell*, 45 N. Y. 753.

The case of *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915, illustrates another difficulty with the instructions given by the court in this case. That was a case where plaintiff, having subscribed and paid for stock in a corporation of which defendant was president, brought action against defendant for damages on account of misrepresentations made as to the solvency and profits of the company, and the courts held that there had been such misrepresentation and fraud on the part of defendant as to entitle plaintiff to recover. This result was reached on the theory that the officers of a corporation owe a duty to those who subscribe for stock in the corporation, and are bound to know its financial condition, and to state with strict and scrupulous accuracy the existence of facts affecting the advantages held out as inducements to take shares, and it is said: "Such officers will be presumed to have known that which it was their duty to know. Before making representations as to the condition of the company as inducements to take stock therein or extend credit thereto, it is their duty to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence and to possess the knowledge which its exercise would bring to them." The lower courts seem to have thought that defendants' relations to the company in the case now before us imposed upon them some such duty as to diligence in dealing with plaintiff; for,

in each of the instructions in which the liability of defendants for representations made by them is discussed, the court conditions the rule of liability which it states on a finding of the jury that the defendants were officers of the corporation. This was plainly erroneous. Plaintiff was not acquiring the stock of the corporation by subscription and purchase from the corporation itself, but was simply buying stock from stockholders of the corporation. He was acquiring in the corporation the rights which defendants had as stockholders, and the officers of the company, as such, had nothing to do with the transaction. They owed to him no duty as officers with reference to diligence and disclosure. The simple question in the case is whether defendants, as holders of certain stock, in transferring it to plaintiff, knowingly made false and fraudulent representations with reference to a material matter affecting the value of the stock. It may be that if, as officers, they actually knew the representations to be false, they would be charged with such knowledge as individuals; but the duties and liabilities of officers towards subscribers to the stock, which are explained in *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915, did not rest upon and attach to defendants in their dealings with plaintiff. The court erred in submitting to the jury the question whether defendants were officers of the corporation, for the purpose of finding a liability on the part of defendants which would not have existed had they not been such officers. The fact to be determined was whether the misrepresentations, if made, were known to be false, and that fact would not be dependent on defendants' official connection with the company. *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426.

A similar error was committed in submitting to the jury the question whether Butcher, who was manager of the ranch, was the agent of the corporation, as bearing on the liability of defendants for false statements made by him in connection with the transaction. If he was the agent of the defendants for the purpose of negotiating the sale of the stock, or if he was a person to whom the defendants referred the plaintiff for information, then, no doubt, false representations made by him with knowledge of their falsity, or representations which defendants supposed he would make, and which they knew would be false, although he might have made them in good faith, would furnish a basis for liability on the part of defendants; but the mere fact that he was the agent of the company in charge of the property, even though as agent of the company he had authority to sell its property, would not make him the agent of the defendants in a transaction relating to the sale of this stock.

Some of the stock acquired by the plaintiff in this transaction was taken in the names of members of his family, and defendants complain that plaintiff was not entitled to recover damages for depreciation in the value of such shares, due to misrepresentations

as to the quantity of land. But we do not concur in this view. The entire body of stock transferred by defendants was so transferred in consideration of the exchange of plaintiff's property, and his right to recover for any deficiency in the value of such stock due to misrepresentations would not be affected by the fact that some of the stock thus acquired by him was, by his directions, put into the hands of others.

Complaint is also made of instructions with reference to whether plaintiff was chargeable with knowledge as to the quantity of the land which might have been derived from the maps, plats, and other papers put into his hands by defendants before the trade was consummated. Without discussing the particular language used in these instructions, it is sufficient to say that, so far as we can see, the plaintiff and the defendants were on an equal footing, and that any documents which in the possession of defendants would charge them with knowledge would equally, if put into the possession of plaintiff for the purpose of giving him information in regard to the quantity of land, constitute notice to him.

In estimating the measure of damage sustained by plaintiff by reason of any false representations made by defendants with knowledge of their falsity, we suggest that the proper rule would be to find out how much less the value of the stock was than it would have been if the representations had been true. This stock did not, as we understand it, have any market value in itself, and its value was dependent entirely upon the value of the corporate property which it represented.

Many assignments of error based on rulings relating to the introduction of evidence are argued. So far as they raise questions which may be important on a retrial of the case, we briefly dispose of them as follows: The court properly allowed witnesses to testify as to whether the lands embraced in the ranch were all covered by the description in documents referred to, inasmuch as the extent of the ranch was a matter of fact. It was also a matter of fact whether the company had sold certain portions of the lands which it had owned, and witnesses familiar with the business of the company might testify with reference thereto. Testimony of parties as to what they believed and intended and relied upon was admissible, for the issue involved knowledge of falsity on the part of defendants, and reliance on representations made on the part of the plaintiff. In such a case mental condition as to belief or intent may be testified to by the person whose material condition is in question. Conclusions of witnesses as to the number of acres, based on documentary evidence, were not admissible, as the documents themselves would furnish the best evidence. Defendants should have been allowed to testify as to the circumstances of their acquiring ownership of the stock, and their knowledge or want of knowledge of the business of the company; for these facts would bear on their knowledge of the falsity of any rep-

representations made. For the same reason, defendants should have been allowed to testify with reference to the custody of the documents belonging to the company containing information as to the quantity of land. If they were not familiar with the contents of these documents, they are not necessarily charged with information that might have been obtained therefrom. It was not proper to allow witnesses to say how much less the ranch was worth containing the number of acres which it was found to really contain than if it had contained the number of acres which it was represented to contain. It seems that the proper rule in such cases is to have the witness state the two distinct valuations, and let the jury ascertain the difference for themselves. *Richardson v. Webster*, 111 Iowa, 427, 82 N. W. 920. It may be that such error in a case like this would be error without prejudice, but it is better to follow the method of inquiry pointed out in the case cited and the other cases in this court on that subject. Many other rulings as to the introduction of evidence are objected to, which, on investigation, we find not to have been objectionable, or, at any rate, not prejudicial. In view of the necessity for a new trial, it is not proper for us to express any opinion as to whether the case should have been taken from the jury on defendants' motion.

*Reversed.*

Rehearing denied October 17, 1901.

M. M. WALKER COMPANY

v.

DUBUQUE FRUIT & PRODUCE COMPANY *et al.*, *Appts.*

(.....Iowa.....)

1. Acquiescence in an erroneous view of the law by offering evidence to meet it will not prevent the party from insisting upon a correct statement of the law in the instructions to the jury.
2. A factor has, in the absence of instructions or usage to the contrary, power to sell the goods of his principal upon a reasonable credit, provided he exercises due care with respect to the responsibility of the purchaser and in the collection of the price.
3. A factor cannot, after learning of a sale of the property by his principal, proceed to sell it himself, although he has made advances or incurred liabilities on account of the property, unless the sale is necessary to protect his interests.
4. Only such of those who participated in the conversion of property consigned to a factor for sale as are in possession of it when suit is brought can be held liable for its return.
5. The manager of a company doing a

**NOTE.**—As to right of factor to whom goods are consigned to sell them, see, in this series, *Romeo v. Martucci* (Conn.) 47 L. R. A. 601.

As to right of factor to pledge goods of principal, see *Commercial Bank v. Hurt* (Ala.) 19 L. R. A. 701.  
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commission business, was, in making a wrongful sale of property consigned to it, acts solely in his capacity of manager, and who has no possession of the property, cannot be held liable for its return.

6. In case the consignor sells property which he has consigned to a factor for sale, the purchaser may recover it or its value without deductions if the lien for advances or charges has been waived, but if such lien has not been waived he can only recover any balance which remains or should remain in the factor's hands after a prudent disposal of the property.

(April 11, 1901.)

**A**PPPEAL by defendants from a judgment of the District Court for Dubuque County in favor of plaintiff in an action brought to recover possession of apples alleged to belong to plaintiff. *Reversed.*

The facts are stated in the opinion.

*Mr. J. C. Longueville*, for appellants:

The court erred in holding that the Dubuque Fruit & Produce Company, could not sell the apples on credit without special authority so to do.

*Story, Agency*, 6th ed. § 209; *Mechem, Agency*, § 990; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Van Alen v. Vanderpool*, 6 Johns. 69, 5 Am. Dec. 192; *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540; *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22.

It erred in holding that the company could not sell the apples to reimburse itself for advances and charges without giving notice to the consignor.

*Brown v. M'Gran*, 14 Pet. 479, 10 L. ed. 550; *Eichel v. Saucyer*, 44 Fed. 845; *Mooney v. Musser*, 45 Ind. 115; *Field v. Farrington*, 10 Wall. 141, 19 L. ed. 923; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662; *Butterfield v. Stephens*, 59 Iowa, 596, 13 N. W. 751.

Factors without instructions from their principal sell to protect themselves for charges and advances. That usage is common and general. The courts will take judicial notice of such usage.

*Baugh v. Kirkpatrick*, 54 Pa. 84, 93 Am. Dec. 675; 12 Am. & Eng. Enc. Law, pp. 660, 651.

Where one is simply acting as the servant of another, without claiming any interest in the property, an action does not lie against him, and no judgment can be entered against him.

*Shinn, Replevin*, §§ 70, 90; *Cobbey, Replevin*, §§ 431, 432.

In an action of replevin, where there are several defendants they are entitled to separate verdicts.

*Cobbey, Replevin*, § 1081; *Carothers v. Van Hagan*, 2 G. Greene, 481.

*Messrs. Lyon & Lyon* and *C. N. Dohs* for appellee.

**Ladd, J.**, delivered the opinion of the court:

One Scott, of Medina, New York, consigned to the Dubuque Fruit & Produce Company, a corporation engaged in business

as a common commission merchant, four carloads of apples. A comparatively few barrels of these had been sold prior to December 17, 1896, when Scott reached Dubuque. He interviewed Muntz, the president and manager of the company, who then advanced \$100 in addition to that previously paid, and then visited plaintiff, to whom it is claimed he sold all the apples. The theory of the plaintiff is that Scott sold to it the apples on Muntz's suggestion, and that when Cyril Walker, a representative of the firm, presented Scott's order on the company for apples, the latter, through Muntz, at first offered to deliver them upon repayment of the money advanced, together with freight, cartage, storage, and commission, which Walker said he would pay, but soon thereafter stated that he had changed his mind, and refused to turn them over. On the other hand, the defendants insist that they supposed that the company was to handle the apples, until Walker and Scott entered the company's place of business to examine the apples, on the morning of the 18th of December; that a sale to plaintiff, or the payment of advances or charges by Walker, was not mentioned by or to Walker, nor was any order presented; that Muntz offered to let the apples go, upon the payment of advances and charges, but Scott refused to pay drayage, storage, and commission; that the latter then said he wanted them sold, regardless of price, and the company made a sale shortly afterwards to one Cartigney, a nephew of Muntz, and an employee in his wife's store, of which he was manager, receiving \$5 in cash and a promissory note for the remainder, payable in thirty days. It was held on the former trial that the evidence was such that the issues respecting the bona fides of this alleged sale to Cartigney, and the waiver of the company's lien for advances and charges, should have been submitted to the jury. 106 Iowa, 245, 76 N. W. 674.

1. After both parties had rested, the court suggested the notion that a sale on credit, unless so authorized, would be of no validity. Thereupon defendants offered evidence of the existence of a general custom among commission merchants throughout the country to sell on thirty days, or longer time, and amended their answer accordingly. Appellee insists that, having acquiesced in this erroneous view, the error was waived. We know of no rule which precludes a party from meeting the opinion of the trial court in the matter of pleading and the introduction of evidence, and yet insisting upon a correct statement of the law in the instructions. Indeed, it is a general principle that no more need be proved than sufficient to entitle a party to the particular relief demanded; and if evidence was unnecessarily introduced, even though at the court's suggestion, this did not waive the right to have the jury told, as a matter of law, that the factor, in the absence of instructions, if not against custom, might sell on reasonable credit. The point that the assignment of error is not sufficiently specific is without merit.

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2. The apples were consigned, without instructions, to be sold by the Dubuque Fruit & Produce Company on commission. It claimed to have sold them to Cartigney on thirty days' time, and took his note for all save \$5 of the purchase price. The court, in substance, advised the jury that, unless a general custom of commission merchants to sell on credit was shown, this sale was invalid, and in doing so seems to have relied on *Payne v. Potter*, 9 Iowa, 549, and *Durant v. Fish*, 40 Iowa, 559. In the first of these the agent selling the horse was not a factor, as he does not appear to have sold on commission; and the opinion proceeds on the theory that he was merely an agent with special authority to sell. A factor or a commission merchant has been defined to be an agent employed to sell property intrusted to his possession by and for his principal, for a compensation usually designated a "commission," but sometimes "factorage." *McGraft v. Rugee*, 60 Wis. 406, 19 N. W. 530; *Milburn Mfg. Co. v. Peak*, 89 Tex. 209, 34 S. W. 102; 12 Am. & Eng. Enc. Law, p. 628. His agency with respect to the particular property is general, unless expressly limited by instructions. In *Durant v. Fish* it was only held that the factor was not liable on loss resulting from retaining goods after refusal to sell on credit to an irresponsible person. The question is *res integra* in this state, and we are inclined to hold, in accord with the great weight of authority, that, in the absence of instructions or usage to the contrary, the factor has the implied power to sell the goods of his principal upon a reasonable credit, provided he exercises due care with respect to the responsibility of the purchaser and in the collection of the price. *Daylight Burner Co. v. Odlin*, 51 N. H. 59, 12 Am. Rep. 45; *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356; *Van Alen v. Vanderpool*, 6 Johns. 69, 5 Am. Dec. 192; *Laussatt v. Lippincott*, 6 Serg. & R. 386, 9 Am. Dec. 440; *Edgerton v. Michels*, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408; *Joslin v. Couce*, 52 N. Y. 90; *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. 827; *Mechem, Agency*, § 990. And he may take a note for the purchase price for his principal's benefit. *Greely v. Burtlett*, 1 Me. 178, 10 Am. Dec. 54; *Goode now v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22.

3. Another point raised was whether the factor or commission company was bound to give notice before selling, to reimburse it for advances made and expenses incurred. If it can be said that no instructions were given, then the matter of sale is within the discretion of the factor; and, as that is the purpose of his employment, he may sell in the ordinary course of trade without consulting his principal. *Butterfield v. Stephens*, 59 Iowa, 596, 13 N. W. 751; 12 Am. & Eng. Enc. Law, p. 651. It is only when there are special instructions with respect to price or time of sale, or the like, that notice is required before the property may be disposed of on different terms or at an earlier date. *Hollowell v. Fawcett*, 30 Iowa, 491; *Mooney v. Musser*, 45 Ind. 115. See *Baugh v. Kirkpatrick*, 54 Pa. 84, 83 Am.

Dec. 675, wherein it was held that the right to sell to satisfy the factor's lien might not be suspended by the attachment of the property. Perhaps the clearest statement of the law on this subject is found in *Brown v. M'Gran*, 14 Pet. 479, 10 L. ed. 550: "Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof according to his own pleasure, from time to time, if no advances have been made or liability incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has the right to sell so much of the consignment as may be necessary to reimburse advances or meet such liabilities, unless there is some existing agreement between himself and the consignor which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price, unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities." But, owing to present facilities for quick communication, it may well be said that the rule concerning the right to sell in order to satisfy advances, etc., is too strongly stated in that case. The interest of the principal in the property, the relationship of the parties as principal and agent, and the nature of the transaction are such that subsequent directions

should be obeyed, and the goods not sold in disregard of these until the principal has been afforded a reasonable opportunity to discharge the factor's lien, unless an immediate sale be necessary to save the lien from loss. It was so held in *Marfield v. Goodhue*, 3 N. Y. 62. See also *Hilton v. Vanderbilt*, 82 N. Y. 591. The same principle was recognized in *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369, where it was said that on a sale, if necessary to avoid loss, the factor's discretion might not be controlled. See also *Howard v. Smith*, 56 Mo. 316. Hence, as said on the former hearing, the produce company had no right to sell after learning of the sale to Walker, unless found necessary to the enforcement of its lien. No claim was made that the sale was necessary to protect the company, and the evidence is conclusive that such was not its purpose. No subsequent instructions had been given, and the issue with respect to necessity of notice, save of the sale to plaintiff, ought not to have been submitted to the jury.

4. In view of another trial, some other matters ought to be disposed of. This is not an action for conversion, but for the possession of the property; and, even though all the defendants may have participated in the conversion of the apples, only those in possession when the suit was brought can be held liable for their return. If Cartigney was in the sole and exclusive possession of the apples, the jury ought to have been allowed to find in favor of the other defendants. Whether he was in such possession, or exercised control over them in connection with the produce company, was an issue proper for the jury's determination. The evidence showed that Muntz neither had nor claimed any interest in the apples, and acted throughout solely in the capacity of the manager of the company to which the apples had been shipped, and in whose possession they continued at least till sold to Cartigney. The motion to direct the verdict in his favor should have been sustained. Shinn, Replevin, § 70. Again, if the lien for advances and charges was waived, the plaintiff was entitled to recover the possession of the apples, or their value, without deduction of the amount of the advances and charges, which in that event constituted but a naked debt of Scott to the company. If such lien was not waived, the defendants had the right to retain the possession of the apples, and the produce company would only be liable in a proper action for any balance which remained in its hands, or should have remained, after a prudent disposal of the property. The objections to the fourteenth instruction may be obviated on another trial, and it is suggested that the precise issues be stated to the jury, instead of devoting ten of the instructions to a substantial repetition of the pleadings.

The point made by appellee concerning motions to direct verdict is disposed of in *German Sav. Bank v. Bates Addition Improv. Co.* 111 Iowa, 432, 82 N. W. 1005.

Reversed.

## KANSAS SUPREME COURT.

Anna A. MOORE, *Plff. in Err.*,  
v.

M. V. B. PARKER *et al.*

(.....Kan.....)

\*A landlord is not an insurer or warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are defective and in a dangerous condition, and especially if such dangerous or defective place is not obvious, or is not discoverable to the tenant by the exercise of ordinary care, and he does not inform the tenant of such defective or dangerous place, and injury is occasioned thereby to the tenant or a member of his family who is not aware of such defective or dangerous place, while in the exercise of ordinary care, the landlord is liable in damages. The law requires good faith on the part of the landlord towards his tenant.

(May 11, 1901.)

**E**RROR to the District Court for Johnson County to review a judgment in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by the defective condition of premises leased by defendants to plaintiff's husband. *Reversed.*

The facts are stated in the opinion.

Mr. A. Smith Devenney, for plaintiff in error:

The legal presumption is that, where a defective and unsafe condition of a portion of the leased premises is not obvious or in plain view, and existed at the time of leasing, the tenant did not know of the same.

2 Shearm. & Redf. Neg. § 724; *Lenz v. Aldrich*, 6 App. Div. 178, 39 N. Y. Supp. 1022.

Where there is, "at the time of leasing," a defect—a latent, a hidden or concealed defect, one not open to the casual observer—which renders the leased premises dangerous, and the landlord has some knowledge of the same, and does not inform or warn the tenant; and the latter is ignorant at the time of such conditions; or if the lessor conceals his knowledge from the tenant,—the landlord is liable to the injured tenant and his family.

*Hines v. Wilcox*, 96 Tenn. 328, 34 L. R. A. 832, 34 S. W. 420; 1 Washb. Real Prop. 5th ed. § 571; *Wilcox v. Hines*, 100 Tenn. 538, 41 L. R. A. 278, 46 S. W. 297; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Denver v. Solomon*, 2 Colo. App. 534, 31 Pac. 507; 1 Thomp. Neg. 317; *Wharton*, Neg. 817; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *Cesar v. Karutz*, 60 N. Y. 229; 19 Am. Rep. 164; *Scott v. Simons*, 54 N. H. 426; *Godley v. Hagerty*, 20 Pa. 397, 59 Am.

\*Headnote by GREENE, J.

NOTE.—For cases in this series as to liability of landlord for injury to tenant or his family from defects in premises, see *Hines v. Wilcox* (Tenn.) 34 L. R. A. 824, and note, 41 L. R. A. 278; *Olson v. Schultz* (Minn.) 36 L. R. A. 790; 53 L. R. A.

Dec. 731; *Perrett v. Dupré*, 3 Rob. (La.) 52; *State use of Bashe v. Boyce*, 73 Md. 469, 21 Atl. 322; *Kern v. Myll*, 80 Mich. 525, 8 L. R. A. 682, 45 N. W. 587; *Spellman v. Bannigan*, 36 Hun, 174; *Albert v. State use of Ryan*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Waggoner v. Jermaine*, 3 Denio, 306, 45 Am. Dec. 474; *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109; *Wilcox v. Zane*, 167 Mass. 306, 45 N. E. 923; *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *Fow v. Roberts*, 108 Pa. 489; *Towle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Leonard v. Storer* (Mass.) 15 Am. Rep. 76, 79, note.

No matter whether the landlord is in or out of possession.

*Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620; *Rankin v. Ingwersen*, 49 N. J. L. 481, 10 Atl. 545; *House v. Metcalf*, 27 Conn. 631; *Anderson v. Dickie*, 28 How. Pr. 105; *Ray*, Negligence of Imposed Duties, 52; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164; *Fabri v. Bryan*, 80 Ill. 182; *Edwards v. New York & H. R. Co.* 98 N. Y. 249, 50 Am. Rep. 659; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449, 22 N. E. 193; *Wood*, Land. & T. 2d ed. p. 1279; *Taylor, Land. & T.* 8th ed. § 175.

As the walls were not of sufficient strength to support the burden the landlord was held liable, in—

*Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84; *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346; *Waggoner v. Jermaine*, 3 Denio, 306, 45 Am. Dec. 474; *Saltonstall v. Banker*, 8 Gray, 195.

It is a fraud upon the tenant and his family for the landlord not to inform them of the defect.

*O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Vandenburgh v. Truax*, 4 Denio, 466, 47 Am. Dec. 268.

Besides, the legal presumption is that the landlord knew of the defect on his own premises.

*Nelson v. Central R. & Bkg. Co.* 48 Ga. 152.

If the defect is inherent in the original construction, and the continuance of its use must result in injury, and this defect and use subsequently occasion injury, then the lessors are liable.

*Shindelbeck v. Moon*, 32 Ohio St. 275, 30 Am. Rep. 584; *Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622, 23 Pac. 293; *Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. 1188; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Wood*,

*Rallion v. Taylor* (R. I.) 39 L. R. A. 246; *Stillwell v. South Louisville Land Co.* (Ky.) 52 L. R. A. 825; and *Smith v. State use of Walsh* (Md.) 51 L. R. A. 772.



Nuisances, § 126; Wood, Land. & T. 918; *Okenango Bridge Co. v. Lewis*, 63 Barb. 111; *Fow v. Roberts*, 108 Pa. 489; *Jackman v. Arlington Mills*, 137 Mass. 277; *Durant v. Palmer*, 29 N. J. L. 545; *Scott v. Simons*, 54 N. H. 426; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404.

More especially if the defect is latent.

*Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 653.

The owner of real property receiving rent should be liable for a defect existing on his premises at the date of the lease.

Rice, Modern Law of Real Prop. p. 60.

It was not the duty of the tenant, or his family, or servants, to actively search for hidden or concealed defects on the premises.

*Wilcox v. Zane*, 167 Mass. 306, 45 N. E. 923; *Lynch v. Swan*, 167 Mass. 510, 46 N. E. 51; *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Lenz v. Aldrich*, 6 App. Div. 178, 39 N. Y. Supp. 1022.

The landlord is not permitted to fold his arms and assume that those stringers or sleepers will last always, but is chargeable with notice of the liability of the same to become weak, defective, and unsafe by use, age, and decay.

*Indiana Car Co. v. Parker*, 100 Ind. 181; *Rapho & West Hempfield Tups. v. Moore*, 68 Pa. 404, 8 Am. Rep. 202; *De Graff v. New York C. & H. R. R. Co.* 76 N. Y. 125; *Fort Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133.

It is not necessary that the landlord should have actual notice or knowledge. If the want of the lessors' actual knowledge is simply the result of their own negligence, knowledge will, nevertheless, be attributed to them.

*Lynch v. Swan*, 167 Mass. 510, 46 N. E. 51; *Wilcox v. Hines*, 100 Tenn. 538, 41 L. R. A. 278, 46 S. W. 300; *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 569; *Wertheimer v. Saunders*, 95 Wis. 573, 37 L. R. A. 146, 70 N. W. 824; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; 3 Elliott, Railroads, 1307, note 2; Pingrey, Real Prop. § 592; *Idel v. Mitchell*, 158 N. Y. 134, 52 N. E. 740; Wood, Land. & T. p. 855; *Lindsey v. Leighton*, 150 Mass. 288, 22 N. E. 901.

If the well platform gave way because, in part, the same was defective in construction, then no other notice to the landlord of its condition is necessary to be alleged or proved.

*Morton v. Detroit, B. O. & A. R. Co.* 81 Mich. 423, 46 N. W. 111; *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 995; *Greenleaf v. Illinois C. R. Co.* 29 Iowa, 14, 4 Am. Rep. 181; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *North-ern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

If the landlord "could have known of the existence of the alleged defective condition of that portion of the leased premises,—by the exercise of ordinary care or diligence," he is as liable as if he actually knew of the same.

*Willcox v. Hines*, 100 Tenn. 538, 41 L. R. 53 L. R. A.

A. 278, 46 S. W. 301; *Kern v. Myll*, 80 Mich. 525, 8 L. R. A. 682, 45 N. W. 587; *Albert v. State use of Ryan*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78; *Timlin v. Standard Oil Co.* 126 N. Y. 514, 27 N. E. 786; Ray, Negligence of Imposed Duties, pp. 44, 48, 51, 52, 147, 148; Rice, Modern Law of Real Prop. 26, 60; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628; Affirmed in *O'Connor v. Curtis* (Tex.) 18 S. W. 953; *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619; *Idel v. Mitchell*, 158 N. Y. 134, 52 N. E. 740; *Hines v. Willcox*, 96 Tenn. 328, 34 L. R. A. 832, 34 S. W. 420.

**Messrs. M. V. B. Parker and L. O. Flickering**, for defendants in error:

The general rule is that the tenant must beware. He must examine the premises before taking them, and rely upon his own examination, unless he procures a warranty from the landlord of their safety. The burden of the examination is placed on him, and not on the landlord.

*Akerley v. White*, 58 Hun. 362, 12 N. Y. Supp. 149; *Franklin v. Brown*, 118 N. Y. 110, 6 L. R. A. 770, 23 N. E. 126; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *O'Brien v. Capwell*, 59 Barb. 497; *Donner v. Ogilvie*, 49 Hun. 229, 1 N. Y. Supp. 633; *Chadwick v. Woodward*, 13 Abb. N. C. 441; *Perez v. Rabaud*, 76 Tex. 191, 7 L. R. A. 620, 13 S. W. 177; *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Lynch v. Speed*, 15 Daly, 207, 4 N. Y. Supp. 556; *Quay v. Lucas*, 25 Mo. App. 4; 1 Thomp. Neg. § 3, p. 323; *Woodfall, Land. & T.* 12th ed. 568; *Keats v. Cadogan*, 10 C. B. 591.

Upon a demise, there is no implied contract that the property is fit for the use for which the lessee requires it,—whether for habitation, occupation, or cultivation.

An obligation on the part of the landlord to make substantial repairs, because the premises are in a dangerous condition will not be implied.

*Heintze v. Bentley*, 34 N. J. Eq. 562; *Mullen v. Rainear*, 45 N. J. L. 520; *Naumborg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Welles v. Castles*, 3 Gray, 326; *Leavitt v. Fletcher*, 10 Allen, 121; *Royce v. Guggenheim*, 106 Mass. 202, 8 Am. Rep. 322.

If the tenant wishes the landlord to take the responsibility of the leased premises being sufficient and safe, that provision must be inserted in the lease.

*Wilkinson v. Clouston*, 29 Minn. 91, 12 N. W. 147; *Foster v. Peyser*, 9 Cush. 243, 57 Am. Dec. 43; *Gorey v. Mann*, 14 How. Pr. 163; *Ward v. Fagin*, 101 Mo. 669, 10 L. R. A. 147, 14 S. W. 738; *Witty v. Matthews*, 52 N. Y. 512; Taylor, Land. & T. 7th ed. §§ 175a, 327.

There was no duty to make the repairs until a reasonable time after notice; and, since no notice had been given, there was no liability on the landlord.

*Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Spellman v. Bannigan*, 36 Hun. 174; *Sinton v. Butler*, 40 Ohio St. 158; *Bove v. Hum- 18*

If the defect could have been discovered by the tenant as easily as by the landlord, the landlord was not liable for the injury.

*Lynch v. Speed*, 15 Daly, 207, 4 N. Y. Supp. 613; *Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85.

No act of care and diligence to discover defects has generally been placed on the landlord.

*Hines v. Willcox*, 96 Tenn. 148, 34 L. R. A. 824, note, 33 S. W. 914.

Where the petition shows that the plaintiff was guilty of contributory negligence, advantage may be taken thereof by demurrer.

5 Enc. Pl. & Pr. p. 10, note 1; *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219; *Street R. Co. v. Nolthenius*, 40 Ohio St. 376; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318.

If Jerome Moore, the lessee, had full knowledge of the condition of the well platform at the time he leased the farm, or at any time before the alleged injury, he could not recover if the platform had given way while he was standing thereon. *A fortiori*, Mrs. Moore, who was on the premises solely by invitation of her husband, the lessee, and with whom the defendants had no relations, contractual or otherwise, could not recover.

*Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Shearm. & Redf. Neg.* § 503.

The plaintiff's petition shows that the alleged defective structure was an ordinary platform of boards covering a well outside of the house, off the porch and in the yard, and that the character of its construction was such that an examination of its condition was both practicable and easy.

*Booth v. Merriam*, 155 Mass. 521, 30 N. E. 85; *Lane v. Cox*, 1 Q. B. 415.

By the common law, he who has the use of a thing ought to repair it, but the grantor may bind himself.

*Taylor v. Whitehead*, 2 Dougl. 745; *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *O'Brien v. Capwell*, 59 Barb. 497.

Greene, J., delivered the opinion of the court:

The plaintiff in error and her husband are tenants of the defendants, occupying a farm leased by Jerome Moore from defendants in error on the 3d day of March, 1899. While the plaintiff in error was about her household duties upon said premises, drawing water from a well used for domestic purposes, and located at the residence, the platform around the well gave way, precipitating her into the well, from which she sustained personal injuries. She brought this action against the defendants in error, the owners and lessors of the property, to recover damages. The defendants filed a demurrer to her petition in the court below, which was sustained. She brings the case here, alleging this as error. The petition, after setting out the lease made by defendants in error to her husband, and the taking possession and occupancy by her husband, herself, and their family, on or about the 3d day of March, 53 L. R. A.

1899, alleges, in substance, that the well that was intended for use for domestic purposes, and situated at the porch of the residence, was covered with a wooden platform or planks; that the defendants in error had built the platform over this well, and had constructed it of inferior and unsuitable material, selected by them for that purpose, and used in its construction by their direction; that the sleepers or stringers under this platform were in a defective and unsafe condition at the time of the leasing and taking possession by plaintiff in error; that the defendants in error knew this, and, notwithstanding their knowledge, they negligently, fraudulently, and carelessly concealed it from the plaintiff, as well as from her husband, the lessee, and failed to disclose said knowledge to the plaintiff or her husband; that the defects in the sleepers or stringers were not obvious, and could not be discovered by the exercise of ordinary care; that the plaintiff in error did not know of such defective material or the dangerous condition of the platform; that in the performance of her household duties she was required to, and frequently did, draw water from this well; and that upon this occasion, about two months after they had gone into possession, she was in the exercise of ordinary care, and while performing her household duties, and in attempting to draw water from this well, the sleepers or stringers under the platform around the well gave way, and she was precipitated into the well, whereby she sustained personal injuries.

In deciding this question, we are not called upon to determine the liability of the landlord where he did not have actual knowledge of the defective condition of the premises. A landlord is not an insurer or warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are in a dangerous condition, and especially if such danger or defect is not obvious, or is not discoverable by the tenant by the exercise of ordinary care, and does not inform him of such danger, and injury is occasioned thereby to the tenant or a member of his family, the landlord is liable in damages. The law requires good faith on the part of the landlord towards his tenant. The defect existed when the premises were leased, and the defendants in error knew this, and intentionally concealed it from their lessee; and, it being a defect not discoverable by the lessee or his family in the exercise of ordinary care and reasonable diligence, we have been unable to find any principle upon which the demurrer should have been sustained. The rule seems to be that in the absence of a contract to repair, or warranty of condition, both landlord and tenant must use reasonable care and diligence. If the tenant neglects such reasonable care and diligence to ascertain the condition of the premises, or knowing their condition assumes the risk, then he cannot recover against the landlord. On the other hand, if the landlord actually knows they are unsafe, and conceals or misrepresents their condition, then

he is liable; the tenant being in no fault. We quote from Wood, Land. & T.: "Where there are defects in the premises, not open to ordinary observation, of the existence of which the landlord knows, or ought to know, which are dangerous to the person of the tenant, it is his duty to disclose them to the tenant; and if he fails to do so, and the tenant is injured thereby, the landlord is responsible for all the damages." In *Willow v. Hines*, reported in 46 S. W. 297, the court said: "Although, in the absence of fraud or warranty, a landlord is not liable on his contract to a tenant for injuries resulting from a defective condition of the leased premises, a liability arises out of the wrong of the landlord in leasing premises dangerous at the time, where the danger is not patent, but is known to the landlord, or could be known to him by the exercise of reasonable care and diligence, and could not be ascertained by the tenant by the exercise of reasonable care and diligence." 100 Tenn. 538, 41 L. R. A. 278. In *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 249, 50 Am. Rep. 659, the court says: "The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable. If not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of anyone who may lawfully be upon the premises, using them for the purposes for which they are demised." *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, was an action by the daughter of the lessee, by her next friend, for personal injuries which she received. It was alleged in the petition that the lessor knew when he rented the building that the timbers upholding the floor were defective, rotten, and dangerous, and suppressed his knowledge of its condition from the father; that neither she nor her father could discover the dangerous condition of the floor, by reason of the character of its construction; that she fell through the floor, which broke under her, and was precipitated into the vault below, and was damaged physically and mentally. To this petition a demurrer was filed and sustained. The court, in passing upon it, said: "Although the law presumes it was her father's duty to repair the premises, in the absence of an agreement otherwise, still we are of the opinion that if the appellee rented the premises, knowing that the privy was in the condition alleged, it was his duty to disclose his knowledge, because it was a portion of the premises which he knew, as all men know, would be in daily use by his tenant and family, and, unless apprised of the hidden danger, they would inevitably be injured, and the younger and more helpless perhaps lose their lives. And if, as alleged, he failed to disclose his knowledge, but nevertheless rented the dangerous tenement to the plaintiff's father, 83 L. R. A.

with whom she lived, he is responsible for the injury she sustained." When the defendants in error rented the farm, they knew that the tenant was going to occupy it for the purpose for which farms are generally occupied. They knew that the well was intended to, and would, be used to furnish water for family purposes, and that necessarily the members of the family of the tenant, in the discharge of their household duties, would be required to go to this well frequently for water. The landlord contracted with reference to this use of the premises by all members of the tenant's family, and withheld from them the knowledge of the fact that the place which they would be compelled to visit more frequently than any other on the premises was almost fatally dangerous.

The owner of premises upon which is situated a structure or building dangerous either by reason of defective construction or from long use, of which the owner has knowledge, and which defect is not obvious or discoverable by the exercise of ordinary care, cannot escape liability to a tenant from whom he conceals such defect, or a member of his family, who, not knowing of such defect, and while in the exercise of ordinary care, is injured by the falling of such building or structure.

*The judgment of the court below is reversed.*

All the Justices concur

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, *Plff. in Err.*,

*v.*  
Anna CONLON *et al.*

(.....Kan.....)

\*1. A grantor in a deed excepted from the land conveyed a 100-foot strip through the same, theretofore taken by a railroad company under condemnation proceedings, by virtue of which the railroad corporation obtained title in fee. *Held*, that the grantee was not entitled to a way of necessity from one part of her land to another, divided by the strip so condemned.

2. A railroad company constructed a crossing over its track and ties, and put gates in its fences, for the benefit of the owner of land so situated, by whom the same were used in passing from one part of her farm to the other for more than fifteen years. During that time the railroad company maintained said crossing and gates. *Held*, that the landowner was a mere licensee, and could not, by use of the crossing for the time stated, obtain a prescriptive right to the same.

(January 5, 1901.)

\*Headnotes by SMITH, J.

NOTE.—On the question of acquiring title to portion of railroad right of way by adverse possession, see *Illinois C. R. Co. v. Houghton* (Ill.) 1 L. R. A. 213, and *note*.

As to duty to keep gates in railroad fence through farm lands closed, see *Swanson v. Chicago, M. & St. P. R. Co.* (Minn.) 49 L. R. A. 625, and *note*.

**E**RROR to the Court of Appeals for the Northern Department, Eastern Division, to review a judgment affirming a judgment of the District Court for Atchison County in favor of defendants in an action brought to enjoin them from trespassing upon plaintiff's property along a strip claimed by them as a right of way. *Reversed.*

The facts are stated in the opinion.

**Messrs. A. A. Hurd, O. J. Wood; and W. Littlefield,** for plaintiff in error:

The plaintiff was not required by any statute of this state to put in or maintain farm crossings for the benefit and convenience of the owners of lands through which the right of way and railroad run.

*Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Atchison & N. R. Co. v. Gough*, 29 Kan. 94; *Chicago, K. & W. R. Co. v. Cosper*, 42 Kan. 561, 22 Pac. 634.

The defendants were not entitled, as a matter of right, to a farm or private crossing across the plaintiff's right of way.

There was an implied obligation on the part of the defendants to use, and not to misuse, the favors and privileges accorded to them, and not to wilfully and habitually abuse them. Having acquired the right to perpetually use this strip of land condemned, so long as it desired to do so for railroad purposes, and having paid for such right and privilege, as provided by law, plaintiff had the right to the exclusive use and occupancy of the same as against all parties.

*Smith County Comrs. v. Labore*, 37 Kan. 486, 15 Pac. 577; *Chicago, K. & W. R. Co. v. Selders*, 4 Kan. App. 497, 44 Pac. 1012.

The defendants at no time were the owners of the strip of land comprised within the right of way. They were, indeed, strangers to the title, and their right to cross and recross was permissive only, and subservient to the right of the plaintiff.

*Kansas C. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Missouri P. R. Co. v. Manson*, 31 Kan. 337, 2 Pac. 800; *Union P. R. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112; *Earlywine v. Topeka, S. & W. R. Co.* 43 Kan. 746, 23 Pac. 940; *Kansas C. R. Co. v. Jackson County Comrs.* 45 Kan. 716, 26 Pac. 394; *Chicago, K. & W. R. Co. v. Cosper*, 42 Kan. 561, 22 Pac. 634; *Kirk v. Smith ex dem. Penn.* 9 Wheat. 241, 6 L. ed. 81; *McClelland v. Miller*, 28 Ohio St. 488; *Union P. R. Co. v. Harris*, 28 Kan. 206; *Canada Southern R. Co. v. Lewis* (Ont.) 20 Am. & Eng. R. Cas. 196; *Sapp v. Northern O. R. Co.* 51 Md. 115; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Ingraham v. Hough*, 46 N. C. (1 Jones, L.) 39; *Thomas v. England*, 71 Cal. 456, 12 Pac. 491.

It was the duty and obligation of the defendants to close the gate whenever they had an occasion to use it. This is a reasonable requirement.

*Atchison, T. & S. F. R. Co. v. Shaft*, 33 Kan. 521, 6 Pac. 908; *Union P. R. Co. v. Harris*, 28 Kan. 206; *Chicago, R. I. & P. R.* 53 L. R. A.

*Co. v. Green*, 4 Kan. App. 133, 46 Pac. 200; *Adams v. Atchison, T. & S. F. R. Co.* 46 Kan. 161, 26 Pac. 439.

**Mr. Charles J. Conlon,** for defendants in error:

Defendants are the owners of the right of way in controversy by the express or implied grant, or necessary reservation of the same, when the Atchison & Pike's Peak Railway Company condemned its right of way across the farm, leaving 100 acres thereof cut off from the public highway.

*Gulf, C. & S. F. R. Co. v. Rowland*, 70 Tex. 298, 7 S. W. 718; *Gay v. Boston & A. R. Co.* 141 Mass. 407, 6 N. E. 236; *International & G. N. R. Co. v. Bost.* 2 Tex. App. Civ. Cas. (Willson) § 386, p. 334; *Washb. Easements*, 233; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76; *Seymour v. Lewis*, 13 N. J. Eq. 444, 78 Am. Dec. 108.

Defendants are the owners of the right of way by prescription, having had open, notorious, uninterrupted, continuous, peaceable, and adverse use of said right of way since 1864.

*Wells v. Northern R. Co.* 14 Ont. Rep. 594; *Gay v. Boston & A. R. Co.* 141 Mass. 407, 6 N. E. 236; *Atkins v. Bordenman*, 2 Met. 457, 37 Am. Dec. 100; *Fitchburg R. Co. v. Page*, 131 Mass. 391; *Fisher v. New York & N. E. R. Co.* 135 Mass. 107.

Where one uses the easement whenever he sees fit, without asking leave and without objection, it is adverse and uninterrupted enjoyment, if the prescription and length of time are sufficient to give the right.

*Garrett v. Jackson*, 20 Pa. 336; *Cox v. Forrest*, 60 Md. 74.

A gate is not placed across the right of way to obstruct the use thereof, but rather to protect the right of way of the plaintiff from trespassers or those who have no right, and because of the necessity of the situation, and is in no way placed there as an obstruction to the free and continued use of the private way by the defendants.

*Atkins v. Bordenman*, 2 Met. 457, 37 Am. Dec. 100; *Demuth v. Amweg*, 90 Pa. 181; *Connery v. Brooke*, 73 Pa. 80; *Gay v. Boston & A. R. Co.* 141 Mass. 407, 6 N. E. 236; *Wells v. Northern R. Co.* 14 Ont. Rep. 594.

Defendants are entitled to the claimed right of way because the same is reasonably necessary to the use of the farm through which said railroad passes.

*Kansas C. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Atchison & N. R. Co. v. Gough*, 29 Kan. 94; *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Adams v. Atchison, T. & S. F. R. Co.* 46 Kan. 161, 26 Pac. 439.

**Smith, J.,** delivered the opinion of the court:

This was a suit brought by the railway company to enjoin the owner of a farm through which its road runs from removing, breaking down, and opening the fences inclosing the right of way. The facts may be briefly stated: The farm consists of about 200 acres. In August, 1864, the Atchison & Pike's Peak Railroad Company

condemned a right of way 100 feet wide over and through it. Thereafter the Central Branch Union Pacific Railroad Company became the successor of the Atchison & Pike's Peak road, and acquired said right of way, and has ever since run its trains over it. At the time this 100-foot strip was so condemned the real estate was owned by James Baldwin. Under the law as it then existed, the railroad company acquired a fee-simple title to the land taken by condemnation for right of way. Laws 1864, chap. 124; *Kansas C. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190. In September, 1870, James Baldwin sold the farm to James Conlon, with the following exception contained in the deed: "The right of way has been given to P. P. Railroad by said Baldwin." In June, 1872, James Conlon conveyed to William Bowen, with the same recital in his deed. On July 26, 1872, Bowen deeded the land to Anna Conlon by similar conveyance. In 1872 the Atchison, Topeka, & Santa Fé Railroad Company, of which plaintiff in error is the successor, acquired by condemnation a strip of land 42½ feet wide on the south side of and within the 100-foot strip formerly acquired in fee by the Atchison & Pike's Peak Railroad Company. The Santa Fé road was built in 1873. Before the latter took possession of the 42½-foot strip condemned, the Central Branch Union Pacific Railroad had put in a plank crossing over its rails for the accommodation of Mrs. Conlon, and at about the same time fenced the track, but provided gates through which the owner of the land might go from one part of her farm to the other. Immediately after constructing its road over the land in 1873, the Santa Fé Company laid a crossing of planks over its track and ties directly south of the crossing put in by the Central Branch Company, and corresponding therewith. This crossing was maintained by the plaintiff in error and its predecessor from the time mentioned until May, 1897. In 1882 the Santa Fé Company inclosed its right of way with a lawful fence, and built therein gates opposite the crossing. This crossing has been in use by the owner of the farm since the construction of the railroads, principally for driving cattle from the north to the south side of the land, and *vice versa*. In February, 1897, the railway company notified Mr. James Conlon, the husband of Anna Conlon, that, unless the gates were kept closed except when in actual use, they would be taken out and the openings shut. In May following the company caused the gates to be nailed up and the crossing removed, notifying Mr. Conlon of its action. Thereupon the latter cut down the wires and left the space open where the gates were located. In her answer and cross petition the defendant below claimed a prescriptive right to use and enjoy the crossing, and the district court found that she was the owner of and entitled to a right of way across the right of way of plaintiff under such title. This judgment was affirmed by the court of appeals. After the commencement of the suit in the court below, Anna Conlon died, 53 L. R. A.

and the action has been revived in the name of her heirs.

It is claimed by counsel for defendants in error that the crossing over the railroad tracks was indispensable to the use of the farm, and constituted a way of necessity. It is unnecessary to dwell on this contention. When James Conlon bought the land his grantor excepted in his deed the 100-foot strip, the fee of which had been taken from him by condemnation proceedings. The grantee obtained no title to it. He was in the same situation as if Baldwin, the grantor, had made two deeds,—one to the ground on the south, and the other to the land on the north, of the right of way. Conlon's deed to William Bowen contained the same exception. The conveyance to Anna Conlon by Bowen also excepted the 100-foot strip. She bought land situated on both sides of a railway, with a fee-simple proprietor owning an estate between the two tracts at the time she took title. No rule of law will permit her to assert a dominant estate, from necessity, in any part of the intervening property.

The question remains whether, under the circumstances of this case, a prescriptive right to the crossing was obtained by a use of the same for more than fifteen years. The testimony shows that the railroad company made, in the first instance, and maintained during all the time of its use, a crossing of planks and earth, suitable to the requirements of the landowner. Gates, also, were provided and kept in repair by the company without expense to her. In *Jones, Easements*, § 282, it is said: "If the use of a way over one's land be shown to be permissive only, no right to use it is conferred, though the use may have continued for a century, or any length of time." Defendants in error assert a right of easement based on adverse enjoyment. Unless their ancestor used the crossing under a claim of right, and not as a privilege revocable at the pleasure of the railroad company, they have no defense to the action brought in the district court by plaintiff in error. There was no express contract or agreement between the parties at the time the crossing was first built and put into use by the landowner. The latter did not at the beginning claim adversely to the railroad company, but, on the contrary, the conduct of the parties shows clearly that a permissive privilege was given to her as a licensee merely. This status of the parties originally existing was in no wise subsequently changed, unless the fact of the continued use of the crossing for more than fifteen years by Anna Conlon finally expanded into greater rights than she had at the beginning. A presumption of continuance obtains when a state of facts is once shown. In *Dewey v. McLain*, 7 Kan. 126, 133, 12 Am. Rep. 418, Mr. Justice Brewer quotes approvingly from *Jackson ex dem. Gansevort v. Parker*, 3 Johns. Cas. 124, as follows: "An entry adverse to the lawful possessor is not to be presumed. It must appear by proof. . . . The statute of limitations could not begin to run until the

possession of the defendant was avowedly held in opposition to the right of the heirs." In *Kirk v. Smith ex dem. Penn.*, 9 Wheat. 241, 288, 6 L. ed. 81, 92, Chief Justice Marshall, delivering the opinion, said: "It would shock that sense of right which must be felt equally by legislators and by judges if a possession which was permissive and entirely consistent with the title of another should silently bar that title. Several cases have been decided in this court in which the principle seems to have been considered as generally acknowledged, and in the state of Pennsylvania, particularly, it has been expressly recognized. To allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud,—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction." Mere use under a naked license, however long continued, cannot ripen into a prescriptive right. In Indiana an appellant alleged in his complaint that for fifty consecutive years a way had existed over the appellee's land; that for twenty years the way had been open to the appellant as an easement, and that he and his grantors had been permitted by the appellee and his

grantees to uninterruptedly use the way for fifty years; and that in March, 1883, the appellee wrongfully closed up the way. It was held that under the facts so pleaded the appellant had a mere naked license to use the land, and such license was revocable at the pleasure of the licensor. *Parish v. Kaspare*, 109 Ind. 586, 10 N. E. 109. In the present case there is an absence of hostility to the rights of the railway company. The facts proved show that the possession and use by Anna Conlon were not adverse in their inception, but on the contrary, began in a spirit of accommodation to her by the company. The repair of the crossing and the maintenance of gates by the latter for more than fifteen years, and the landowner's use of the same, show that the privilege extended in 1873 was recognized as such by her during the time mentioned. *Dewey v. McLain*, 7 Kan. 126, 133, 12 Am. Rep. 418; *Bennett v. Biddle*, 140 Pa. 396, 21 Atl. 363; *Deater v. Tree*, 117 Ill. 532, 6 N. E. 506; *Rosseel v. Wickham*, 36 Barb. 386.

*The judgment of the Court of Appeals and the District Court will be reversed, and a new trial granted.*

All the Justices concur.

#### KENTUCKY COURT OF APPEALS.

Edward STAPLETON *et al.*, *Appts.*,  
v.

Christena POYNTER.

(.....Ky.....)

1. Courts of equity will overrule the claims of nature, or substitute their discretion as to a child's welfare for the responsibilities imposed by God upon the parent, only in cases where the parent asks the court to change the child's possession, basing the claim upon a naked legal right.
2. The custody of a child will be taken from its grandparent and given to its parent when the latter is of moral habits, free from contagious or infectious disease, and of enough industry to reasonably insure the child from want and positive distress, although the grandparent possesses fortune, character, kindness, and affection for the child, and the child prefers to remain with the grandparent.
3. A contract by a mother for the disposition of her child, made during coverture, is void.

(May 1, 1901.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Laurel County in favor of plaintiff in an action brought to

recover possession of plaintiff's child. *Affirmed.*

The facts are stated in the opinion.

*Mr. Henry C. Haslewood*, for appellants:

The welfare of the child is the cardinal point in determining who should have the custody of it.

Schouler, Dom. Rel. 5th ed. 248; *Tiffany*, Personal & Dom. Rel. § 125; *Ellie v. Jessup*, 11 Bush, 403; *Proctor v. Rhoads*, 4 Ky. L. Rep. 453; 9 Am. & Eng. Enc. Law, p. 245; *Burke v. Crutcher*, 4 Ky. L. Rep. 251.

The courts will refuse to disturb a custody voluntarily yielded, in favor of the parent, who has long acquiesced in the transfer; thus regarding the ties both of nature and association.

Schouler, Dom. Rel. 5th ed. 248; Notes of Cases, 5 Ky. L. Rep. 188; 2 Lawson, Rights, Rem. & Pr. § 816.

The contract in this case shows the voluntary surrender of the child, and that it was for its best interest. It is not void.

*Enders v. Enders*, 164 Pa. 266, 27 L. R. A. 56, 30 Atl. 129; *Anderson v. Young*, 54 S. C. 388, 44 L. R. A. 277, 32 S. E. 448; *Smith v. Martin*, 4 Ky. L. Rep. 734.

NOTE.—For earlier cases in this series as to right to custody of children as between parents and others, see *Van Walters v. Marion County Childrens' Guardians* (Ind.) 18 L. R. A. 431; *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593; *Re Lally* (Iowa) 16 L. R. A. 681; *Sheers v. Stein* (Wis.) 5 L. R. A. 781; *Weir v. Marley* 53 L. R. A.

(Mo.) 6 L. R. A. 673; *Kelsey v. Green* (Conn.) 38 L. R. A. 471; *Stringfellow v. Somerville* (Va.) 40 L. R. A. 623; *Anderson v. Young* (S. C.) 44 L. R. A. 277; *Hibbette v. Bains* (Miss.) 51 L. R. A. 839; and *Prieto v. St. Alphonsus Convent of Mercy* (La.) 47 L. R. A. 656.

The choice of the infant, if of sufficient mental capacity, should control.

*Ellis v. Jesup*, 11 Bush, 403; 9 Am. & Eng. Enc. Law, p. 245.

*Messrs. James Sparks, E. H. Johnson, and J. A. Wilson* also for appellants.

*Messrs. J. W. Alcorn and D. K. Rawlings*, with *Ar. Charles E. Brock*, for appellee:

The appellee, being a married woman on the 30th day of April, 1893, did not have the power or capacity to enter into a contract.

While in his lifetime the father alone can control the custody of his child, he cannot do so in a way to deprive the mother of its custody and control after his death.

*State ex rel. Neider v. Reuff*, 29 W. Va. 751, 2 S. E. 807; *Day v. Everett*, 7 Mass. 145; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *Armstrong v. Stone*, 9 Gratt. 102.

Unless a substantial reason is shown to the contrary, the father being dead, the mother is the most suitable person to rear her child, and the interest of the child demands, above all things else, a mother's love and personal influence during its growth and development into manhood.

*State ex rel. Neider v. Reuff*, 29 W. Va. 751, 2 S. E. 806; *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798; *Re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; *State ex rel. Mayne v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 397; *Albert v. Perry*, 14 N. J. Eq. 540; *Johnson v. Terry*, 34 Conn. 259; *Rust v. Vanvacter*, 9 W. Va. 600; *Queen v. Barnardo*, L. R. 24 Q. B. Div. 283; *Dalton v. State*, 6 Blackf. 357; *De Jarnett v. Harper*, 45 Mo. App. 415; *Barlow v. Kennedy*, 17 Lower Can. Jur. 253.

**O'Rear, J.**, delivered the opinion of the court:

This action was instituted by appellee, the mother of John Craig Stapleton, to recover his possession of appellants, his paternal grandfather and grandmother; the lad being then about nine years of age. Appellee is a widow. The father of the boy had died some years previous, leaving no estate, and the widowed mother had none. Appellee, who assumes her maiden name, and W. R. Stapleton were married in 1888, and after a brief and unhappy union of three or four years a separation ensued; being, as the record discloses, an abandonment of appellee by her husband, who had become dissolute, and who finally lost his life in a drunken brawl. In this distressing situation, appellee went with her two children, John Craig, and a girl some two years younger, to the home of appellants. This was before the death of appellee's husband. She continued there some months, when it was suggested that the old folks could not well accommodate her longer; but they insisted on keeping the children, to whom they appear much attached,—especially the boy. Appellee then sought and obtained employment as a domestic, but, desiring the presence of her children, above other con-

siderations, left the place, and took them with her to her father's, in an adjacent county. Appellant Edward Stapleton, and the father of the boy, went to her father some two months afterwards, and, under promises of reform, a reunion of the unfortunate couple was agreed upon; the father and grandfather of the boy taking him back to Laurel county, and the wife and the little girl to follow in a few days. She did so. But she says that then her husband declined to live with her, and declared his only purpose was to regain possession of the boy. Appellee returned to her father's, but soon after again sought employment, and obtained a situation in a family at Somerset, where her girl had better advantages for attending school.

When appellee was first abandoned, and was face to face with the proposition of earning her own living, she was induced to sign a contract with appellants concerning her children. This contract is as follows:

An article of agreement between Christena Stapleton, of the first part, and Ed Stapleton and Elizabeth Stapleton, his wife, of the second part: The party of the first part agrees to give her two children, Craig and Della, to the party of the second part, to keep and control as their own until they become twenty-one years old, unless the party of the first part and her husband should live together again. Then she is to have her children, and not until then. She also gives to the party of the second part all her household goods, and horse and cow, to be used to the benefit of raising said children, and also what W. R. Stapleton, her husband, left in the house of Mr. Gee, which she was to have in provisions to live on; and the party of the second part agrees to try to give said children a common education.

This April 30th, 1893.

Christena Stapleton.

Ed Stapleton.

Elizabeth Stapleton.

Att.: Ellen Stapleton.

I do agree to the above contract.

W. R. Stapleton.

Her husband, some time after, by his indorsement, approved it.

After the death of her husband, the boy now having grown in size, years, and usefulness, and therefore helpfulness, she seeks to recover possession of him, and, indeed, has sought at frequent intervals before this suit to do so, but unsuccessfully until now.

The defense is summed up by counsel for appellants, in their brief, as follows: "(1) The appellants, the grandparents of the child, John Craig Stapleton, are the proper persons to have the care, custody, and control of said child, and appellee is not. (2) That they (appellants) are financially able to care for and educate said child in a manner suited to his station in life, and that appellee is not. (3) That said child is possessed of sufficient intelligence and age to judge for himself where he should live, and that it is the desire of said child to remain

with its grandparents, and not with its mother. (4) That on the 30th day of April, 1893, when this child was a mere infant, appellee, by a writing, surrendered the custody of this child to appellants; and afterwards her husband, its father, agreed to the same contract, and signed it. (5) That since said time appellants have had the care, custody, and control of said child, and that during all of said time, up to now, they have cared for and treated said child in a manner highly conducive to its best interests. (6) That it must be a great hardship to appellants and the child, considering the contract and promises made concerning the child, and the attachments that now have grown up between it and appellants during this long time, for it to be taken from them now." All these grounds may well be grouped into three classes: (1) The child's welfare and wishes; (2) the contract of its parents; and (3) the equity of the grandparents, appellants.

The welfare of a child, its life, health, and moral and intellectual being, should be, and are, kept well in view by the courts in determining its legal disposition in litigations over it. This is not upon the ground, sometimes supposed, that courts of equity will overrule the claims of nature, or substitute their discretion as to the child's welfare for the responsibilities imposed by God upon the parent. We apprehend, and, from an examination of the authorities, we gather, this course is justified and applied only in cases where a parent asks the court to change the child's possession, basing his claim upon a legal right,—such, for example, as the legal right of the parent to the custody of his child. Then, and then only, will the court look to the welfare of the child, in withholding its aid; basing its action upon the principle that equity will not do a wrong to aid a mere naked legal right. By statutory enactment the legislatures have provided for the state's taking charge of infants in extreme cases; but nowhere has it been held, so far as we are aware, that a parent, however indigent and ignorant, or even vicious, can be deprived by law of the custody of his child at the suit of a stranger, however opulent, charitably disposed, and prepared he may be to give the child advantage of coveted opportunities for its moral or intellectual development. The day may come when society will demand and exercise some such right. Perhaps it may be recognized in milder form by some in legislation for compulsory attendance at schools. But, in the broad sense suggested, it certainly is not here yet. We hold that when it is shown by the suing claimant parent that he or she is a person of moral habits, of good health (that is, without contagious or infectious disease), and of enough industry to reasonably insure the child from want and positive distress, these conditions, coupled with the parent's legal right, will overcome the supposed advantages accruing to the child by the adverse claimant, a stranger, who merely shows that he possesses fortune, character, kindness, and affection for the

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child; and that, too, even though the court might well consider that the opportunities afforded by the stranger are the most favorable for the infant's welfare. The experience in this country is not that wealth, especially when coupled with indulgence, is always most conducive to a useful education and the foundation of the best character. We apprehend that the best part of the child's education will not be obtained at some ideal social institute, beginning with a kindergarten and ending with a university, but generally at the hearthstone of its family, if that family be a proper one. The welfare of the child is not merely training its head, but includes training of its heart. Wisdom may be imparted by teaching it to think; the feelings that at last make the man, by teaching it to feel. Orphanage, even partial, is generally conceded to be a misfortune, and universally moves to pity, but it likewise carries a privilege and an opportunity. The boy who, taught by the stern lessons of necessity and the inscrutable ties of fellow suffering and gratitude to revere his mother, and to help her bear the burdens of widowhood and overcome the adversities of untoward conditions, has accumulated an asset of more value, perhaps, than had his disappointed benefactor been allowed to exploit his plans of education at the sacrifice of filial devotion. "Honor thy father and thy mother" is a command, followed by a promise, of peculiar value in determining the welfare of the child. It is argued, and in some instances has been held, that the wishes or election of the infant will be regarded in determining this question. Generally those instances where the wishes of a child of sufficient maturity to realize in a measure its situation have been allowed to control were either in a controversy between parents upon their separation, or where the facts of welfare were so nearly balanced as to leave the court in grave doubt, in which case the wishes of the child were consulted and given some weight. However, it has not been held anywhere, so far as we have been cited, that the judgment of the infant is to control independent of or despite other circumstances. We hold that an infant cannot dispose of his property of the smallest value, or become bound by contract generally, because of the conclusive presumption that he has not a sufficiently matured judgment to know what his interests are. We cannot, therefore, hold that the determination of a question involving such serious and permanent importance to him as the training of his youth should be at his disposal.

The contract relied upon, in so far as it purports to bind appellee, having been entered into by her while under the legal disability of coverture, was not binding upon her. It was void. We are unable to distinguish it, so far as affecting the *feme covert's* contractual ability, from any other contract relating to her legal or property rights. If the paper ever had any legal value, it was only to the extent of transferring the legal right of the father to the custody



of his infants. It could convey, at most, only such right as he held, which, of course, terminated with his death. Thereupon the mother's right of exclusive possession began.

The record discloses that appellants are estimable and worthy old people, who doubtless would bestow on this grandchild every fair opportunity within their power for its material advancement. Their love for it, natural and cultivated, is clearly shown by the circumstances put in evidence. The separation decreed by the circuit court must seem to them, viewed from their standpoint, as a hardship. These facts are argued by their counsel here as presenting an equity entitled to be regarded by the court, in connection with the child's welfare, in decreeing its custody. The utmost the court could be expected to do would be to measure the equities of these contending parties. It requires no judicial determination to properly estimate the mother's love,—probably the strongest instinct of the species. This temporary separation, enforced by conditions beyond her control, instead of weaning her from the child, appears to have intensified her yearning. As between the two,—the grandparents and the mother,—we do not feel at liberty to change the responsibility of the parent, and the privilege and duty of the child, from where God has placed them.

*The judgment of the Circuit Court is therefore affirmed.*

BOARD OF EDUCATION of Covington et al., Appts.,

v.  
Camilla G. BOOTH, by Next Friend.

(.....Ky.....)

**The question of guilt or innocence of a pupil expelled from the public schools in accordance with established rules cannot be reviewed by the courts unless it appears that he was expelled arbitrarily or maliciously.**

(May 8, 1901.)

**A** PPEAL by defendants from a judgment of the Circuit Court for Kenton County in favor of plaintiff in a proceeding to compel defendants to permit plaintiff to attend the schools under the control of the defendants. *Reversed.*

The facts are stated in the opinion.

Mr. W. A. Byrne for appellants.

Mr. Ulle J. Howard, for appellee:

The intention to open wide the doors of the public schools to all children possessing the necessary qualifications to entitle them to admittance is obvious from Ky. Stat. §§ 3212, 4521. It is an absolute right, and in no wise dependent upon the favor of any of the school officials.

**NOTE.**—For right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent, see *Cartersville Bd. of Edu. v. Purse* (Ga.) 41 L. R. A. 593, and *note*.

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By rule 41 the superintendent is vested with the power to expel a pupil for certain things, viz.: "For disorder, irregular attendance, tardiness, or any other violation of the rules of the school."

Rule 41 is the only rule of the school that appellants claim is applicable, and appellee was expelled for writing an alleged "insulting composition." She is unable to understand how the writing of a composition is disorder, irregular attendance, or tardiness, or is calculated to produce either.

Mandamus is the proper remedy to compel a board of education to reinstate a pupil in the public schools, where he has been unjustly excluded therefrom.

High, Extr. Legal Rem. § 332, note 5; 14 Am. & Eng. Enc. Law, p. 175; *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N. W. 393; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471; *Trustees of Schools v. People ex rel. Van Allen*, 87 Ill. 303, 29 Am. Rep. 55; *People ex rel. Ulrich v. Board of Education*, 4 N. Y. Supp. 102; *State ex rel. Clark v. Osborne*, 32 Mo. App. 536; *Board of Education v. Helston*, 32 Ill. App. 301; *Perkins v. Independent School Dist. Directors*, 56 Iowa, 476, 9 N. W. 356; *Stephenson v. Hall*, 14 Barb. 222; *State ex rel. Clark v. Osborne*, 24 Mo. App. 309; *Murphy v. Independent Dist. Directors*, 30 Iowa, 429.

Mandamus is a discretionary remedy, granted where the right is clear and plain although the petitioners may have another remedy, if that remedy is not so speedy, adequate, and complete as the remedy by mandamus.

Merrill, Mandamus, §§ 52, 54.

Being a discretionary remedy, a judgment absolute will not be reversed unless the court below has abused its discretion.

*Savannah & O. Canal Co. v. Shuman*, 91 Ga. 402, 17 S. E. 937.

Where a party has more than one remedy he may resort to "either, and especially to the most speedy one."

Merrill, Mandamus, §§ 52, 54; *Archie v. State*, 99 Ga. 23, 25 S. E. 612.

A city school board of education is not such a court as is beyond control by mandamus.

*School Dist. No. 23 v. McCoy*, 30 Kan. 268, 1 Pac. 97.

Boards of education may make rules for the suspension or expulsion of pupils, but the rules must not be subversive of their rights.

*King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 499; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; 21 Am. & Eng. Enc. Law, pp. 771-776; *State ex rel. Boice v. Fond du Lac Bd. of Edu.* 63 Wis. 234, 23 N. W. 102; *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 605, 6 L. R. A. 534, 43 N. W. 996.

Practically the only instances in which courts have upheld the school authorities in exercising their power of expulsion have been where the pupils were either licentious or incorrigible.

*Murphy v. Independent Dist. Directors*, 30 Iowa, 429.

In *Cartersville Bd. of Edu. v. Purse*, 101 Ga. 422, 41 L. R. A. 593, 28 S. E. 896, one of the defenses was that the court had no right to review the proceedings of boards of school trustees. No notice was taken of that contention on the part of the board of education, and the case was decided on its merits as that court saw it.

*Bishop v. Rowley*, 165 Mass. 460, 43 N. E. 191.

Guffy, J., delivered the opinion of the court:

It appears from the petition in this action that the plaintiff for a number of years had been a pupil in the public school of the city of Covington, and that she was expelled therefrom; and this action was instituted for the purpose of obtaining a mandatory injunction to compel the authorities of said city school to permit plaintiff to continue as a pupil in said school. It is substantially alleged in the petition that the superintendent, Morris, wrongfully, maliciously, and without cause or provocation, expelled plaintiff from the public school of said city; that, after said expulsion, the plaintiff petitioned the board of education of said city for investigation of the charges made, and for the privilege of attending said school, but said petition was denied. It further appears that the superintendent, after an investigation of the charges against the plaintiff, which investigation was conducted by an interview with the plaintiff and with the principal in her division of the school, and with another in authority, to wit, Dr. Blaisdell, the superintendent expelled the plaintiff from said school, and reported his action to the board of education of the said city of Covington, which board approved his action. The defense is that the conduct of the plaintiff was such that the good order and proper conduct of the school and proper discipline thereof demanded that the plaintiff should be denied the privilege of attending said school. The court granted a temporary injunction compelling the defendants to admit the plaintiff to the privileges of said school, and upon final hearing made said injunction perpetual, and from that judgment this appeal is prosecuted.

It is the contention of appellee that the action of defendants was unreasonable, unauthorized, and arbitrary. The contention of appellants is that their action was lawful, and was necessary for the proper and necessary management of the school. It is further contended that the court has no jurisdiction to review the action of the defendants, but under the statute, as well as by the inherent power of the school authorities, that defendants had the right to adopt such rules as would promote good order, and make the said city school efficient for the education of the children entitled to attend the same; and that rule 41 of said school board authorized the action taken by the defendants. Numerous authorities were cited, 53 L. R. A.

both by appellee and appellants, in support of their respective contentions.

It does not appear that this court has ever been called upon to decide the questions in dispute in this action. The public schools of the state are for the benefit of the children within the school age, and their efficiency ought to be the sole object of those charged with the power and privilege of managing and conducting the same, and to this end great care should be taken to preserve order and a proper discipline, and also to see that no child within the school age should be denied the privilege of attending said school unless the public interest demanded the expulsion of such pupil, or a denial of their right to attend the same. It necessarily follows that those in charge of said school must be allowed to judge of and determine as to the propriety of expelling scholars therefrom, and it is manifest that those in charge of the school are better qualified to judge of and determine as to what offenses justify expulsion than the courts can ordinarily be.

It seems that the weight of authority is that a court may, in a proper case, by mandamus compel those in charge of schools to admit thereto any child within the school age; but this power, of necessity, must be based upon the fact that the child, as a matter of right and public policy, ought to be admitted. Our conclusion is that those in charge of such schools have a right to formulate such necessary rules as, in their judgment, will best promote the public good; and, if such rules are violated by any pupil, the right to expel such pupil exists, and may be exercised by the proper school authorities; and the question as to the guilt or innocence of the accused cannot be reviewed by the courts unless it appears that such pupil was expelled arbitrarily or maliciously. We do not feel called upon to determine in this case whether the plaintiff was guilty of the offense for which it seems she was expelled from school. It may be that she did not mean to insult her teacher. That question was determined by the superintendent, and his action ratified by the board of education, and we do not think we have the authority to weigh and determine the evidence in respect thereto. We are not of opinion that the evidence in this case tends to show that the teacher, superintendent, or board of education acted maliciously or unfairly in the matter under consideration. After a careful consideration of the law and facts of this case, we are of the opinion that the temporary injunction ought not to have been granted, and that the court erred in making the injunction perpetual.

*The judgment appealed from is therefore reversed, and cause remanded, with direction to set aside the judgment, dissolve the injunction, and dismiss plaintiff's petition, and for proceedings consistent herewith.*

Rehearing denied.

George M. MEERS, *Appt.*,

*v.*

Alonzo McDOWELL.

(.....Ky.....)

**A parent who permits his child to have possession of a deadly weapon when, from youth or mental weakness or the use of intoxicants, he is incompetent to be intrusted with it, and the parent knows the danger, or in the exercise of reasonable care should know it, is liable for injuries inflicted upon other persons by the child's discharge of the gun.**

(May 21, 1901.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Larue County in favor of defendant in an action brought to recover for the loss of services of plaintiff's son and for expenses incurred in his treatment because of the negligent shooting by the discharge of a gun in the hands of defendant's child. *Reversed.*

The facts are stated in the opinion.

*Meers*, Otis M. Mather and Charles F. Creal, for appellant:

This is an action brought against the parent to recover damages which appellant believes to be the natural and probable result of a negligent and reckless disregard of the safety of others on the part of the appellee.

Consequential losses are proximate when the natural and probable effect of the wrongful conduct under the circumstances is to set in operation the intervening cause from which the loss directly results. When such is not the natural and probable effect of the wrongful conduct, the losses are remote.

Hale, *Torts*, § 113.

Proximate consequences are simply those that are natural and probable. "Natural and probable" means what, according to common experience and the usual course of events, should be expected to happen. Every one is conclusively presumed to know and contemplate the natural and probable result of his acts.

*Ibid.*; Pollock, *Torts*, p. 33; Shearm. & Redf. Neg. § 55; 16 Am. & Eng. Enc. Law, p. 464.

Where the right to recover depends upon the question whether the defendant's negligence was the proximate cause of the plaintiff's injury, that is to be submitted to the jury, under proper instructions, unless it is entirely free from doubt.

Shearm. & Redf. Neg. § 55; *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 19 Atl. 1013.

Loaded firearms are regarded as highly dangerous things, and persons dealing with them are answerable for damage done by their explosion, even if they have apparently used sufficient precaution.

*Dixon v. Bell*, 5 Maule & S. 195; *Morgan v. Coe*, 22 Mo. 373, 66 Am. Dec. 623; *Law-*

**NOTE.**—As to negligence in intrusting a gun in hands of child, see *Chaddock v. Plummer* (Mich.) 14 L. R. A. 675, with note as to negligence in respect to guns and similar dangerous agencies.

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son, *Rights, Rem. & Pr.* § 1145; *Jaggard, Torts*, p. 852.

An injury by a young child with a loaded gun negligently placed in its hands by another is the wrong of the person putting it in his hands.

Cooley, *Torts*, \*594; *Binford v. Johnston*, 82 Ind. 428, 42 Am. Rep. 508; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *Poland v. Earhart*, 70 Iowa, 285, 30 N. W. 637; *Shearm. & Redf. Neg.* § 686.

No appearance for appellee.

**Hobson, J.**, delivered the opinion of the court:

Appellant filed this suit in the Larue circuit court. A general demurrer was sustained to the petition, and the action was dismissed. The sufficiency of the petition is the only question to be determined on the appeal. The allegations of the petition are as follows: The plaintiff, George M. Meers, is the father of Shelburn Meers, an infant sixteen years of age, residing with the plaintiff. The defendant, Alonzo McDowell, is the father of Ollie McDowell, an infant — years of age, and of weak and undeveloped mind for a child of his age, and in the custody and control of his father. The defendant notwithstanding his son Ollie was at any time incapable of making proper use of dangerous weapons, negligently permitted him to have in his possession a loaded rifle, and while in possession of the rifle he shot Shelburn Meers, plaintiff's infant son, inflicting upon him injuries which permanently deprived plaintiff of his son's services, of the value of \$1,500, and caused expenditures by plaintiff, for nursing, medicine, and medical attention for his son, to the amount of \$500. Defendant's son Ollie was known by him to be wholly incompetent to make proper use of a deadly weapon, and was negligently permitted by him to have and use the rifle; and, while he was in possession of the rifle, defendant recklessly gave to his said son Ollie intoxicating liquor, and the son was under the influence of the liquor at the time of the shooting, which was the result of the defendant's negligence, as stated.

In *Dixon v. Bell*, 1 Starkie. 287, the declaration alleged that the defendant sent a young maidservant for a loaded gun, that he knew her to be too young and indiscreet to be intrusted with the care and custody of it, and that she carelessly and improperly shot the plaintiff's minor son with the gun, severely wounding him. The girl was between thirteen and fourteen years of age. The defendant sent word by her to the person having the gun to take the priming out. This was done. She took the gun and presented it in play at the plaintiff's son, saying she would shoot him, and drew the trigger. The gun went off. Lord Ellenborough submitted to the jury the question whether the defendant was guilty of negligence in intrusting the gun to a servant of such an age, who, under all the circumstances, was likely to make such a use of it as a person of proper discretion would not have

done, and instructed them that, if the gun ought not to have been intrusted to such a person, they should find for the plaintiff. The jury returned a verdict against the defendant which was sustained by the court. In *Carter v. Toune*, 98 Mass. 567, 96 Am. Dec. 682, the defendant sold gunpowder to a minor of the age of eight years, whom he knew to be unfit to be intrusted with it. The child was injured by an explosion of the powder. The defendant was held liable. The court said: "By the well-settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself in fault. The liability does not rest on privity of contract between the parties to the action, but on the duty of every man so to use his own property as not to injure the person or property of others." In *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508, the defendant sold cartridges for use in a toy pistol to two boys, one aged ten and the other twelve years, and instructed them how to use the cartridges. Another boy six years old subsequently picked up the toy pistol containing one of the cartridges, and shot with it one of the boys who bought them. The dealer was held liable for the shooting of the child. The court quoted with approval from an English case: "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons." It approved this as also the law in America, and said: "A man who places in the hands of a child an article of a dangerous character, and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite, or other explosives of a similar character, nobody would doubt that he had committed a wrong for which he should answer in case injury resulted. So, if a druggist should sell to a child a deadly drug likely to cause harm to the child or injury to others, he would certainly be liable to an action." These cases are approved by the text writers. See Cooley, Torts, 594; Bishop, Non-Contract Law, § 151; 3 Lawson, Rights, Rem. & Pr. § 1145. They rest upon the principle that in the use of firearms, which are necessarily dangerous, all persons are bound to take care to avoid injury to others in proportion to the probability of such injury. If the defendant's child was from age or mental weakness or the use of intoxicants, incompetent to be intrusted with a deadly weapon, and the defendant knew the danger, or should have known it in the exercise of reasonable care, he should not have permitted him to use the loaded rifle. See *note, Chaddock v. Plummer* (Mich.) 14 L. R. A. 675.

It will be observed that the action is by the father for the injury to him from the loss of the son's services, and the expenses

incurred by him in consequence of the son's injury. In several cases this court has sustained actions of this character. *Louisville & N. R. Co. v. Willis*, 83 Ky. 57; *Newport News & M. Valley R. Co. v. Carroll*, 17 Ky. L. Rep. 374, 31 S. W. 132.

Judgment reversed and cause remanded with directions to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

Jane SMITH, Appt.,

v.

L. M. ATKINS et al.

(22 Ky. L. Rep. 1619.)

1. The right to navigate a stream does not include the right to use the banks in aid of navigation, and to fasten booms to trees growing thereon.
2. A parol grant of the right to attach booms to trees on the bank of a stream is not valid as against a subsequent grantee of the land.

(February 27, 1901.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Lawrence County in favor of defendants in an action brought to recover damages for alleged trespass on plaintiff's real estate. *Reversed*.

The facts are stated in the opinion.

Mr. Alexander Lackey, for appellant:

A navigable stream cannot be obstructed without the consent of the lawmaking power.

Wharton, Crim. Law, § 1473; *Cincinnati Cooperage Co. v. Com.* 11 Ky. L. Rep. 629.

Whether the stream was navigable or non-navigable the right to use the banks of the stream and the timber growing thereon never extended to a right of one individual to take possession and control, and deprive the owner of the land bordering thereon, or the public, of the free use thereof.

The right of use by floatage of a stream does not authorize the erection of a boom on private property,—the banks of the stream.

*Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

Such an injury is a taking of private property, and cannot be done without compensation.

Cooley, Const. Lim. 680; Mills, Em. Dom. §§ 79-81; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557.

Messrs. Hager & Stewart, for appellees: Big Blaine creek at and about where it

**NOTE.**—For earlier authorities in this series as to right to use stream for floating generally, see *Connecticut River Lumber Co. v. Olcott Falls Co.* (N. H.) 13 L. R. A. 826, and *note*; and *Carlson v. St. Louis River Dam. & Improv. Co.* (Minn.) 41 L. R. A. 371, and *note*.

As to liability to riparian owner for injuries by running logs in stream, see *Coyne v. Mississippi & R. River Boom Co.* (Miss.) 41 L. R. A. 484, and *note*.

empties into the Big Sandy river, and that vicinity, is a locality in which logging and lumbering is an important industry; and Big Blaine creek is a stream which is capable of floating logs, and is therefore subject to a public easement for that purpose.

One floating logs down navigable streams is not responsible to a riparian proprietor for damage caused by the stranding of his logs, if he uses all reasonable efforts to keep them in the streams.

*Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

*Messrs. Stewart & Stewart* also for appellees.

**Burnam, J.**, delivered the opinion of the court:

The appellant in this court was the plaintiff in the court below. She alleged that she was the owner and in possession of a tract of land situated in Lawrence county, Kentucky, bounding on Big Blaine creek, from where it emptied into the Big Sandy river, up the creek for a distance of about 1 mile; that appellees had without right entered upon her land, taken possession of the banks, and erected booms across the creek, and fastened them to her land, and had thereby caused large quantities of water logs, staves, ties, etc., to accumulate against the booms, and upon and against her land, and washed away her land, trees, bushes, etc., growing upon her land on the banks of the stream, and were threatening to continue to fasten said booms and other booms to her land,—all of which, she complained, was greatly to her injury and damage. The first paragraph of defendants' answer is a traverse of the affirmative allegations of plaintiff's petition. In the second paragraph they say that Big Blaine creek is a navigable stream of water for the purpose of marketing the produce of the forests binding upon the stream; that the only mode of marketing the product of said forests at a reasonable cost is to float it out on the bosom of the creek during high or small tides; and that to do so, and to prevent the loss of the logs, it was necessary to erect booms across said creek to catch and hold them until they could be rafted into the Big Sandy river, and that for this purpose, and for no other, they used the banks and the timber along the creek, in a careful and prudent manner, and no longer than it was necessary to enable them to catch and hold their timber; and denied that any injury resulted to appellant's land, trees, bushes, or banks by reason of any wrongful or negligent use of same by them; that the boom at the mouth of the creek was the means of catching railroad ties, staves, and sawlogs floating down the creek; and that its banks were charged with this easement and servitude for the benefit of the public. In the third paragraph defendants allege that they had purchased the right to so use the banks from plaintiff's grantor by parol. Plaintiff demurred generally to the whole answer, and also to the first, second, and third paragraphs, which 53 L. R. A.

were overruled. Thereupon plaintiff filed a reply traversing all of the affirmative averments of the answer. The trial before a jury resulted in a verdict and judgment for the defendants. Appellant objected to the giving of the second and third instructions, which were based upon the second and third paragraphs of the answer, which objection was overruled.

The principal question to be determined upon this appeal is the rights of persons using a navigable stream for the purposes of navigation to use the banks, and trees growing thereon, either permanently or temporarily, for their own use, without the consent of the owner. It is insisted by appellees that the right to use the stream itself as a public highway, for purposes of commerce, necessarily includes therein such reasonable use of the banks as is necessary to render the use of the stream itself available. This doctrine was announced in the case of *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621. Our attention has not been called to a case where the question has been considered by this court, but it has been frequently decided by the courts of last resort in other states, and it seems to us that the great weight of authority is in conflict with the conclusions reached by the Oregon court in the case *supra*, and is to the effect that the absolute rights of persons in the use of a navigable stream for the purpose of navigation extend alone to the bed of the stream, and not to the appropriation of the soil, trees, and vegetation on its banks, either permanently or temporarily, to their own use; and such an appropriation is a taking of private property, within the meaning of the law, and cannot be done, either by the public or an individual, without compensation to the owner. See *Cooley*, Const. Lim. 680; *Ensminger v. People*, 47 Ill. 384; *Carlson v. St. Louis River Dam & Improv. Co.* 73 Minn. 128, 41 L. R. A. 371, 75 N. W. 1044; *Coyne v. Mississippi & R. River Boom Co.* 72 Minn. 533, 41 L. R. A. 494, 75 N. W. 748.

In our opinion, the second and third paragraphs of the answer do not state sufficient facts to support a defense, and the trial court erred in not sustaining the demurrers filed thereto. It consequently follows that the instructions based upon the averments of these paragraphs were erroneous, and prejudicial to the rights of appellant.

For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

M. M. TEAGAR, Appt.,  
v.

City of FLEMINGSBURG.

(.....Ky.....)

The building of a step in a sidewalk is not of itself such negligence as will make the

NOTE.—As to liability of municipal corporation for defects in streets, see the following cases in this series: *Lincoln v. Boston (Mass.)* 3 L. R. A. 257, and note; *Dundas v. Lansing*

municipality liable for injuries to a pedestrian from a fall caused by the step, if the plan adopted is not palpably unsafe, and from the nature of the grade the municipal authorities deem the step necessary and proper.

(February 7, 1901.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Fleming County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from a defective sidewalk which defendant was alleged to have negligently constructed. *Affirmed.*

The facts are stated in the opinion.

**Messrs. J. P. McCartney, Thomas L. Given, and G. A. Cassidy,** for appellant:

Cities must use reasonable care to keep their streets in safe condition for traveling in ordinary modes, by day and night, and for the negligent failure so to do they are liable to one who, while so traveling and exercising reasonable care, is injured by reason of their negligence.

24 Am. & Eng. Enc. Law, p. 90.

The city or town is liable for injuries caused by defects in its sidewalk.

*Whittaker v. Smith*, Neg. p. 306; *Haire v. Kansas*, 76 Mo. 438; *Todd v. Troy*, 61 N. Y. 506; *Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Blykl v. Waterville*, 57 Minn. 115, 58 N. W. 817; *Newport v. Miller*, 93 Ky. 24, 18 S. W. 835; *Beach*, Contrib. Neg. p. 56.

The law requires the city to furnish unobstructed sidewalks, and it requires of the individual passing over the same the exercise of due care and caution.

*Altoona v. Lots*, 114 Pa. 238, 60 Am. Rep. 347, 7 Atl. 240.

The question of contributory negligence is for the jury.

*Maus v. Springfield*, 101 Mo. 613, 14 S. W. 630; *Mathews v. Cedar Rapids*, 80 Iowa, 459, 45 N. W. 894; *Baltimore & O. R. Co. v. Kane*, 69 Md. 11, 13 Atl. 387; note to *Harris v. Clinton Twp.* (Mich.) 8 Am. St. Rep. 849; *Thoresen v. La Crosse City R. Co.* 87 Wis. 597, 58 N. W. 1051; *Newport v. Miller*, 93 Ky. 25, 18 S. W. 835.

The court was in error in granting the nonsuit.

*Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 48 N. W. 1045; *Bernhard v. Rennselaer & S. R. Co.* 1 Abb. App. Dec. 131; *Russell v. Monroe Twp.* 116 N. C. 720, 21 S. E. 550; *Kelly v. Blackstone*, 147 Mass. 448, 18 N. E. 217; *Hays v. Gainesville Street R. Co.* 70 Tex. 602, 8 S. W. 491; *Lancaster v. Kissinger*, 11 W. N. C. 151.

**Messrs. O. R. Bright and W. G. Dearling,** for appellee:

Plaintiff knew of the existence and location of the step. The step was on the same grade with the street, and he could easily have gone around it if it was dangerous, or if he considered it dangerous, and in not do-

ing so he was guilty of contributory negligence and cannot recover.

*Henderson v. Burke*, 19 Ky. L. Rep. 1781, 44 S. W. 422; *Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; 2 Dill. Mun. Corp. 3d ed. §§ 1008, 1007.

Municipal corporations are only bound to see that their sidewalks are reasonably safe for persons exercising ordinary care and prudence.

*Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Burns v. Bradford*, 137 Pa. 381, 11 L. R. A. 726, 20 Atl. 997; *Merrill v. North Yarmouth*, 78 Me. 200, 57 Am. Rep. 794, 3 Atl. 575.

**O'Rear, J.**, delivered the opinion of the court:

Appellant was injured while traveling along the streets of the city of Flemingsburg, January, 1899. He fell, breaking a thumb, making its amputation necessary. The fall was caused, he alleges, by his stumbling on a step made in the pavement of the street he was walking. This step was 4 or 5 inches high. He sues the city, alleging that the step was not necessary, and was in itself dangerous to those passing over it. On the trial it developed as an undisputed fact that there was a slight grade in the street for some distance before the point where the step was made and that the purpose of this step was twofold: First, to level the grade to some extent; and, second, thereby to serve as a watershed, throwing the surface water of the street from the pavement. There was nothing to show that the step was out of repair, or unskillfully constructed. Some of appellant's witnesses testified that, in their opinion, the step was dangerous; others, that it was not. But this was not because of any special manner of construction. It seems that some of the witnesses thought any step was necessarily dangerous to pedestrians at night. And this is doubtless true to some extent. The circuit court having at the close of plaintiff's evidence, given a peremptory instruction in favor of the city, we are brought to consider whether the building a sidewalk with a step, which, from the nature of the grade, the city government deemed necessary and proper, is of itself such negligence as will warrant a recovery by one injured in a fall caused by the step. The city, when it assumes to construct sidewalks, engages to do so in a reasonably safe manner, affording pedestrians reasonably

(Mich.) 5 L. R. A. 143, and note; *Goshen v. England* (Ind.) 5 L. R. A. 253, and note; *Molloy v. Walker* (Mich.) 6 L. R. A. 695, and note; *Thompson v. Quincy* (Mich.) 10 L. R. A. 734, and note; *Bates v. Rutland* (Vt.) 9 L. R. A. 363; *Burns v. Bradford* (Pa.) 11 L. R. A. 726; 53 L. R. A.

*Childrey v. Huntington* (W. Va.) 11 L. R. A. 313; *Gibson v. Huntington* (W. Va.) 22 L. R. A. 561; and note; *Roberts v. Detroit* (Mich.) 27 L. R. A. 572; *Selleck v. Janesville* (Wis.) 47 L. R. A. 601; and *Kansas v. Orr* (Kan.) 50 L. R. A. 788.

safe conditions of travel; they at the time using due caution. The rule is fairly stated in Dill. Mun. Corp. § 1019, as follows: "A municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day." The same author lays down the further rule that this implied liability of the corporation is only on the ground of negligence. "The liability is not that of a guarantor of the safety of the traveler. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. It is under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist, or such as may be reasonably expected to occur." Section 1015. It is argued for the city in this case that the plan of street improvements is one within the discretion of the council, and not to be interfered with by the courts. Some authority is cited from other states supporting this contention. But we rather incline to the view that, while the city governing body may exercise its discretion in the selection of a plan of street improvement, if the plan adopted is one palpably unsafe to travelers, the city would be liable. But when the plan is one that many prudent men might approve; or where it would be so doubtful upon the facts whether the street as planned or ordered by the city governing board was dangerous or unsafe or not,—that different minds might entertain different opinions with respect thereto,—the benefit of the doubt should be given the city, and it should not be held liable. To this effect we find *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; *Madison v. Ross*, 3 Ind. 236, 54 Am. Dec. 481; *New York v. Bailey*, 2 Denio, 433. Nor is the city bound to maintain an even or perfect grade of its streets and pavements. *Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256. We are cited the case of *Blyth v. Waterville*, 57 Minn. 115, 58 N. W. 817, in support of appellant's claim. In that case the municipality had adopted a plan for constructing a plank

walk, requiring a drop or step 7 or 8 inches high. The appellant was injured by stumbling over this step in the night-time. The court found that the step was unnecessary, and there was no reason for having it. This decision seems to be contrary to those of New York, Pennsylvania, Michigan, Indiana, and Kansas; and, furthermore, in that case Judge Cauty dissented, saying: "Unless it appears that the alleged defect is of ministerial origin, it must appear that there is such gross mistake in the adoption of the plan as would imply a failure to exercise the legislative judgment. If two reasonable minds might have adopted different plans, the legislative judgment cannot be impeached for having adopted either one of these plans." In *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273, the plaintiff was injured by stumbling and falling over a stepping stone placed in one of the defendant's sidewalks. In denying his right of recovery, the court used this language: "It would be extending the rule of the liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping stones on the edge of sidewalks in front of hotels, stores, public buildings, and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by a failure of their officers to keep the streets and sidewalks in a proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping stones, which are almost a necessity in providing for the interests, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby." It may frequently be, and we know it is sometimes, necessary to break the angle of sidewalk grades by steps. The determination of the necessity and the plan should be left to the discretion of the governing or legislative body of the city, subject to control in cases of such manifest error or mistake as would indicate a failure to consider or a purpose to misconstrue the work.

The ruling of the lower court in giving the peremptory instruction being in accord with these views, the judgment is affirmed.

### COLORADO SUPREME COURT.

Arthur BREWSTER, Appt.,  
v.  
George W. SHOEMAKER et al.  
(.....Colo.....)

#### 1. A location of a mining claim void

NOTE.—Rights under tunnel-site locations.

- I. Statutory authority for tunnel-site locations.
- II. Precedence as between tunnel locator and surface locator.

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because of the absence of a valid discovery of mineral may be made good by a subsequent valid discovery within its limits before the rights of third persons have attached, but after the filing of the location certificate and all acts of location have been performed.

- III. Extent of tunnel locator's right to veins discovered in tunnel.
- IV. Necessity of following up discovery in tunnel by location on surface.
- V. Right and duty of tunnel locator to "grade

2. A surface location of a mining claim may be based on an underground discovery of mineral through a tunnel not claimed under the tunnel-site act of Congress, on a vein, the apex of which is calculated from its dip, but which has never been opened on the surface or shown by actual working to have its apex within the limits of the claim as staked.

(December 17, 1900.)

**A**PPEAL by plaintiff from a judgment of the District Court for San Miguel County in favor of defendants in an action brought to establish rights in a mining claim. *Affirmed.*

Statement by Campbell, Ch. J.:

The action concerns a strip of ground in conflict between the Bootjack and Contention

lode-mining claims, situate in San Miguel county. The Bootjack is the earlier location in point of time. When its owners (defendants) applied in the land office for a patent, plaintiff, the owner of the Contention lode, filed his adverse therein, and brought this action in its support. The facts material to the present controversy may thus be stated: The location of the Contention lode was made on May 1, 1898. No question is raised as to its validity, provided it was unappropriated public domain at the time of plaintiff's entry. The location of the Bootjack lode is claimed as of the 9th day of November, 1897, and also January 28, 1898. The first discovery of mineral was upon patented ground, and not within the boundaries of the Bootjack claim, as staked. It was therefore void. On the 28th of January, 1898, a valid discovery of

*verse* surface locations; meaning of "line of tunnel."

VI. Expenditures on tunnel.

VII. Location and notice of tunnel claim.

VIII. Miscellaneous.

# I. Statutory authority for tunnel-site locations.

The authority for tunnel-site locations is given, and the rights thereunder defined, by § 4 of the act of May 10, 1872, embodied in § 2323, U. S. Rev. Stat., which reads as follows: "Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes, within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

## II. Precedence as between tunnel locator and surface locator.

Whatever doubts may have existed previously as to the superiority of the tunnel claimant's right to follow a vein or lode discovered in his tunnel, to the full distance allowed by law, as against the conflicting rights of surface locations on such vein or lode, made in the interval between the tunnel-site location and the discovery of the vein or lode in the tunnel, have been dissipated by the decision of the United States Supreme Court in *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 187 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 782, Affirming 13 C. C. A. 390, 32 U. S. App. 75, 66 Fed. 200 (which reversed 53 Fed. 321, on another point), that the right to a vein discovered in a tunnel dates, by relation, back to the time of the location of the tunnel site, and takes precedence of the conflicting rights of one who locates a surface claim on the vein after the location of the tunnel site, but before the discovery of the vein in the tunnel. This decision, of course, overrules the prior decision of the land department (Commissioner Drummond's letter to Chaffee, Copp, U. S. Min. Dec. 144) that the tunnel locator cannot cut off the rights of other parties on a lode discovered and claimed outside the line of the 53 L. R. A.

tunnel, i. e., the width of the tunnel location, before the discovery in the tunnel. And if *Corning Tunnel Co. v. Fell*, 4 Colo. 507, can be construed as authority for the position taken by the land department in the decision last referred to (though that is doubtful; see *infra*, V.), it must be regarded as overruled by the decision in the *Enterprise Case*.

But the locator of a tunnel site acquires no right of possession of blind veins cut by the tunnel underneath surface locations made prior to the commencement of the tunnel. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 409, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885, Affirming 27 Colo. 1, 50 L. R. A. 209, 59 Pac. 607.

*Stratton v. Gold Sovereign Min. & Tunnel Co.* 1 Denver Legal Adv. 350, and *Portland Gold Min. Co. v. Uinta Tunnel Min. & Transp. Co.* 1 Denver Legal Adv. 494, both decided by the United States circuit court of the district of Colorado, are to the same effect as the preceding case. In these two cases injunctions were granted to restrain the driving of tunnels beneath surface locations that antedated the tunnel-site locations. The injunctions were granted upon the ground that the tunnel owners were claiming the right to take any blind veins they might find beneath the surface locations; and the court refrained from expressing any opinion on the question as to a right of way through a senior surface location for the convenient working of other property of a tunnel owner, or for making discoveries beyond the senior locations. It is decided in *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 1, 50 L. R. A. 209, 59 Pac. 607, and *Cone v. Roxanna Gold Min. & Tunneling Co.* 2 Denver Legal Adv. 350, however, that there is no such right of way for such purpose through a surface location antedating the tunnel-site location. In the latter case it was held that the Colorado statute of 1897, declaring that tunnel owners shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of the tunnel, is in conflict with §§ 14 and 15, art. 2, of the Constitution, declaring that private property shall not be taken for private use, and that it shall not be taken without just compensation to the owner, in view of the fact that no provision is made in the act for ascertaining the need of the tunnel owner for such a right of way or for compensating the damages to the surface location. It was urged in this case that the surface location, though prior to that act, was subservient to all local legislation regulating the use of claims, by virtue of § 2338, U. S. Rev. Stat., providing that, as a condition of sale, in the absence of necessary regulation by Congress, the local legislature of



mineral was made within these boundaries, and an amended location certificate filed. Both these discoveries of mineral were at a point about 250 feet below the surface, and upon the same vein, and were made in driving a tunnel; the latter discovery being at a point on the vein uncovered by running the tunnel further into the mountain. It was not a statutory tunnel,—that is, not located under the tunnel site act of Congress,—but was driven by the owners of the Bootjack lode through patented property, not belonging to defendants, and into the territory in dispute, under an arrangement made between the patentee and the tunnel owners. The vein in the tunnel dipped about three degrees from the vertical. A calculation was made, based upon the dip of the vein as thus disclosed, and at a point on the surface where, according to such calculation, the

vein should come to the surface, a discovery notice was posted, containing the statement required by statute, and also a recital that a like notice, which is admitted, was at the place of discovery (describing it), and information was given how to reach it through the tunnel. Starting with this discovery stake on the surface as the initial point, the boundaries of the claim were designated, and the stakes set, as the statute prescribes. No tracing of the vein upwards was done, and no surface work performed, by the locators of the Bootjack claim. The vein found in the tunnel was not by actual exploitation shown to apex within the limits of the claim, but only as might inferentially appear from the calculation to which reference has been made. When the plaintiff appeared upon the ground and made his attempted location of the Contention lode, the posted notice

any state or territory may provide rules for working mines, involving easements, drainage, and other necessary things to their complete development. The court said, however, that the section referred only to such rules and regulations as may be made before the government has conveyed its title.

In *Creede & C. Creek Min. & Mill. Co. v. Ulata Tunnel Min. & Transp. Co.* 1 Denver Legal Adv. 494, it was held that where the tunnel had already been driven through a prior claim, and nothing of value had been taken therefrom, the remedy is by an action of ejectment at law, and not by an injunction in equity.

### III. Extent of tunnel locator's right to veins discovered in tunnel.

Section 2323, U. S. Rev. Stat., declares the right of the tunnel locator to a vein discovered in the tunnel to be "to the same extent as if discovered from the surface." The United States Supreme Court decided, in *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, affirming 13 C. C. A. 390, 32 U. S. App. 75, 66 Fed. 200 (which reversed 53 Fed. 321), that the effect of such provision was to give a tunnel owner discovering a vein in the tunnel a right to appropriate 1,500 feet (the length of a claim based on a surface discovery) in length on either side of the tunnel, or in such proportion thereof on either side as he may desire. The surface locator contended in this case that the tunnel owner, not having specified at the time of the original tunnel location, the particular 1,500 feet of the vein that he desired to claim, the line of the tunnel was to be taken as dividing the extent of the claim to the vein, so that he would be entitled to only 750 feet on either side of the tunnel. The Supreme Court, however, rejected this contention, saying: "The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery—whether such discovery be made on the surface or in the tunnel."

The land department had already decided (*Copp. U. S. Min. Lands*, 90, Commissioner Drummond's letter to Chaffee, *Copp. U. S. Min. Dec.* 144) that the 1,500 feet might be taken all on one side of the point of discovery, or intersection of the lode and the tunnel, or partly on one side and partly on the other.

The decision in the *Enterprise Case* does not settle the question whether the tunnel owner's right may be limited to a less length than 1,500 feet along the lode by a local statute

passed after the act of Congress of 1872. The Supreme Court did hold that the rights of the tunnel locator in that case were not measured by the act passed by the territorial legislature of Colorado in 1861, limiting the right of the tunnel owner on the discovered vein to 250 feet each way from the tunnel; but this was upon the ground that if that section had not in terms been repealed by the legislature of Colorado it had been superseded by the legislation of Congress as found in the Revised Statutes.

Judge Hallett held in *Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.* 53 Fed. 321, that the length of a claim founded on a discovery in a tunnel notice must be determined by the local regulations on the subject, and if there were no such regulation nothing would pass but the line of the tunnel itself; but this decision, at least so far as it denies any rights on the lode outside the line of the tunnel in the absence of local regulations, was reversed by the United States Supreme Court, as has already been shown.

The Colorado supreme court, in *Ellet v. Campbell*, 18 Colo. 510, 38 Pac. 521, held that while the acts of Congress leave the width of mining claims upon the surface subject to local regulations within certain limits, the length and depth may not be thus regulated, and that a tunnel locator who discovered a lode or vein in his tunnel subsequently to the act of 1872 is entitled to claim 1,500 feet in length along the vein or lode. This case was affirmed by the United States Supreme Court in *Campbell v. Ellet*, 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765, but, so far as this point is concerned, the situation in this case seems to have been the same as in the *Enterprise Case*, and, as the point is not discussed, the affirmance is not necessarily to be regarded as an approval of the statement of the Colorado supreme court to its full extent; and for the same reason the statement itself must be regarded as *obiter* so far as it concerns the right to limit the length by local regulations adopted after the act of 1872.

### IV. Necessity of following up discovery in tunnel by location on surface.

Judge Hallett in *Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.* 53 Fed. 321, took the view that for all purposes, except the representation work, it was as necessary, in the case of a location from a discovery in a tunnel, to mark the boundaries of a claim on the surface and file a certificate for record, as in case of a discovery from the surface. The decisions of the land department were to the same effect (*Commissioner to David Hunter*, 5 C. L. O. 520; *Copp. U. S. Min. Lands*, 281).

and boundary stakes of the Bootjack were in place, and the location certificate was on file. Upon this state of facts, and with evidence as to other acts necessary to constitute a valid location of a mining claim, the case was submitted to the jury, under the instructions of the court, and a verdict returned for the defendants, upon which judgment was entered.

**Messrs. Gerry & Taylor and W. H. Tripp** for appellant.

**Messrs. Hogg & Hamill** for appellees.

**Campbell, Ch. J.**, delivered the opinion of the court:

Upon this appeal two questions only are important, and, as stated by appellant's counsel, they are: (1) Can a location ad-

mittedly void, because of an absence of a valid discovery of mineral, but regular in all other respects, be made good by a subsequent valid discovery of mineral within the limits of the location, made before the rights of third parties attach, but after the filing of the location certificate and all acts of location have been performed? (2) May a location of a valid mining claim be based upon an underground discovery of mineral made upon the dip of a vein at a distance of 250 feet below the surface, or any other distance, through a tunnel not statutory,—that is, not claimed under the tunnel site act of Congress,—where the vein has never been opened upon the surface, or shown by actual working to have its apex within the limits of the claim as staked?

1. Plaintiffs rely upon *Upton v. Larkin*,

These decisions, however, so far as they require a formal location on the surface as a condition of the continuance of the owner's rights, are overruled by *Campbell v. Ellet*, 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765, affirming 18 Colo. 511, 33 Pac. 521, where it is held that the failure to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed will not destroy the right of a tunnel owner to mineral veins which he has discovered in the tunnel, as against a subsequent surface locator, where the tunnel owner posts at the mouth of the tunnel a notice of the discovery of the lode, and the extent of the claim thereon, and causes to be filed in the office of the recorder of the county a location certificate, as required by the local statutes. It appeared in the case that the subsequent locator knew of the tunnel claim and of the discovery of the lode therein; but the decision does not seem to be limited by that fact. The decision in *Campbell v. Ellet* merely obviates the necessity of a surface location as a condition of the preservation and continuance of the tunnel owner's rights on a lode discovered in the tunnel, and the opinion intimates that a surface location may be necessary as a condition of procuring a patent. In this connection the court says "We do not mean to say that there is any impropriety in such a location [a surface location based on a tunnel discovery], the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel, and about that point locating the lines of his claim, in accordance with other provisions of the statute. It may be true . . . that before a patent can be secured there must be a surface location . . . It is enough to hold, following the plain language of the statute, that the discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right."

The land department has ruled that a location on the surface must precede the granting of a patent; thus: No patent can be issued for a vein or lode without surface ground, and a survey of a lode discovered in a tunnel cannot properly be made until it has been definitely determined what portion of the public domain overlies the apex of the lode. *Copp, U. S. Min. Lands*, 220; 4 C. L. O. 102.

**V. Right and duty of tunnel locator to "adverse" surface locations; meaning of "line of tunnel."**

The United States Supreme Court, in *Enter-53 L. R. A.*

*prise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, held that a tunnel owner's right to a vein which crosses his tunnel is not defeated by his failure to "adverse" an application for a patent for a conflicting surface location made on the vein between the time of the original tunnel location and the discovery of the vein in the tunnel, where, at the time the application was presented and proceedings were had thereon, the tunnel owner knew of no vein which would enable it to dispute the right of the owners of the surface location to a patent. The effect of this decision is, however, limited by the fact that the surface location involved in the case was nearly parallel with the line of the tunnel, and some 500 feet therefrom. There was, therefore, nothing in the situation to put the tunnel owner on notice that the tunnel, when extended, would cut the lode on which the surface location was made. The court says that at the time of the application for the patent to the surface location the presumption would be that the lode ran lengthwise and not crosswise of the claim (as a matter of fact the lode did run crosswise of the claim). The case, therefore, cannot be regarded as a direct authority upon the question as to the necessity of "adversing" an application for a patent to a surface claim which crosses the line of the tunnel. When this case was before the circuit court of appeals (13 C. C. A. 390, 32 U. S. App. 75, 66 Fed. 200) that court, like the Supreme Court, held that under the circumstances the tunnel locator lost no rights by failure to adverse the application for the surface location; but it intimated that it is, at least, proper to "adverse" such an application when it is known that the lode crosses the line of the tunnel.

Section 2323, U. S. Rev. Stat., provides that "locations on the line of such tunnel of veins or lodes, not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be 'invalid.' The phrase "the line of such tunnel," in this provision, has been construed to mean the width of the tunnel, the lines of which are required by rules prescribed by the commissioner of the general land office to be marked on the surface (*Cir. Instruction Dec. 10, 1891, ¶¶ 20-26*), and not a strip whose width on each side of the tunnel is measured by the distance that the tunnel owner may follow a lode cut by the tunnel. *Corning Tunnel Co. v. Pell*, 4 Colo. 507; *Hope Min. Co. v. Brown*, 7 Mont. 550, 19 Pac. 218; *Re David Hunter*, 5 C. L. O. 130; *Copp, U. S. Min. Lands*, 231; *Commissioner Drummond, Copp, U. S. Min. Dec. 144*; *Commissioner Williams, Copp, U. S. Min. Lands*, 222; *Cor-*

5 Mont. 600, 6 Pac. 66, 7 Mont. 449, 17 Pac. 728,—which was afterwards affirmed in *Larkin v. Upton*, 144 U. S. 19, 36 L. ed. 330, 12 Sup. Ct. Rep. 614. In the opinion, as reported in 5 Mont. and 6 Pac., *supra*, it was said that a location void at the time it is made, because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located. Upon a second appeal of the same case, reported in 7 Mont. and 17 Pac., *supra*, the learned court seems to recognize the doctrine laid down by Mr. Justice Sawyer in the case of *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 686, wherein it was said that in such a case a subsequent valid discovery, made before any other person has

acquired any rights, will make such a location good. But the court proceeds at the second hearing, with the case then in hand, to say that the evidence sought to be introduced at the trial to show a subsequent valid discovery was properly rejected because it appeared—or at least it was not clear that the contrary was true—that the subsequent discovery to which the evidence was directed was made after the application for patent was filed. And the court held that a patent ought not to issue upon a discovery made after application. It also declared that the offer of evidence was not made in good faith, but to enlist the sympathy of the jury. In the review of the case by the Supreme Court of the United States there is nothing said to give color to the position taken here by appellant's counsel. Whether the owners of

ing Tunnel M. & R. Co. v. Pell, 3 C. L. O. 131, Copp, U. S. Min. Lands, 38, 90. The decision of the United States Supreme Court in *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, does not seem to involve a denial of the correctness of this definition. The decision giving the tunnel owner the precedence, to the full extent of 1,500 feet along the lode, over a surface location made between the time of the commencement of the tunnel and of the discovery of the lode therein, seems to rest entirely on the clause of § 2323 that gives the owner the right to "all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface." No reference is made in the opinion to the provision making locations on the line of the tunnel invalid.

*Corning Tunnel Co. v. Pell*, 4 Colo. 507, *supra*, was an action of ejectment to determine title, brought by a tunnel owner who had filed an "adverse" against an application for a patent to a surface claim that crossed the center line of the tunnel site nearly at right angles. The discovery shaft, however, was not on the "line of the tunnel" as defined in this case; and the lode had not been reached or cut by the tunnel. The court held that, as the surface location (in the sense in which "location" is used in § 2323, i. e., the initial point of location or discovery shaft) was not on the line of the tunnel, the tunnel owner had no right of action. The court had already held that there was no right of action by virtue of the provision of § 2323, giving the tunnel owner "the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface," because the right of possession was dependent upon, and could not attach until, a discovery in the tunnel. Some of the courts and textbook writers have regarded this case as holding that the tunnel owner's rights, as against surface locations made between the commencement of the tunnel and the discovery of the lode therein, were confined to the width of the tunnel. As has been seen (*supra*, II.), the view thus attributed to the court has been repudiated by the United States Supreme Court in the *Enterprise Case*; and if the court in the Pell Case really took that view, and based its decision denying the tunnel owner's right to maintain an action to establish title as against a surface location outside the line of the tunnel, upon the ground that he had no rights, inchoate or consummate, outside such line, as against such surface location, the de-

cision has been deprived of its value as a precedent on the point in question by the decision of the United States Supreme Court in the *Enterprise Case*. But it is not clear that the court in the Pell Case, by defining the "line of the tunnel" as the width of the tunnel, meant to deny that the tunnel locator had any rights outside that line. It would seem that the court may have taken the position that, outside the line of the tunnel, the tunnel owner's rights were inchoate merely, and would not become consummate until a discovery in the tunnel, and that, being inchoate merely, they would not support an action to determine title. If this was the theory on which the Pell Case was decided, the decision is not necessarily affected by the decision in the *Enterprise Case*. It is not perceived that the latter case militates against the theory that there is a space (the width of the tunnel) within which surface locations are expressly forbidden during the progress of the tunnel, and another space beyond, and extending to the full width of 1,500 feet on either side of the center line of the tunnel, within which surface locations may be made and patented during the progress of the tunnel, subject, however, to the paramount right of the tunnel locator to follow any vein discovered in the tunnel to the full length of 1,500 feet, though in so doing he may conflict with the surface locations. The suggestion that this may have been the theory of the Pell Case is not made for the purpose of showing that the decision in that case against the right of the tunnel locator to maintain his action was correct, and ought to be adopted. Even assuming the correctness of that theory, the question would still be open whether, under the circumstances that existed in the Pell Case, the tunnel locator ought not to file an "adverse" and support it by action; but the suggestion is made for the purpose of showing that the weight of the decision in the Pell Case as authority for a negative answer to that question is not materially affected by the decision in the *Enterprise Case* that the rights of the tunnel locator after discovery in the tunnel, as against surface locations made in the interval between the tunnel location and the discovery, are not confined to the width of the tunnel.

The theory just discussed seems to have been adopted in *Hope Min. Co. v. Brown*, 7 Mont. 550, 10 Pac. 218, which was an action by a tunnel locator to enjoin defendant, who had located a claim within 300 feet of the line of the tunnel, from excavating ore therefrom. The defendant's location was made after the commencement of the tunnel; but at the time of the action the plaintiff had not discovered the lode in his tunnel. The plaintiff's right to maintain

the Bootjack lode, in connection with the second discovery of mineral,—the one within its exterior boundaries,—in January, 1898, supposed they were merely amending the former attempted location by correcting the description and filing an amended location certificate, or whether they intended to make, and supposed they were making, a re-location of an abandoned claim, is immaterial; for, before the rights of third persons, including the claimant, attached, it is admitted that they had taken all of the steps which, under the Federal and state statutes, constitute an appropriation of a lode mining claim. The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done

before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim, and refile their location certificate, or file a new one. In the case of *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, we have ruled against appellant's contention. The United States circuit court of appeals for the eighth circuit, in *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608, in a case coming up from Utah, has reached the same conclusion. We know of no statutes of this state that require a different ruling. Other authorities sustaining our conclusion are *Craig v. Thompson*, 10 Colo. 517, 16 Pac. 24; *North Noonday Min. Co. v. Orient Min. Co.* 9 Morrison Min. Rep. 529, 6 Sawy. 299,

the action was denied upon the ground that third persons had the right to locate veins or lodes on either side of the line of the tunnel, but not on the line of the tunnel itself, such locations, however, being subject to be defeated upon the discovery of the vein or lode in the tunnel. As a matter of fact, the court in this case held that the complaint did not sufficiently allege that the ore or lode discovered by the defendant would be found in the plaintiff's tunnel; but it is apparent from the opinion that the decision on the other point was not affected by the insufficiency of the complaint in this respect.

The relative rights of the parties in the preceding case came before the court in *Hope Min. Co. v. Brown*. 11 Mont. 370, 28 Pac. 732. In this action the tunnel owner, who had not yet discovered the vein or lode in his tunnel, sought to enjoin the defendant from prosecuting proceedings to obtain a patent to his claim, the plaintiff having adversed the application in the land office. It appeared that the discovery upon which defendant's location was made was outside the line of the tunnel, but that the claim was so located that it intersected and extended across the line of the tunnel. The court held that the defendant should be restrained from prosecuting his proceedings for a patent until it should be demonstrated that the vein or lode upon which he made his location would not be discovered, or until the tunnel rights were abandoned by cessation to prosecute the tunnel. This decision does not seem to involve a denial of the position taken in the preceding case to the effect that the line of the tunnel designates a width marked by the exterior lines or sides of the tunnel, and that outside that line third persons may locate claims subject to be defeated if the vein or lode on which the location is made is subsequently discovered in the tunnel. The Court says: "The only question of difficulty in the application of the law is whether a party discovering a lode not appearing on the surface, and not previously known to exist, which lies in such position in relation to the tunnel that the same may be discovered therein, and taken by the tunnel claimant, can be restrained from acquiring such lode while the tunnel claimant is prosecuting his tunnel according to law. This difficulty lies in the fact that it cannot be definitely shown in advance, either that the tunnel will or will not strike such lode. A lode lying near the line of the tunnel, with its strike or course at the surface extending along parallel with the line of the tunnel, may so dip in its downward course as to be in the range of the tunnel excavation. In the case at bar, however, it is shown that

the strike of the lode in its course crosses the line of the tunnel, and the location made by respondent overlies the line of the tunnel. It seems to us that the intent of the statute is to provide for this condition in which the parties are placed, and reserves to the tunnel claimant the opportunity to demonstrate what veins or lodes may be discovered therein, before allowing such veins or lodes to be appropriated and taken by another."

The situation in this case was substantially the same as in *Corning Tunnel Co. v. Pell*, 4 Colo. 507, *supra*, and the decisions in the two cases seem to be diametrically opposed so far as concerns the right of the tunnel locator to prevent the issuance of a patent to a surface location prior to the discovery of the vein in the tunnel.

*Hope Min. Co. v. Brown*, 11 Mont. 370, 28 Pac. 732, is perhaps distinguishable from the *Enterprise Case* by reason of the greater probability in the former than in the latter case that the vein would be discovered in the tunnel. The decision in the *Enterprise Case*, however, weakens the force of one of the reasons assigned in the *Hope Case* for allowing the injunction, namely, that if others were allowed to patent locations that might eventually be found to conflict with the tunnel owner's rights, the latter might be deprived of those rights, the court apparently taking the view that the issuance of the patent to the surface location would necessarily cut off any of the tunnel owner's rights in conflict therewith. The decision in the *Enterprise Case* shows that the issuance of a patent to the surface claim is not necessarily, and under all circumstances, inconsistent with the preservation of the conflicting inchoate rights of the tunnel owner. It may be, even since the decision in that case, that in a situation like that which existed in the *Hope Case* the issuance of a patent without any "adverse" would cut off the tunnel owner's rights; but if this is so, it is because, under the circumstances and in view of the probable conflict of rights, the tunnel owner ought to have protected those rights by an "adverse," and not because the mere fact of the issuance of a patent is necessarily inconsistent with the continuance of those rights. Therefore, any argument to support the right or necessity of filing an "adverse" which assumes that the inchoate rights of the tunnel locator cannot survive the issuance of a patent to the surface claim begs the question. The suggestion in the *Hope Case*, that if the surface locator may be allowed to mine the mineral during the progress of the tunnel, the tunnel owner will be deprived of the benefit of a subse-

1 Fed. 522; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Golden Tierra Min. Co. v. Mahler*, 4 Morrison Min. Rep. 390; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 4 Morrison Min. Rep. 411, 7 Sawy. 96, 11 Fed. 666; 1 Lindley, Mines, §§ 335 *et seq.*; Morrison, Mining Rights, 9th ed. 28, and cases cited.

2. In *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, it was held that when a tunnel claim has been duly located under the provisions of the acts of Congress, and the owner thereafter discovers a mineral lode therein, he is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface location of the same lode. This case was affirmed by the Supreme Court of the United States in *Campbell v. Ellet*, 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765. This, however, is not

controlling of the proposition now under consideration. In the case at bar the defendants were not attempting to locate a tunnel site under the acts of Congress. The mouth of the tunnel was not upon the Bootjack claim, and the entire work was done upon patented land by the plaintiffs under agreement with the patentee. The point of discovery was over 800 feet from the mouth of the tunnel. As well said by Mr. Morrison in his work on Mining Rights, 9th ed. 30: "The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a shaft of the process of location, subsequent to discovery." Certainly there is no requirement of the Federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discovery shall be within the limits of the

quent discovery, seems to have a better foundation.

In *Back v. Sierra Nevada Consol. Min. Co.* 2 Idaho, 386, 17 Pac. 83, it was held that a tunnel locator might adverse an application for a patent for a surface location within the line of the tunnel, although the vein or lode on which the location was made had not then been discovered in the tunnel. It appeared in this case, however, that the discovery was made within the line of the tunnel, *i. e.*, the width of the tunnel, which had been marked on the ground pursuant to the rules prescribed by the commissioner of the general land office, and therefore, the surface location was expressly prohibited by statute.

A tunnel location under the United States mining laws is a mining claim, and an "adverse" may be based upon it; and if the owner of such location fails to adverse applications for patents to claims that lie across the general course of the tunnel, or to establish his rights therein by suit, as provided by § 2326, U. S. Rev. Stat., it is not competent for the land department to insert any clauses of reservation with respect to the tunnel rights in the patents to be issued upon such applications. *Bodie Tunnel & Mfg. Co. v. Bechtel Consol. Mfg. Co.* 1 Land Dec. 584.

*Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, affirming 167 U. S. 116, 42 L. ed. 101, 17 Sup. Ct. Rep. 765, was a suit by a tunnel owner in support of an "adverse" filed against a surface location, and the right to maintain the suit was upheld; but in this case the discovery of the lode in the tunnel preceded the location of the claim on the surface.

#### VI. Expenditures on tunnel.

The expenditures required upon mining claims may be made in running a tunnel for developing the claim. Commissioner to E. D. Coleman, 1 C. L. O. 134; Commissioner to William S. Merrill, Dec. 13, 1877, 5 C. L. O. 5; Commissioner to John Hunter, 5 C. L. O. 534.

The act of February 11, 1875, credits to a lode claim the expenditures in running a tunnel for the purpose of developing a lode owned by the proprietors of the tunnel. *George S. Lodge*, 6 C. L. O. 122.

But such expenditures cannot be credited to a claim not owned by the proprietor of the tunnel, in the absence of any binding agreement whereby the owners of both claims are bound to contribute to the expense of the tunnel, and are entitled to its use,—notwithstanding that it is designed to work both the claims through the tunnel. *Ibid.* 53 L. R. A.

Compliance with the requirement of § 2323, U. S. Rev. Stat., as to marking the line of the tunnel and posting and filing notice, is not essential to make work done upon a tunnel run in compliance with the act of February 11, 1875, for the purpose of developing a lode already discovered and located, applicable to that lode. *Henry M. Hoyt*, 8 C. L. O. 70.

Should either of the parties claiming a tunnel refuse or fail to contribute his portion of the expenditures required upon the lodes which it is proposed to develop by such tunnel, his co-owners may proceed against him under § 2324 U. S. Rev. Stat. Commissioner to John Hunter, 3 C. L. O. 520.

No specific amount of work is required to be done in order to retain ownership of the tunnel location, but the work must proceed with reasonable diligence, or it will be treated as abandoned. *Copp*, U. S. Min. Lands, 121.

#### VII. Location and notice of tunnel claim.

Tunnel owners are required to give proper notice of their tunnel location by good and sufficient notice, and must at the same time establish the boundary lines thereof. Prospecting within the lines for lodes not previously known to exist is prohibited, while work on the tunnel is prosecuted with reasonable diligence. Commissioner to David Hunter, 5 C. L. O. 130.

Notice and location of a tunnel claim are required only where blind lodes are sought. *Henry M. Hoyt*, 8 C. L. O. 70.

Where a party runs a tunnel to develop a known lode, already discovered and located, notice of such intention is not required, and a tunnel location need not be made. *Ibid.*

#### VIII. Miscellaneous.

The reservation, by § 2392, U. S. Rev. Stat. from a town-site patent issued prior to the act of 1872, of any "gold mine that may be known to exist in any part of the lot," did not operate to give a third person the right, without the consent of the owner, to run a tunnel under the portion of the lot not included in the ledge, in order to reach the ledge. *Dower v. Richards*, 73 Cal. 477, 15 Pac. 105.

In an action for recovery of a tunnel and tunnel site in a mining district, it is not ground of demurrer to the complaint that the lodes alleged to be embraced within the tunnel-site location are not each separately described; a statement in the complaint that all the lodes in the tunnel claimed have been worked and mined by the plaintiffs and its grantors comprehends every part of the property for the recovery of which

claim. Under our statute (Mills's Anno. Stat. § 3154; Gen. Stat. 1883, § 2403) where a lode is cut at a depth of 10 feet below the surface by means of an open cut, cross cut, or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth. *Gray v. Truby*, 6 Colo. 278; *Electro Magnetic Min. & Development Co. v. Van Auken*, 9 Colo. 204, 11 Pac. 80. The question here is not whether a subsequent discovery on the apex of the lode would take precedence of the prior discovery on the dip, for there is no claim here that plaintiff's subsequent location is on the apex of the same lode on whose dip defendants' discovery was theretofore made. But the question is whether a valid location can be made by a discovery at a point 250 feet beneath the surface, when it is followed up by a marking of the boundaries on the surface as though the discovery had been made from the surface, and by the doing of the other acts which the statute requires, though no surface work is done, and no actual tracing of the vein to the surface attempted. The precise question has not, to our knowledge, been decided by a court of last resort, but we do not see why a location such as has been made by the defendants is not good. It has been held that where the discovery is made in a discovery shaft along the course of a vein, and the surface boundaries marked with reference to its course or strike as disclosed in the discovery shaft, the presumption is that the vein continues on the same course throughout the limits of the claim. When, as in the case at bar, the discovery is made underground upon the dip of the vein, it is fair to assume, in the absence of a contrary showing, that the vein extends upward at the same angle; and a marking of the boundaries by making the place at which the vein, if continued to the

surface, would be disclosed, the initial point, is a sufficient compliance with the law. That the mouth of the tunnel was not upon the claim we do not consider important. That the tunnel was driven through patented property, not belonging to the owners of the lode discovered, is something of which the plaintiff cannot complain. If the owners of the land through which the tunnel is driven give their consent thereto, a third person may not object. Sufficient notice was conveyed to the public of this location. The defendants not only placed in the tunnel, at the point of discovery, a discovery stake and notice, but also posted the discovery notice on the surface, containing, not only the things required by statute, but in addition informing the public of the exact spot where the discovery was made, and furnishing information how to reach the same through the tunnel, where inspection might be had. We do not think it necessary, in a discovery which is made underneath the surface, that the locator shall, at the risk of losing his claim, demonstrate by actual working that the top or apex is within the limits of his location. In the absence of some proof to the contrary, the court will presume, as we have said already, that the vein continues in its upward course on the same angle to the surface; and if the locator selects and traces his boundaries with reference to this place on the surface, so as to include it within the limits of his claim, nothing further in this respect is required. On this last point *Armstrong v. Louber*, 6 Colo. 393, and *Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283, though not deciding the precise question, are, in principle, authority for the holding here.

*The judgment of the court below is in harmony with our views, and it is affirmed.*

the action is brought. *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 32 L. ed. 172, 8 Sup. Ct. Rep. 1214.

Where a complainant in an action for the recovery of a tunnel and tunnel site alleges a claim to a tunnel 5,000 feet in length, it is not good ground of demurrer thereto that the statute recognizes a right to only 3,000 feet from the mouth of the tunnel. Such allegation does not render the whole claim void; the location would be good to the extent of 3,000 feet. *Ibid.*

Tunnel sites cannot exceed 3,000 feet in length, with width of the actual width of the tunnel itself. Commissioner to John Hunter, 5 C. L. O. 34.

The timber on a tunnel site belongs to the tunnel owner. *Ibid.*

Parties forfeit all right to undiscovered veins on the line of their tunnel by a failure to prosecute work on their tunnel site for six months. *Ibid.*

53 L. R. A

Where there has been a total abandonment of, or a failure to prosecute work on, a tunnel for six months, the party or parties claiming such tunnel forfeit all right to the undiscovered veins on the line of such tunnel. *Ibid.*

The provisions of § 2323, U. S. Rev. Stat., and the privileges granted thereby, apply to one who locates a tunnel for discovery purposes, as well as for development purposes; but failure to prosecute work on such a tunnel for six months works an abandonment of the right to all undiscovered veins on the line of such tunnel, and the owner of such tunnel is not entitled to blind veins subsequently discovered, but only to the bore of the tunnel and a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes. *Fissure Min. Co. v. Old Susan Min. Co.* 22 Utah, 438, 63 Pac. 587.

G. H. P.

## MICHIGAN SUPREME COURT.

Ira N. BRYANT

v.

Daniel B. KINYON, *Plff. in Err.*

(.....Mich.....)

1. A debt arising from the sale and collection of the proceeds of property conditionally sold to the vendor with retention of title until the payments were made as required by the contract is not within the provision of the bankruptcy act excepting from the operation of the discharge debts created by fraud, etc., while acting as an officer "or in any fiduciary capacity," but the discharge will reach it under the other provisions of the act.
2. A surety on a *capias* bond in a suit to hold the principal liable for selling and converting the proceeds of property sold to him on condition cannot be held after the principal has been discharged in bankruptcy.
3. Jurisdiction of the bankruptcy court need not be shown in pleading a discharge in bankruptcy to defeat an action for conversion of property sold on condition.

(June 17, 1901.)

**E**RROR to the Circuit Court for Hillsdale County to review a judgment in favor of plaintiff in an action brought to recover for the alleged conversion of certain wood belonging to him. *Reversed.*

The facts are stated in the opinion.

*Mr. F. A. Lyon* for plaintiff in error.

*Messrs. Grant Fellows and B. D. Chandler*, for defendant in error:

In order to constitute an equitable estoppel, such as will prevent a party from asserting his legal rights to property, there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross neglect on his part as to amount to constructive fraud.

*Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904; *First Nat. Bank v. Marshall & I. Bank*, 108 Mich. 115, 65 N. W. 604.

We have not waived our rights under this contract by trying to get our pay.

*Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330.

If defendant was in possession of our property, with no right to dispose of it, he held it simply as our trustee or bailee; and if he disposed of it and converted it to his own use, the liability thereby created was a liability against him while acting as our trustee and bailee and in a fiduciary capacity.

*Mattleson v. Kellogg*, 15 Ill. 547; *Herman v. Lynch*, 26 Kan. 435, 40 Am. Rep. 320; *Darling v. Woodward*, 54 Vt. 101; *Johnson v. Worden*, 47 Vt. 457; *Fulton v. Hammond*, 11 Fed. 291.

**NOTE.**—On the question, What constitutes a fiduciary capacity within the meaning of the provisions of the bankrupt law?—the above case is believed to be one of first impression so far as the present bankrupt law is concerned, but seems to be clearly covered by the principles declared in the decisions on the previous law.

53 L. R. A.

Defendant, having given his bond at the time he was taken into custody under the writ issued in this case, cannot now be discharged from custody, nor can his sureties be discharged.

*Minon v. Van Nostrand*, Holmes, 251, Fed. Cas. No. 9,641; *Re Albrecht*, 17 Nat. Bankr. Reg. 287, Fed. Cas. No. 145; *Robinson v. Soule*, 56 Miss. 549; *Goodwin v. Stark*, 15 N. H. 218; *Wilson v. Field*, 27 Hun, 46; *Knapp v. Anderson*, 7 Hun, 295; *Re Marshall Paper Co.* 95 Fed. 419; *Hill v. Harding*, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725.

The liability of these sureties upon this bond is conditioned upon the defendant's first obtaining judgment against the principal. Under the bankruptcy statute, the liability of these sureties is not in any way released.

*Serra e Hijo v. Hoffman*, 30 La. Ann. 67; *Sandusky v. Exchange Bank*, 81 Ill. 353.

**Hooker, J.**, delivered the opinion of the court:

The parties made a written contract, whereby the plaintiff agreed to sell and deliver to the defendant 2,400 cords of wood at \$1.50 per cord, to be paid as follows: "As fast as 100 cords of said wood shall be sold (i. e. by Kinyon), he shall pay to Bryant \$150 in cash therefor." It further provided that the title to the wood should remain in Bryant, with all rights of possession until the same should be fully paid for, which should be within three years; and that "as earnest money" Kinyon should convey to Bryant a house and lot designated, and upon receipt of the deed Bryant should indorse upon the contract \$300. 2,111 cords of wood were delivered before April 15, 1896. In June, 1896, the plaintiff brought assumpsit against the defendant for the price of the wood sold by the defendant up to that time, and recovered a judgment for \$640 and interest. After the bringing of the action in assumpsit, defendant continued to sell the wood, and there is testimony tending to show that he sold 512 cords after that time. On May 17, 1897, this action was begun by *capias*. The declaration contains three counts in trover; the first being for an alleged conversion of 2,400 cords of wood; the second and third for the conversion of \$2,400 in money; the third alleges the money to have been received by the defendant from the sale of the wood delivered under this contract. The defendant pleaded the general issue, and, after the case had been once tried and reversed by this court, added a notice that, after the commencement of this action, he received his final discharge in bankruptcy, and was, together with his sureties on the *capias* bond, thereby released from any further liability on this claim. The plaintiff recovered a verdict and judgment, and the defendant has brought error.

We consider the last question mentioned

conclusive of the case. It is maintained by the defendant that the plaintiff's claim for the conversion of the property constituted a debt provable against the bankrupt, and § 63 of the bankrupt act of 1896 sustains this contention. It provides that "debts of the bankrupt may be proved and allowed against his estate which are: 1st, a fixed liability as evidenced by an instrument in writing; 2d, founded upon a contract express or implied." That unliquidated claims such as this may be proved against a bankrupt's estate admits of no doubt. Subdivision 6 of § 63 expressly recognizes the right and there are many cases arising under earlier laws where they have been proved. It does not necessarily follow that a discharge in bankruptcy releases a bankrupt from all of his provable debts. He is released only from those which the law provides that he shall be released from. Section 17 of the act of 1898 excepts all provable debts "created by his fraud, embezzlement, misappropriation or defalcation, while acting as an officer, or in any fiduciary capacity," and it seems to be agreed by counsel that the defendant is released by his discharge unless this claim is within this exception. Counsel for the plaintiff cite some cases which are said to sustain the claim that this conversion falls within the exception. Thus, in *Matteson v. Kellogg*, 15 Ill. 547, it was held that one receiving money to be used in the purchase of certain land for the owner of the money acted in a fiduciary capacity, and would not be discharged from a claim based on his misappropriation of the money. The case of *Herman v. Lynch*, 26 Kan. 435, 40 Am. Rep. 320, was similar. The defendant received money for the purpose of buying exchange, and remitting it to plaintiff's creditors. Instead of doing so, he converted the money, and it was held that he was not released by a discharge in bankruptcy. In *Fulton v. Hammond* (1882) 11 Fed. 291, action was brought against one who had taken a note for collection, and appropriated the proceeds to his own use. Discharge in bankruptcy was held no defense. In each of these cases there was a clear fiduciary relation. The defendant was an agent, and embezzled the funds of his principal. There are, however, two Vermont cases which are in point. In the case of *Johnson v. Worden*, 47 Vt. 457, decided in 1874, plaintiff brought trover for a yoke of oxen, which he sold conditionally to the defendant, reserving the title until fully paid for. The latter exchanged the cattle for some stags, and never paid for the oxen. Bankruptcy proceedings followed, and plaintiff proved his claim for a balance due upon the oxen, and the defendant was discharged. The court refused to instruct the jury that the discharge should defeat plaintiff's action, and the judgment was affirmed, the court holding that by the contract plaintiff had a claim for the price, and a right to the oxen until the debt should be paid; and that by proving his debt he was pursuing one of his remedies, which he could do without losing 53 L. R. A.

the other. No authority was cited. In *Darling v. Woodward* (1881) 54 Vt. 101, plaintiff had a lien on sheep, and brought trover for their conversion. A discharge in bankruptcy being pleaded, the court held that the debt was created by fraud, and the plaintiff was allowed to recover. Upon the other hand, we find the leading case of *Chapman v. Forsyth*, reported in 1844 in 2 How. 202, 11 L. ed. 236. It was there held that a factor who converted a balance did not owe a "fiduciary debt." It was said: "The second point is whether a factor, who retains the money of his principal, is a fiduciary debtor within the act. If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the 1st section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee' are not cases of implied, but special, trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factory is not, therefore, within the act." In *Campbell v. Perkins* (1853) 8 N. Y. 439, it was held that a claim for unliquidated damages founded on a contract of storage was a debt, subject to the bankruptcy act, though recovery was sought in an action of tort; and the bankrupt was released by the discharge. In *Cronan v. Cotting* (1870) 104 Mass. 245, it was held that the delivery of bills of exchange to defendant for collection, for application upon defendant's claim against the plaintiff, and payment of the balance of the proceeds to plaintiff, did not constitute a fiduciary relation, and it was said that to so hold "would require an interpretation so broad that almost all pecuniary obligations, especially those implied by law, would be included," and the court added: "We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises." In *Neal v. Clark* (1877) 95 U. S. 704, *sub nom. Neal v. Scruggs*, 24 L. ed. 586, it was held that the word "fraud," as used in the bankruptcy law of 1867, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. In *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. Rep. 311, the defendant availed himself of a right under an executory contract to call for wines, when he knew he was insolvent, with intent to get possession of them,



and convert them to his own use, without paying for them. The jury was allowed to find that he was guilty of fraud in fact involving moral turpitude or intentional wrong in the creation of the debt. In *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313, this question is discussed, and the doctrine of *Cronan v. Cotting* approved; i. e. that the phrase implies a fiduciary relation existing previously to or independently of the particular transaction out of which the debt arises. See also *Hennequin v. Cleics*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; *Collier, Bankruptcy*, p. 203.

It is contended, however, that, as the defendant was arrested upon a capias, and gave bail, the surety is not discharged, and that a judgment is necessary, and should be permitted to fix his liability. We think this position is not tenable. The responsibility of the surety is limited by a strict construction of his bond. There can be no liability unless a judgment is procured in the action against the principal, and that can never be, for the reason that he is released by his discharge. *Com. v. Huber*, 3 Clark (Pa.) 334; *Kirby v. Garrison*, 21 N. J. L. 179; *Barber v. Rodgers*, 71 Pa. 362; *Collier, Bankruptcy*, p. 185. Counsel for

the plaintiff assert that the "discharge was not sufficiently pleaded to permit defendant to go to the jury on that question, or to call for an instruction by the court, in that the notice of the discharge did not set up facts necessary to give the bankruptcy court jurisdiction, including "an allegation of residence of the bankrupt in the district where said court was situate. The jurisdiction of courts of bankruptcy need not necessarily appear upon the face of the proceedings. See *Collier, Bankruptcy*, p. 8, and cases there cited. In pleading judgments of domestic courts of record, the jurisdiction of the court need not be affirmatively shown by stating the facts upon which it attached. 12 Am. & Eng. Enc. Law, p. 149f, and note. Under the proofs the court should have directed a verdict for the defendant.

We think it unnecessary to discuss the other questions raised, most, if not all, of which are covered by our former opinion in this case, reported in 123 Mich. 151, 81 N. W. 1093.

*The judgment is reversed, and a new trial ordered.*

**Long, J.**, did not sit. The other Justices concur.

## MINNESOTA SUPREME COURT.

Ludvig MASTAD, Appt.,  
v.  
SWEDISH BRETHREN, Resp't.

(.....Minn.....)

\*A person managing and controlling a public place of amusement which he invites the public, on payment of an admission fee, to attend, and at which place he sells to his customers and patrons intoxicating liquors, who sell such liquors to one in attendance at such place, and thereby renders him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without cause or provocation, is bound to exercise reasonable care to protect his other customers and patrons from such assaults and insults, and for a failure to do so is liable for damages at the suit of one assaulted and injured.

(April 26, 1901.)

**A** PPEAL by complainant from an order of the District Court for Hennepin County sustaining a demurrer to the complaint in an action brought to hold defendant liable for an assault committed upon

\*Headnote by BROWN, J.

**NOTE.**—For a case in this series as to liability of saloon keeper furnishing liquor to intoxicated person for injury done by him to other guest, see *Belding v. Johnson* (Ga.) 11 L. R. A. 53.

As to liability for negligence causing injury to spectators at public exhibition or entertainment, see *Hart v. Washington Park Club* (Ill.) 53 L. R. A.

complainant while he was attending a picnic held by defendant upon grounds for admission to which payment was required. *Reversed.*

The facts are stated in the opinion.

**Mr. John W. Aretander**, for appellant: Ordinary care in and about protecting defendant's guests invited to come to its grounds for its benefit certainly required either police, or other protection to the peaceable element.

There can be no reason why the same rule should not be applied to defendant in this case that applies generally to a trader who invites the general public to his premises for his own benefit, viz., to use ordinary care to see that they sustain no injuries, either from pitfalls or other exposures, which ordinary care can guard against.

*Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779.

A different rule obtains in cases of criminal acts, and in cases of public nuisance, than obtains in cases of negligence.

If a man does an unlawful act, he shall be answerable for the consequences of it.

*Scott v. Shepherd*, 3 Wils. 403.

One who does an illegal or mischievous

29 L. R. A. 492; *Lane v. Minnesota State Agri. Soc. (Minn.)* 29 L. R. A. 708; *Richmond & M. R. Co. v. Moore* (Va.) 37 L. R. A. 258; *Hallyburton v. Burke County Fair Asso. (N. C.)* 38 L. R. A. 156; *Thompson v. Lowell, L. & H. Street R. Co. (Mass.)* 40 L. R. A. 345; and *Sebeck v. Plattdeutsche Volkfest Verein (N. J.)* 50 L. R. A. 199. Digitized by Google

act which is likely to prove injurious to others is answerable for the consequences which may directly and naturally result from his conduct, though he does not intend to do the particular injury which follows.

*Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Dygart v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Weick v. Lander*, 75 Ill. 93.

Selling liquor without a license is not only a criminal act, but was considered a public nuisance at common law.

*Wood, Nuisances*, § 25; *State ex rel. Circuit Attorney v. Uhrig*, 14 Mo. App. 413; *State ex rel. Vance v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182.

The primary and substantial cause of the injury was the negligence of the defendant, and it is not competent for it to say that it is absolved from the consequences of its wrongful act by what someone else did.

*Collins v. Middle Level Comrs.* L. R. 4 C. P. 279; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Scott v. Shepherd*, 3 Wils. 403; *Illidge v. Goodwin*, 5 Car. & P. 192; *Lynch v. Nurdin*, 1 Q. B. 29; *Dygart v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Poucell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Lane v. Atlantic Works*, 107 Mass. 104; *Weick v. Lander*, 75 Ill. 93; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Henry v. Southern P. R. Co.* 50 Cal. 176.

**Messrs. A. B. Darellus and F. N. Hendrix**, for respondent:

This action is not distinguishable from *Swinfen v. Loucry*, 37 Minn. 345, 34 N. W. 22.

It does not appear from the complaint in this action that the defendant knew, or ought to have known, that Olson assaulted plaintiff, or that it could have prevented any of the injuries so received by him after it knew of the assault.

*Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944.

The mere fact that a man is a wrongdoer does not make him liable for all the consequences of his wrongful act, no matter how remote.

*Beach v. Ranney*, 2 Hill, 309.

**Brown, J.**, delivered the opinion of the court:

Appeal from an order sustaining a general demurrer to the complaint. The complaint alleges, substantially: That defendant is a corporation. The character and nature of its business is not stated. That on the 11th of June, 1899, defendant held or gave a picnic on certain grounds at Lake Minnetonka, invited the general public to attend the same, sold tickets of admission thereto, and undertook to protect persons so invited, and who bought tickets and attended the picnic, from assaults by ruffians and drunken people. That plaintiff bought a ticket, and spent the day on the grounds. That during the whole of the day, and 53 L. R. A.

through a committee appointed for such purpose, defendant unlawfully, and without license, sold intoxicating liquors on such picnic grounds to all who desired to purchase the same, although it was well aware that the sale of such liquors would be likely to cause persons to become drunk, violent, and dangerous, and likely to commit assaults and other breaches of the peace. That defendant knew that one Charles Olson, who was an attendant at the picnic, was liable to drink to excess, and when under the influence of intoxicants was an ugly and dangerous person, and likely to commit assaults on peaceable persons. That, nevertheless, defendant wrongfully and unlawfully sold him large quantities of such liquors, and to such an extent as to render him drunk and disorderly; and, although defendant had undertaken to protect plaintiff while on the grounds from assaults at the hands of such persons, it carelessly and negligently failed to procure police protection, or to provide or appoint persons who could maintain peace and order. That the said Olson, after being so made intoxicated, and by reason thereof, without cause or provocation assaulted, beat, and bruised plaintiff. The plaintiff asked to recover against the defendant damages for such assault. Defendant demurred to the complaint, which was sustained by the court below. Plaintiff appeals.

It is not only alleged in the complaint that defendant made Olson drunk, knowing him to be a dangerous and quarrelsome person when in that condition, and negligently failed and neglected to provide protection from his assaults and insults, but that defendant made the sale of liquor to him unlawfully, and without license. Whether defendant would be liable for the conduct of Olson, and for assaults committed by him while intoxicated, because of the fact that the sale of the liquor to him was unlawful, and without license, we need not determine. The cases cited by counsel for appellant sustain the affirmative of the proposition on principle, but, as it is not necessary to a decision of this case, we pass the question for future consideration. The case made by the complaint is similar to those holding a railroad company liable for assaults committed upon passengers by fellow passengers, and similar to the rule of law applicable to hotel keepers with respect to the responsibility of the keeper for the property and effects of his guests, and the proprietors of other public places. The rule with respect to railroad companies as carriers of passengers is stated in clear language in *Mullan v. Wisconsin C. R. Co.* 46 Minn. 475, 49 N. W. 249, to the effect that a railroad company as a carrier of passengers is bound to exercise the utmost diligence in maintaining order, and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated, or naturally expected to occur, in view of all the circumstances, and the number and character of persons on board. This rule, of course, applies to drunken persons per-

mitted by the railroad company to remain upon their train; is not limited to persons the company may have made intoxicated by the unlawful or other sale of intoxicants to them; but extends as well to those who became intoxicated elsewhere, and go aboard the train in that condition. If they be permitted to remain passengers, and commit assaults upon other unoffending passengers, and such assaults are such as might reasonably be anticipated from the condition of the drunken passenger, the company is liable. The same principle is applied to hotel or inn keepers. All who engage in a public business of that nature are bound to protect their guests, both in person and property, from acts and misconduct of wrong-doers permitted to remain upon the premises; and the rules of law applicable to the common carrier are applicable alike to them. Bishop, Non-Contract Law, 1173. If such is good law as to the railroad company and as to the innkeeper,—and there is no doubt but that it is,—the same rule should apply, though, perhaps, with a lesser degree of care, to a person engaged in the sale of intoxicating liquors at a public entertainment, given and controlled by him, which the public are invited to attend upon payment of an admission fee, and who sells such liquors to a person in attendance at the entertainment he well knows to be violent and disorderly when intoxicated. There is no reason on principle why a person owning and controlling such a place, who sells his wares to such a person, knowing his ugly and quarrelsome disposition when intoxicated, should not be bound to exercise at least reasonable care to protect his other guests from his assaults and insults. The proprietor of such a place has the undoubted right to exclude therefrom drunken and disorderly persons, and the right to remove and expel them when they become in that condition and disorderly, and likely to produce discord and brawls. Being clothed with such power and authority, a corresponding duty to do so in the interests of law and order, and for the protection of his other guests, should be imposed as a matter of law. We are now speaking of a person lawfully engaged in the business stated in the complaint, and not of one who violates the law by sale of intoxicating liquors without license. The

case of *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, is squarely in point. It is there said: "If, on the other hand, he was guilty of making Flanagan drunk, or if he came there drunk, and Schambacher knew that fact, he was bound to see that he did no injury to his customers. All this is a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute. Where one enters a saloon or tavern opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults as well of those who are in his employ as of the drunken and vicious men whom he may choose to harbor." In line with these principles we therefore hold that a person having the management and control of a public place of amusement, which he invites the public, on payment of an admission fee, to attend, and at which he sells to his customers intoxicating liquors, who sells to one in attendance at such place intoxicating liquor to such an extent as to render him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without provocation or cause, is bound to exercise reasonable care to protect his other patrons from his assaults and insults, and for a failure to do so is liable in an action for damages to one assaulted and injured by such person.

The point is made by respondent that the complaint does not allege that defendant owned and controlled the picnic grounds. There is no direct allegation of either fact, but the complaint does allege affirmatively the facts from which its control of the picnic grounds may be fairly and reasonably inferred. The complaint is sufficient in this respect. *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214. The case of *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22, is not in point. Defendant in that case was not the proprietor of a public place where intoxicating liquors were sold, and the trial disclosed no duty on his part to protect persons from the assault of the intoxicated person. Such duty clearly follows from the relation of the parties in the case at bar, and on this ground is distinguishable from the *Swinfin Case*.

*Order reversed.*

## MISSOURI SUPREME COURT.

John REEDY, *Respt.*,  
v.

ST. LOUIS BREWING ASSOCIATION  
*et al.*, *Appts.*

(.....Mo.....)

### 1. A joint liability against the owner

**NOTE.**—As to liability of municipal corporation for injuries caused by ice and snow on streets or sidewalks, see, in this series, *Hausmann v. Madison* (Wis.) 21 L. R. A. 263, and *note*; *Huston v. Council Bluffs* (Iowa) 36 L. 53 L. R. A.

of property abutting on a street, and the municipality, exists where he negligently suffers rainwater to be discharged from defective pipes on his roof, so that it freezes and forms a dangerous condition of the sidewalk, which is permitted to remain for an unnecessary period, until a passer-by falls and is injured.

### 2. An owner of property abutting on

R. A. 211; and *Gavett v. Jackson* (Mich.) 32 L. R. A. 861.

As to right to join municipal corporation and private person in action for injuries, see *Dutton v. Lansdowne* (Pa.) *ante*, 469.

a street is not liable to a passer-by injured by falling upon ice on the sidewalk, formed by water from a burst pipe leading to a storage tank, when the break is not caused by any defect in the pipe, or by his negligence, although the water may have reached the sidewalk because pipes designed to carry rain-water were insufficient to carry it.

3. Where a sidewalk is in fact rendered dangerous by slippery ice formed from accidental or incidental discharge of water thereon, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice, or by the exercise of reasonable care can discover the condition.
4. Although the question of notice to the city of dangerous ice on the sidewalk is for the jury, where it froze during the night and in the morning was covered by the abutting owner with malt sprouts, which were swept off by boys about dark on the evening of the accident, yet if the jury is not from the vicinage it should not be permitted to draw the inference of notice from consideration of the care that would be exercised by the city's "proper officers having charge of keeping its streets in repair."
5. It cannot be assumed conclusively, as matter of law, that a sidewalk covered with slippery ice over which malt sprouts have been spread is safe until they are swept off.
6. Whether or not a city performs its duty by seeing that slippery ice on the sidewalk is covered with malt sprouts is a question of fact for the jury.

(March 29, 1901.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Gasconade County in favor of plaintiff in an action brought to recover damages for personal injuries caused by a fall on a sidewalk which was alleged to be unsafe because of defendants' negligence. *Reversed.*

The facts are stated in the opinion.

*Messrs. B. Schnurmacher, Carl Ungar, and A. Nicholson*, for appellant city:

It is not every accumulation of snow or ice upon the highway which makes it defective, nor will mere slipperiness from ice during inclement weather, and an accident resulting therefrom, create liability upon the part of a municipal corporation.

*Stanton v. Springfield*, 12 Allen, 566; *Nason v. Boston*, 14 Allen, 508; *Stone v. Hubbardston*, 100 Mass. 49; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; *Broburg v. Des Moines*, 63 Iowa, 523, 14 Am. Rep. 356, 19 N. W. 340; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Kinney v. Troy*, 108 N. Y. 567, 15 N. E. 728; *Kaveny v. Troy*, 103 N. Y. 571, 15 N. E. 726; *Harrington v. Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 543, 9 N. E. 225; *Henkes v. Minneapolis*, 42 Minn. 530, 44 N. W. 1026.

The ice in question resulted in consequence of the sudden bursting of a water pipe on private premises adjoining the highway, and a sudden fall of temperature. These circumstances were casual and could not be foreseen, and therefore the city ought not 53 L. R. A.

to be held liable, even though the formation of ice was of such a character as to make the sidewalk temporarily defective.

*Market v. St. Louis*, 56 Mo. 189.

Immediately after the bursting of the pipe and the wetting of the sidewalk all possible precautions were taken to prevent accident. The water was swept off the sidewalk with brooms, and malt sprouts were strewn thereon, which remained until within two hours of the time when plaintiff slipped. They were removed by small boys who made a slide of the ice, rendering it slippery. Under these circumstances the city will not be held liable for the accident to plaintiff.

*Myers v. Kansas*, 108 Mo. 480, 18 S. W. 914.

*Messrs. Kehr & Tittmann*, for appellant association:

There is in this case no joint liability between the city and the brewing association. Each is sought to be charged upon a separate and distinct ground of liability,—the city because it failed to keep the sidewalk in a reasonably safe condition for public travel, the brewing association because the gutter and down-spout on its building adjoining the sidewalk are charged to have been defective and insufficient. The case therefore does not come within § 9 of art. 16 of the charter of St. Louis.

*Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 17 S. W. 637.

The city has sole control of the streets and sidewalks, and is alone liable for their condition. The abutting owner has no such liability.

*Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 17 S. W. 637; *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921; *Blake v. St. Louis*, 40 Mo. 569; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240; 1 *Shearm. & Redf. Neg.* 5th ed. § 343.

The defendant brewing association owed the plaintiff no duty which it has violated. The petition alleges none. Hence there is no negligence.

*Fuchs v. St. Louis*, 133 Mo. 194, 34 L. R. A. 118, 31 S. W. 115, 34 S. W. 508; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Gurley v. Missouri P. R. Co.* 104 Mo. 211, 16 S. W. 11; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 1112; *Cooley, Torts*, 2d ed. 791-794.

The condition of the sidewalk on the evening of December 1, 1896, was certainly the proximate cause of the plaintiff's injury, the condition of the gutter and down-spout on defendant's building on the evening of November 30, 1896, at best, only the remote cause. The law always refers the injury to the proximate, not to the remote, cause. Negligence is not actionable unless it is the proximate cause of the injury complained of.

*Shearn. & Redf. Neg.* 5th ed. §§ 5, 8, 9, 25, 26; *Webb's Pollock, Torts*, pp. 26, 29, 54; *Addison, Torts*, 6th ed. 1887, with *Wood's notes*, pp. 40, 42; *Cooley, Torts*, 73; *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 229; *Stanley v. Union Depot R. Co.* 114 Mo. 606, 21 S. W. 832; *Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 288, 43 Am. Rep. 762; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Sharp v. Powell*, L. R. 7 C. P. 253, 41 L. J. C. P. N. S. 95; *Blyth v. Proprietors of Birmingham Waterworks Co.* 11 Exch. 781, 25 L. J. Exch. N. S. 212; *West Mahanoy Turp. v. Watson*, 116 Pa. 344, 9 Atl. 430; *Fauccett v. Pittsburg, O. & St. L. R. Co.* 24 W. Va. 755; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Chamberlain v. Oakkosh*, 84 Wis. 289, 19 L. R. A. 513, 54 N. W. 618; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Brandon v. Gulf City Cotton Press & Mfg. Co.* 51 Tex. 121; *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279, 72 N. W. 735; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

The ice on the sidewalk did not constitute an obstruction in the sense of the law.

*Broburg v. Des Moines*, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340; *Chicago v. McGiven*, 78 Ill. 347; *Mauch Chunk v. Kline*, 100 Pa. 119, 45 Am. Rep. 364; *Gilbert v. Roxbury*, 100 Mass. 186; *Smyth v. Bangor*, 72 Me. 249; *Pinkham v. Topsfield*, 104 Mass. 78; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642.

By stepping into the street, plaintiff would have avoided the ice on the sidewalk, and would thus have escaped the risk of injury. His failure to do so is contributory negligence.

*Cohn v. Kansas*, 108 Mo. 387, 18 S. W. 973; *Indianapolis v. Cook*, 99 Ind. 10; *Boyle v. Mahanoy City*, 187 Pa. 1, 40 Atl. 1093.

*Messrs. A. R. Taylor and B. L. Mathews* for respondent.

**Valliant, J.**, delivered the opinion of the court:

Plaintiff slipped and fell on ice on a sidewalk in one of the public streets of the defendant city, and suffered serious injuries. This suit is to recover damages for those injuries. The defendants were sued as joint tortfeasors. The joint injury is alleged to consist in neglecting to remove the ice from the sidewalk within a reasonable time after its existence was known, or would have been known, if reasonable care had been observed. The defendant the St. Louis Brewing Association is charged in the petition to have caused the ice to form by suffering water from its abutting premises to flow upon the sidewalk in freezing weather. The particular fact of negligence alleged against the brewing association is that the gutter on that defendants' building was in "defective condition;" "that, owing to the insufficiency of the spouts and gutters on said building, 53 L. R. A.

the water from the roof of said building overflowed upon the sidewalk of said street, where it was frozen, and became a dangerous obstruction to passage over said sidewalk. The defendants answered severally, denying the allegations of negligence, and pleaded that plaintiff was himself guilty of negligence that contributed to his injuries. It appeared from the evidence that the brewing association owned buildings at the south-east corner of Eighteenth street and Cass avenue, running south to a paved alley 20 feet wide. Next south of the alley is its storage house, which is about 40 feet high. The buildings north and south of the alley are connected by a bridge. On the building east of the storage house there was a water tank supplied by a pipe running across the bridge from north to south. It was a 2 or 2½ inch pipe, packed in a wooden box, extending over the roof of the storage house to the tank. This was a flat gravel roof 40 by 42 feet, with a copper gutter around it 4 inches wide at the bottom and 8 at the top, with a 4½ inch down-spout of galvanized iron. As to the condition of the gutter, the testimony was conflicting. Two of plaintiff's witnesses said it sagged in the center, and one said it bent outward. Defendants' witnesses testified that it was in perfect condition, of best material and workmanship, set on brick the entire length of the wall, and could not sag; that the pitch of the roof was 18 inches from east to west, and the gutter and down-spouts sufficient to carry off the rainwater that would accumulate on a roof of that size. Plaintiff lived in the same block just south of the brewery, and visited it almost every day. On the evening of November 30, 1896, between 7 and 7:30 o'clock, plaintiff went to the brewery, and informed the night watchman the water was running off the roof upon the sidewalk. The two went out together, and saw water running off the roof of the storage house. The night watchman went upon the roof, and there found that a leak had occurred in an elbow in the pipe leading to the tank. He went across the bridge to the mill house, and turned off the water. Then got a broom and swept the water off the sidewalk as well as he could. The superintendent of the brewery, who lived near, was notified, and he caused two men to spread malt sprouts on the sidewalk where the water had fallen, with a view to prevent the ice becoming slippery, as it was then cold and freezing. There was no rain or snow. The weather was clear, dry, and cold. The water that had thus fallen from the roof of the storage house, or so much of it as had not been swept off, became frozen, and covered the sidewalk from the building line to the curb with a coating of ice. The ice was thicker near the building line and the curb than in the center. The location is a thickly inhabited part of the city, and a great many people (the witnesses said thousands) passed over the place the day following, which was December 1. About 5:30 p. m. that day a lot of boys were seen sweeping the malt sprouts from the ice to convert it

into a skating place, and used it for that sport. About 7 o'clock that evening the plaintiff, while walking in the center of the sidewalk on this ice, slipped and fell, receiving serious injuries.

In its instructions, the court, after presenting in other respects the plaintiff's hypothesis of the case, including the formation of ice on the sidewalk, rough and uneven, so as to be a dangerous obstruction to persons passing, directed the jury to find for the plaintiff against both defendants if they found from the evidence that "the water was caused to so fall upon said sidewalk because the gutter of said building was out of repair and insufficient to carry the water from the roof of said building," "and if the brewing association did not use ordinary care in maintaining the gutters in that condition, and in suffering the ice to so remain on the sidewalk, and if the city knew, or by the use of ordinary care would have known, of the condition in time to remove it." Other instructions, upon like hypotheses (leaving out that of the city's duty), directed a verdict against the brewing association alone, to all of which exceptions were taken. It is unnecessary to here copy the instructions given for defendants, but it is sufficient to say that, in general, they directed a verdict for defendants, and each of them, unless the acts of negligence propounded in plaintiff's instructions were established by the proof, or if the plaintiff was himself negligent. For the city the instructions given carried the theory that the mere formation of ice or accumulation of snow on the sidewalk did not constitute a condition for which the city would be liable, but that the ice or snow would have to be so rough and uneven as to constitute an obstruction dangerous to persons using the sidewalk, while exercising ordinary care. Each defendant asked an instruction in the nature of a nonsuit, and, among others, instructions to the effect that ice which was smooth and slippery was not an obstruction, but, to become such, it must be rough and uneven in its surface. Those instructions were refused, and their refusal assigned for error. There was a verdict of \$4,500 for plaintiff against both defendants, from which they appeal.

1. The first proposition advanced by the defendant brewing association is that the petition makes no case of joint liability of the two defendants, but that as to the one the charge is negligence in suffering water to be discharged on the sidewalk in freezing weather, and as to the other allowing an obstruction to remain in the street for an unnecessary period after it was known, or would have been known by the use of proper care. It is argued upon the authority of *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242; *St. Louis v. Connecticut Mut. L. Ins. Co.* 107 Mo. 92, 17 S. W. 637; *Baustian v. Young*, 152 Mo. 317, 63 S. W. 921, and other cases cited, that the abutting owner is not responsible for the condition of the sidewalk in his front, but that the duty to look after that is on the city alone. It does not, however, impair the doctrine laid down in those 53 L. R. A.

cases to say that an individual may become liable and jointly liable with the city for an unsafe condition of the sidewalk. This liability does not arise from the fact that he is owner of property abutting the sidewalk, but from the fact that he is instrumental in causing the condition, either by his wilful act or negligent omission to perform a duty which the law imposes on him. If he is allowed an extraordinary use of the sidewalk for his private convenience, as, for example, to place in it a manhole for the reception of coal (*Benjamin v. Metropolitan Street R. Co.* 133 Mo. 274, 34 S. W. 590), a water meter (*Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210), or an excavation in close proximity to the sidewalk for a foundation for a new building (*Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528), the law imposes on him the exercise of reasonable care to guard the public from injury in such use. And it may be said that if the individual neglect to perform any duty that the law imposes on him in particular, and a dangerous condition of the sidewalk results, then a new duty on him in relation to that condition arises, and, of course, with greater force, it would be so if that condition was the result of his wilful act.

Now the petition in this case charges that the defendant brewing association maintained a defective gutter, and that the insufficiency of the spouts and gutters resulted in the discharge of water on the sidewalk, where it became frozen. If, therefore, it was the lawful duty of that defendant to maintain spouts and gutters sufficient to prevent a discharge of water on the sidewalk, its neglect to do so, and the resultant ice, imposed a duty on that defendant with reference to the ice which the law would not have imposed if the water had fallen from the clouds in the form of rain or snow. It is said by this defendant that there is no law requiring it to have gutters and downspouts on its buildings at all. There is no statute on the subject that we are aware of, but the principle of the common law is that, while the owner of adjoining property is not responsible for the natural flow of water across his land onto the land of his neighbor, yet he is liable if he collects it in a quantity by artificial means, and discharges it in a flood on his neighbor's land, and that principle underlies that feature of this case. Water accumulated on a large roof, and directed to a single point, may cause a nuisance for which the owner of the house would be liable. If, therefore, the petition is to be construed into stating a case in which the brewing association was negligent in suffering water to be discharged on the sidewalk where it became frozen, and formed a dangerous condition (and that seems to have been the construction put upon it by both parties and the trial court), then it showed a condition of the sidewalk for the continuance of which for an unnecessary period both defendants would be liable, the joint wrong being the neglect to remove the obstruction.

2. But neither the petition nor evidence of plaintiff presents a theory of duty on the

part of the brewing association to furnish gutters and down-spouts to carry off water from a bursting pipe or a bursting tank. Conceding that the gutter sagged in the center, and that it bent outward (upon which point the testimony was conflicting), and that it was insufficient to carry off this water, it does not follow that the gutters and spouts were not sufficient to carry off the rain and melting snow that might fall upon the roof, and that is all that would naturally be inferred as their purpose. Suppose the pipe had burst at a point on the bridge over the alley, the water would probably have reached the sidewalk where it crossed by the alley entrance, without passing through the gutter; or suppose the tank had burst, what would the defective gutter have had to do with the flooded sidewalk? These ideas are suggested to point the fact that there is no relation, as far as the pleadings and proof show, between the office of the gutter and the water in the pipe. When this pipe burst, the water may have been forced in a body by the pressure on the mains to a given point, where the gutter was unable to impede it. But the gutter was not designed for that purpose. There is nothing in the case as made upon which the court could hold the brewing association liable for failure to furnish a gutter and down-spouts sufficient to carry off water from a burst pipe; and, even if the evidence had showed that the gutter was insufficient to hold rainwater, that would not have helped out the plaintiff's case, because the plaintiff's injuries did not result from a discharge of rainwater on the sidewalk. There is no suggestion, either in the pleadings or evidence, that there was any defect in the pipe that burst, or that the bursting was attributable in any degree to negligence of defendant brewing association. Since the water did not get on the sidewalk by reason of any wilful act or neglect of duty on the part of this defendant, the condition of the sidewalk in consequence was the city's affair alone. The trial court should have given the brewing association's instruction for a nonsuit.

3. The law requires a city to keep its streets and sidewalks in reasonably safe condition for the purposes for which they are designed, and holds it liable to one who, while properly using the street, suffers injury in consequence of its dangerous condition, provided the city had neglected a reasonable opportunity to remove the danger. The questions that we meet, therefore, on this branch of the case, are: Did the ice in this instance render the sidewalk dangerous? If so, did the city have a reasonable opportunity to remove the danger before the plaintiff suffered? Snow and ice on sidewalks have been the occasion of many injuries to persons, and the law books are full of instances where the duty of a municipality in respect to such conditions has been discussed. Running through all the cases to which our attention has been called on this subject, we find the general proposition that ice or snow upon a sidewalk or in a street

is not to be classed with dangerous obstructions, such as a city is required to remove. It would be more accurate to say that it is a dangerous obstruction, but that it is excepted from the category of obstructions for which the city is liable upon the ground of the impracticability of requiring the city to remove it. There are, for example, in this city, many hundred of miles of sidewalks upon which snow falls and ice forms when the weather suits, and immediately upon its fall the snow is beaten down by the feet of thousands walking over it. To some extent the sidewalks and streets may be and are cleared of such obstruction, but to remove it entirely or to a degree that would render it not dangerous is impracticable, and therefore not embraced in the law's reasonable requirements. There is another reason for making snow or ice on the sidewalks and in the streets an exception to that dangerous condition for which a city is liable; that is, when that condition exists generally it is obvious, and everyone is on his guard. Any pedestrian on the sidewalk or traveler in the street is warned by all his surroundings that ice and snow abound, and consequently danger of slipping and falling is to be apprehended at every step. The law is reasonable in this, as in all things. There is a collection of interesting cases in the briefs of the learned counsel on this subject which are authority for saying that when the ice or snow is merely smooth and slippery it is not such a dangerous condition as will render the city liable, but that that condition arises only when the ice or snow has been suffered to accumulate so as to form an uneven surface, making it dangerous to attempt to pass over. *Stanton v. Springfield*, 12 Allen, 566; *Mason v. Boston*, 14 Allen, 508; *Stone v. Hubbardston*, 100 Mass. 49; *Grossenbach v. Milwaukee*, 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182; *Broburg v. Des Moines*, 63 Iowa, 523, 50 Am. Rep. 756, 19 N. W. 340; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Koveny v. Troy*, 108 N. Y. 571, 15 N. E. 726; *Harrington v. Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 543, 9 N. E. 225; *Henkes v. Minneapolis*, 42 Minn. 530, 44 N. W. 1026. The principle involved in those cases was present in the minds of the court and counsel in the trial of this case, as was shown in the instructions given and in those asked and refused. But the circumstances of the case at bar do not bring it within the reason upon which the doctrine of those cases is founded.

In the first place, while the evidence showed that the ice was thicker at both edges of the sidewalk than it was in the center, yet it was not such a piling up of ice at either side as would convert it into a dangerous obstruction if it was not dangerous otherwise, and, besides, the plaintiff fell in the center, where the ice was smooth, and he fell because it was smooth and slippery. And, on the other hand, the reasons which except slippery ice on a sidewalk from the category of dangerous obstructions

for which a city may be liable do not exist in this case. The water which was frozen here did not fall in rain or snow from the clouds, the city was not confronted with a thousand miles of ice-covered sidewalks to look after, nor were the people using the sidewalk at this point admonished by the general conditions surrounding them that ice was to be expected. The weather was dry, clear, and cold. There was ice at that point for a distance of about 15 feet, but not elsewhere. That the condition was dangerous is demonstrated by the plaintiff's fall; that the danger could have been removed with little labor or expense is beyond question. Therefore the city is not excused as it is when its powers are overcome by nature covering the face of the earth with ice and snow. In one of the cases above cited under this head (*Henkes v. Minneapolis*), there is an expression to the effect that no difference in principle is seen between a case of ice formed from rain or snow and that formed from water escaped from a hose of a fire engine. But the facts of that case do not mark it so distinctively as to make it an authority for that proposition, because, although water from the hose had entered into the case, yet it scarcely changed the conditions. The court said: "The sum of all the evidence is that it was, and for some time had been, cold winter weather, and all the sidewalks in the city were covered with ice to a certain extent, so that 'if a man did not take care he was liable to slip and fall almost any place.'" In *Chase v. Cleveland*, 44 Ohio St. 505, 58 Am. Rep. 543, 9 N. E. 225, the Ohio court put the exemption of the city from liability on account of ice on the sidewalk upon the ground that it would be unreasonable to require the city to remove the obstruction. Said that court: "It is not unreasonable to assume that there were hundreds of similar dangerous places in the city of Cleveland at the time of the accident to plaintiff. To effectually provide against dangers from this source would require a large special force, involving enormous expense." We hold that where the sidewalk is in fact rendered dangerous, because of slippery ice formed from accidental or incidental discharge of water, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice, or by the exercise of ordinary care would have discovered the condition.

This brings us to the second question under this head: that is, Did the city neglect that duty? The city is not negligent unless it knew, or should have known, that the dangerous condition existed, and after such notice, actual or constructive, it was entitled to a reasonable time to remedy the fault. *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921. The water had fallen upon the sidewalk about twenty-four hours before the accident. It seems to have been frozen, or some of it, almost immediately, and the brewery people covered the surface with malt sprouts, with a view to rendering it

less dangerous, and these remained until about an hour and a half before the plaintiff fell. During the day it was said thousands of people passed over it in safety. It was about nightfall when the boys swept the malt sprouts off, and made a skating place of it. It was after dark when the plaintiff fell. The only evidence of notice to the city was contained in those circumstances. The instruction on this point was: "And if the jury find from the evidence that the city of St. Louis, by its proper officers having charge of keeping its streets in repair, knew, or by the exercise of ordinary care would have known, of said defective conditions of said sidewalk in time, by the exercise of ordinary care, to have caused said ice to be removed before plaintiff's injury, and neglected to do so." The question of notice in such case is one of fact, and where it is to be inferred from circumstances it depends upon those peculiar to the case. No definite rule can be laid down, either as to duration or conditions. *Frank v. St. Louis*, 110 Mo. 516, 19 S. W. 938. We cannot say that the circumstances in this case did not justify the court in submitting that question to the jury, but in submitting it the court left a great deal of inference to be drawn by the aid of that common knowledge which jurors derive from their every-day experience. While that is a source of information which the law under certain conditions authorizes a jury to draw upon, yet because of its uncertainty it should be resorted to with caution. In this case we must remember the jury was not drawn from the vicinage of the accident, nor was it composed of men familiar with the duties of the city officers. The cause had been taken by change of venue to Gasconade county, and it was tried by a jury of strangers to the scene of action. Therefore, when the court gave them the instruction that required them to consider the care that would be exercised by the city's "proper officers having charge of keeping its streets in repair," it left them very much to conjecture. If plaintiff relied upon an inference of notice derived from the ordinary duties of the city officers, he should have furnished this jury some evidence on that point. The question was confused before the jury with questions relating to the liability of the brewing association that should not have been submitted. This was doubtless to the city's prejudice.

If the dangerous condition was to be reckoned from the time the boys swept the covering of malt sprouts off the ice, in the absence of proof that the city had actual notice, the court might, with propriety, have refused to submit to the jury the question of the city's constructive notice, depending, as it did, on an inference to be drawn from the length of time the condition had existed, because the plaintiff's fall occurred within less than two hours after the boys had swept off the malt sprouts, and it was about dusk when that was done. But it cannot be assumed conclusively, as a matter of law, that the condition was safe until the boys did the mischief. The ice had been there twenty-four



hours, which was long enough to have, at least, raised a question of constructive notice, and it could have been removed entirely in a very short while with trifling expense. Whether seeing that the ice was covered with malt sprouts was all that the situation reasonably demanded, and all that could have been reasonably expected, of the city, with the ordinary means at its hands, was a question of fact, and one which the jury was possibly better equipped, with common knowledge of things, to try, than they were the question relating to the duties of the city's "officers having charge of keeping its streets in repair." The case was tried on a wrong theory. The instructions were fashioned on those decisions above cited, which related to a condition of ice and snow all over the city rendering it practically beyond the city's means to remove, and holding the city liable only in case the ice or snow is suffered to be piled up so as to create a veritable obstruction to climb over. The jury were told that if they found that condition they should find for the plaintiff, and the jury so found, although there was no evidence of such a condition. There was evidence, as we have seen, tending to show that the sidewalk for a distance of about 15 feet was covered with smooth, slippery ice, which rendered it dangerous, and that it was altogether practicable to remove the danger, and that the city would, by the use of ordinary care, have known of the condition in time to have removed the ice or obviated the danger. The case, as between the plaintiff and the city, should have been given to the jury with appropriate instructions on that theory. There was no case at all made against the brewing association.

The judgment is reversed, and the cause remanded to the Gasconade Circuit Court, to be retried according to the views herein expressed.

All concur, except **Marshall, J.**, absent.

Rehearing denied.

Simeon BRINK *et al.*, Appts.,

v.

WABASH RAILROAD COMPANY.

(160 Mo. 87.)

1. The prevention of the performance of a contract by a man to support his parents by negligently causing his death gives them no right of action at common law.

NOTE.—For other cases in this series as to right of parent to maintain action for death of child, see *Winnt v. International & G. N. R. Co.* (Tex.) 5 L. R. A. 172, and note as to action for damages for death caused by negligence; *Atlanta & C. Air Line R. Co. v. Gravitt* (Ga.) 26 L. R. A. 553; *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 7 L. R. A. 283; *Meyer v. King* (Miss) 35 L. R. A. 474; *Noble v. Seattle* (Wash.) 40 L. R. A. 822; *Marshall v. Macon Sash Door & Lumber R. Co.* (Ga.) 41 L. R. A. 211; and *Hennessy v. Bavarian Brewing Co.* (Mo.) 41 L. R. A. 385.  
53 L. R. A.

2. The injury to a parent by the negligent killing of his son who is under contract to support him, thereby preventing performance of the contract, is too remote to form a basis for recovery on behalf of the parent in the absence of wilful intent to injure the parent.

(February 12, 1901.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Clay County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's son, whereby he was prevented from carrying out his contract to support them. *Affirmed.*

The facts are stated in the opinion.

**Mr. L. M. Conkling**, for appellants:

The law will not suffer a wrong or injury to be done to the person of another, or to his legal rights or vested interests, without furnishing the means or remedy to redress the same.

If a person do an act or a wrong to another, whereby he sustains an injury or suffers damages in consequence of the wrongful act, he will have the legal right to an action for damages therefor.

*Baird v. Daly*, 57 N. Y. 236, 15 Am. Rep. 488.

Every invasion or injury to a right imports a damage, even if it does not result in pecuniary loss; for wherever the plaintiff establishes some legal right in himself, by or through any act, agency, or agreement independent of the defendant, and that right has been invaded, weakened, or destroyed by or through the negligent or wrongful act of the defendant, without contributory liability of plaintiff, there is a wrong and damage in law resulting therefrom, and an action will lie for pecuniary compensation, though no actual pecuniary loss can be proved.

*Wells v. Steam Nav. Co.* 2 N. Y. 204, 8 N. Y. 375; *Merriek v. Brainard*, 38 Barb. 574; 1 Addison, Torts, ed. 1876, pp. 9, 10, 16, 17; *Green v. Clarke*, 12 N. Y. 343.

If one commits a wrong against another the latter has a remedy in an action for damages to recover compensation for the wrong.

1 Addison, Torts, ed. 1876, pp. 43, 57; Story, Bailm. 3d ed. §§ 94, 150 *et seq.*

A wrongful act may not be done with a wilful or malicious intent, yet, if it be done by or through carelessness or negligence, and is attended with and produces injury to the rights of another, he has the legal right to recover whatever damages he shall sustain by reason of the negligent or wrongful act.

1 Addison, Torts, ed. 1876, pp. 11, 17; *Blair v. Chicago & A. R. Co.* 89 Mo. 334, 1 S. W. 367; *Baird v. Daly*, 57 N. Y. 236, 15 Am. Rep. 488.

Prospective loss or damages are considered the immediate and natural consequences of the wrong or injury, and it is not necessary to plead this fact in specific terms.

*Golden v. Clinton*, 54 Mo. App. 100; *Lewis v. Independence*, 54 Mo. App. 183; *Clark v. Hill*, 69 Mo. App. 541; *Bartley v. Trorlicht*, 49 Mo. App. 214; *Schmits v. St.*

*Louis, I. M. & S. R. Co.* 119 Mo. 256, 23 L. R. A. 250, 24 S. W. 472; *Gerdes v. Christopher & S. Architectural Iron & F. Co.* 124 Mo. 347, 25 S. W. 557, 27 S. W. 615.

All the law requires is that an injury and damage by wrongful act shall be done, and when this fact occurs then the right to an action legally follows.

*Mohelsky v. Hartmeister*, 68 Mo. App. 324; *White v. Nellis*, 31 N. Y. 405, 88 Am. Dec. 282; 2 Addison, Torts, ed. 1876, 1088-1091, 1105, 1106.

Every invasion of the plaintiff's right by the fraudulent or wrongful act of defendant entitles the plaintiff to damages.

*Baird v. Daly*, 57 N. Y. 236, 15 Am. Rep. 488.

The loss of a pecuniary provision for one's support, which fails to be made, or which is prevented from being made, by the wrongful act of another in killing the person by whom such provision would have been made had he lived, will give a right of action for damages for such loss against the person by whose wrongful act the loss is caused.

1 Addison, Torts, ed. 1876, p. 505; *McIntyre v. New York C. R. Co.* 37 N. Y. 287; *Tilley v. Hudson River R. Co.* 24 N. Y. 471; *Kesler v. Smith*, 66 N. C. 154; *Pennsylvania R. Co. v. Keller*, 67 Pa. 300; Shearm. & Redf. Neg. 2d ed. § 612, p. 693; *Keller v. New York C. R. Co.* 17 How. Pr. 102, 24 How. Pr. 172; *Dickens v. New York C. R. Co.* 28 Barb. 41; *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. New York & H. R. Co.* 14 N. Y. 310; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Pennsylvania R. Co. v. Bantom*, 54 Pa. 495; Bliss's Code, 3d ed. p. 46; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15; 2 Lawson, Rights, Rem. & Pr. p. 1490, note.

Mr. George S. Grover, for respondent:

At common law no civil action could be maintained against a person causing the death of a human being.

*Barker v. Hannibal & St. J. R. Co.* 91 Mo. 91, 14 S. W. 280; 1 Tiffany, Death by Wrongful Act, § 1, p. 2; *Baker v. Bolton*, 1 Campb. 493; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580; *The Harrisburg*, 119 U. S. 199, sub nom. *The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

A third party cannot maintain an action at common law or under our statute for injuries resulting from a breach of a contract between two other contracting parties.

*Roddy v. Missouri P. R. Co.* 104 Mo. 245, 12 L. R. A. 746, 15 S. W. 1112; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 611, 15 L. R. A. 821, 19 S. W. 630.

Burgess, J., delivered the opinion of the court:

This is an action, by plaintiffs, husband and wife, and parents of F. W. Brink, deceased, against defendant to recover damages claimed to have been sustained by and through the wrongful acts of the defendant in destroying the deceased and thereby preventing him from carrying out the terms of a contract entered into between himself and plaintiffs for their support and maintenance. 53 L. R. A.

The facts briefly stated in the petition are about as follows: On the 26th day of June, 1897, and for some time prior thereto, plaintiffs' said son was and had been a mail clerk or agent in the mail or postal service of the government of the United States, and while en route from Kansas City, Missouri, east on defendant's road, in the discharge of his duties, as a passenger of defendant, at a point on its road in Clay county where it crosses a stream by means of a bridge over a creek called and known as "Rose Creek," defendant's train of cars upon which plaintiffs' said son was a passenger, by reason of the carelessness and negligence of defendant's servants and employees in charge of the train, left the track while crossing or about to cross said bridge, by reason of which it displaced some part of the structure of said bridge, and it gave way, precipitating the entire train of cars into the creek, killing plaintiffs' said son immediately. That at the time of the death of plaintiffs' said son, and prior thereto, they had a contract with him by which he contributed a certain amount of his earnings monthly to their support, and by reason of the carelessness and negligence of defendant in causing his death the performance of said contract on the part of their son with them has been rendered impossible, to their damage in the sum of \$5,000, for which they ask judgment. Defendant demurred to the petition upon the ground that it fails to state a cause of action. The demurrer was sustained, and, plaintiffs declining to plead further, judgment was rendered in favor of defendant. The case is before us upon plaintiffs' appeal.

It is well understood that the common law of England has been in force in this state ever since its admission into the union of states. It was adopted by the territorial assembly in 1816. *Lindell v. McNair*, 4 Mo. 380. So that, as we have no statute upon which an action of the character of the one at bar can be predicated, it must necessarily be based upon the common law, if any of its principles furnish a bottom for it to stand upon. Plaintiffs in their brief call our attention to several authorities which they insist sustain the position that such an action may be maintained; but, without reviewing them here, we think the great weight of authority, and that which is sustained by better reason, the other way. *Baker v. Bolton*, 1 Campb. 493, was an action against defendants as proprietors of a stage coach, on the top of which plaintiff and his wife were riding when it overturned, whereby they were both hurt,—the plaintiff bruised, and the wife so seriously injured that she died about a month thereafter. The declaration, besides other special damage, stated that by means of the premises the plaintiff had "wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." The plaintiff was much attached to his wife, and, being a publican, she had been of great use to him in conducting his business. Lord Ellenborough

said: "The jury could only take into consideration the bruises which [he] . . . himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution. In a civil court the death of a human being cannot be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop with the period of her existence." In *Barker v. Han-nibal & St. J. R. Co.* 91 Mo. 86, 14 S. W. 280, it was said: "It may be observed that damages for a tort to the person, resulting in death, were not recoverable at common law; nor could husband or wife, parent or child, recover any pecuniary compensation therefor against the wrongdoer. Our statute on this subject both gives the right of action and provides the remedy for the death where none existed at common law." In *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580, the plaintiff sued Brame to recover the sum of \$7,000, upon the ground that it had insured the life of one McLemore, a citizen of Louisiana, for that amount in favor of third parties, and that while its policies were in force Brame shot and killed McLemore, thereby causing damages to plaintiff in the amount of the policies on the life of deceased, which amount plaintiff acknowledged to be due, and a part of which it had paid. Plaintiff contended that the killing of deceased was an injury to, or a violation of a legal right or interest of, the company, and that as a consequence thereof it sustained a loss which was the proximate effect of the injury. The answer of defendant to plaintiff's contention was that the loss was the remote and direct result, merely, of the act charged; that at the common law no civil action lies for an injury which results in the death of the party injured; and that the statutes of Louisiana upon that subject did not include the case. The court observed: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." A similar rule is announced in 1 Hilliard, Torts, 4th ed. p. 87, and in *The Harrisburg*, 119 U. S. 199, *sub nom. The Harrisburg v. Rickards*, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. The defendant was not a party to the contract between plaintiffs and their deceased son, nor was it in any way interested therein; and we know of no rule of law by which it can be held liable under such circumstances for its nonperformance, although it may have been prevented by the death of the son, and his death may have been occasioned by the negligence of defendant. Now, where a person is entitled to the services of another,—for instance, a servant,—and he is wrong-

fully enticed away, and his master or employer is by reason thereof deprived of his services, he will be entitled to recover damages against the wrongdoer; but the case at bar is not of that character, but is bottomed upon the claim, as alleged, that defendant prevented the performance of a contract entered into by plaintiffs and their son, by which he had undertaken to support and maintain them during their lives, by carelessly and negligently killing him, when at the same time they could not at common law have maintained an action against it on account of his death. If plaintiffs are entitled to recover in this action, it logically follows that they could in a common-law action for the death of the son, and might in the same action recover damages for the prevention of the performance of the contract of the son by killing him; and this no one will contend they could do. The one is the sequence of the other. However, the case of *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580, settles this question beyond controversy, and adversely to the contention of plaintiffs.

But there is another and still further reason why the plaintiffs' petition does not state a cause of action, and that is, the damages claimed are too remote. There is no allegation in the petition, nor is it pretended, that plaintiffs' son was killed with a wilful intent to injure the plaintiffs, and it is only under such circumstances that plaintiffs would be entitled to recover. In *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278, it was held that when one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action, but the rule is different where the injury is done to one with a malicious intent to injure another through a contract relation. *Id.*, 37 Conn. 365. In *Taylor v. Neri*, 1 Esp. 386, it was held that damages resulting to a plaintiff by reason of the defendants having assaulted and beaten an actor, whereby the latter was disabled from fulfilling an engagement with the plaintiff, are too remote. So, in the case of *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571, it was held that, where one person has contract relations with another, an injury to the latter which affects disastrously those relations does not constitute a legal injury to the former; that where an insurer has been compelled to pay the insurance on the life of a person whose death has been caused by the unlawful act of a third person, and where there is no privity of contract between the insurer and the wrongdoer, and no direct obligation of the latter to the former growing out of the relation of the wrongdoer to the insured, by contract or otherwise, though the loss of the insurer is due to the acts of the wrongdoer, yet, as those acts affect the insurer only through his artificial relation of contractor with the in-

sured, the loss is a remote and indirect consequence of the act of the wrongdoer, and no action therefor can be sustained against him by the insurer.

For these considerations, *the judgment should be affirmed*, and it is so ordered

Gantt, P. J., and Sherwood, J., concur.

### OKLAHOMA SUPREME COURT.

Conrad MAAS, *Piff. in Err.*,

v.

Territory of OKLAHOMA.

(.....Okla.....)

- \*1. Where one is being tried for murder, and his defense is insanity, lunacy, or unsoundness of mind at the time of committing the act, the defendant, in the first instance, is presumed to be sane and of sound mind, and the burden is upon him to introduce sufficient evidence to raise a reasonable doubt of his sanity. When he has done this, the territory, before a conviction can be had, is required to prove his sanity beyond a reasonable doubt.
2. Under § 1852, Stat. 1893, one who has sufficient mental capacity to know the wrongfulness of an act which is by law declared to be a crime is responsible and subject to punishment therefor.
3. Section 5373, Stat. 1893, only requires the trial court to impanel a jury to inquire into the sanity of a defendant who is brought before it for judgment and sentence, when the trial judge entertains a reasonable doubt of the defendant's sanity; and where the trial court overrules the motion in arrest of judgment, which is based upon the condition of the defendant's mind, and sentences him, its finding as to such matters is entitled to the same weight and credit as a verdict against the defendant by a jury, and such finding will be disturbed on appeal only when it clearly appears on the face of the record that the proofs offered on the hearing of such motion were such as to raise a reasonable doubt of the defendant's sanity.

(February 8, 1901.)

**E**RROR to the District Court for Blaine County to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

*McSsrs. R. B. Forrest, C. A. McBrian, and L. H. Lookabaugh* for plaintiff in error.

*Mr. J. C. Strang*, Attorney General, for defendant in error:

The law presumes every man to be sane until the contrary is proved.

*Bovard v. State*, 30 Miss. 600; *State v. Erb*, 74 Mo. 199; *United States v. McGlue*, 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *United States v. Guiteau*, 10 Fed. 161.

If one charged with crime has the mental capacity to distinguish right from wrong in

\*Headnotes by BURWELL, J.

NOTE.—As to presumption and burden of proof as to sanity of accused person, see *State v. Scott* (La.) 36 L. R. A. 721, and *note*; and *Ryder v. State* (Ga.) 38 L. R. A. 721, with *note* on nonexpert opinions as to sanity or insanity. 53 L. R. A.

respect to the particular act charged, he is responsible.

*Hart v. State*, 14 Neb. 572, 16 N. W. 905; *Wright v. People*, 4 Neb. 407; *Hauce v. State*, 11 Neb. 537, 38 Am. Rep. 375, 10 N. W. 452.

**Burwell, J.**, delivered the opinion of the court:

The appellant was tried and convicted of the crime of murder, in the district court of Blaine county, and sentenced to life imprisonment at hard labor. From this sentence he appealed to this court, and contends that the trial court erred in two of its instructions to the jury upon the defense of insanity, and these instructions we will now consider:

"Instruction 28. In this case it is claimed for the defendant that, at the time of the commission of the act, his mind and judgment were affected by an insane delusion, or by insanity, and to such an extent as to render him of unsound mind, and not responsible for his acts.

"Instruction 29. In reference to this point, you are instructed that although you may believe from the evidence that the defendant, at the time of the killing of his wife, Martha Maas, was affected by an insanity, or was laboring under an insane delusion, yet this would not exempt him from liability for his acts, if the jury believe from the evidence, beyond a reasonable doubt, that he intentionally fired the shot or shots which killed the deceased, and that he knew and was conscious at the time that what he was doing was wrong, and punishable by the law of this territory."

To the giving of each of these instructions the defendant saved an exception. If these two instructions stood alone, unaided by any other, it might be said that they were insufficient to present fully the question of insanity; but when considered in connection with the other instructions requested by the defendant, and given, they are a correct statement of the law.

Instruction 28 is merely a statement of the defendant's contention, and instruction 29 states the rule of law applicable thereto. Before discussing the general rules of law regarding insane persons, we will notice the express provisions of our own statutes. Stat. 1893, § 5372, provides: "An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense while he is insane." Stat. 1893, § 1852: "All persons are capable of committing crimes except those belonging to the following classes: . . . Lunatics, insane persons, and all persons of unsound mind, including persons

temporarily or partially deprived of reason, upon proof that, at the time of committing the act charged against them, they were incapable of knowing its wrongfulness."

Now, it is contended by the appellant's counsel that the statute recognizes two classes: (1) That one who is a lunatic or insane cannot, under any circumstances, be punished for an act done by him; and (2) that one of unsound mind, including persons temporarily or partially deprived of reason, cannot be punished for a criminal act upon proof that at the time of committing the act charged against him he was incapable of knowing its wrongfulness. This position is incorrect. We think that the language, "upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness," modifies all of subdivision 4 of § 1852 which precedes it; and an insane person or a lunatic, before he can be excused from the consequences of an act which is declared to be a crime, on the ground of insanity or lunacy, must introduce his proof to show that, at the time of the commission of the act charged, he did not, by reason of his insanity or lunacy, have sufficient understanding to know that the act was wrong. Under this section of the statute, the test of responsibility is fixed at the point where one has the mental capacity to know that the act is wrong, and if one has sufficient mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act, he is responsible for the same; and it is immaterial what standard scientific men may fix, or by what rules the medical profession determines that one is a lunatic or insane, he is in law insane or a lunatic, or of unsound mind, or temporarily or partially deprived of reason, to such an extent as will excuse him from punishment, only when he has not the capacity to know the wrongfulness of the particular act, but the knowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same. But no matter what the condition of a defendant's mind at the time of committing an act which the statute declares to be criminal, he can only be excused, where his defense is lunacy, insanity, or unsoundness of mind, upon proof that he was incapable of knowing its wrongfulness, and the duty of establishing this proof is upon the defendant. But to what extent? Upon this point the authorities differ. Two states, New Jersey and Delaware, follow the rule that the defendant must prove his insanity beyond a reasonable doubt before he can be acquitted. But perhaps two thirds of the states follow the rule that the defendant must prove his insanity by a preponderance of the evidence. Among the 53 L. R. A.

states following this rule are Alabama, Arkansas, California, Connecticut, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Nevada, and this is the rule in England. One of the best-considered cases which follows this rule is *State v. Lewis*, 20 Nev. 333, 22 Pac. 241, written by Chief Justice Hawley. This opinion is clear and logical, and shows great research and a thorough understanding of the subject. But with the development of criminal law, and the advancement of civilization, the rules which once governed the defense of insanity are being relaxed so as to give defendants the fullest opportunity to present the truth to the court and jury, that full justice may be done; and, while it is true that this defense is sometimes successfully manufactured and imposed upon courts and juries, the adjudicated cases show no greater abuse of this defense than of the defense of alibi or self-defense. The defense of insanity, when successfully made, appeals to the tenderest sentiments and mercies of the jury, but when feigned and detected it invites their utmost contempt; and, while juries are always ready to deal kindly with one who is so unfortunate as to be dethroned of his reason to such an extent that he cannot distinguish between right and wrong, they are also, as a rule, quick to punish a guilty defendant who tries to escape the consequences of his act through fraud and deceit. Therefore, viewing this defense from every standpoint, we see no good reason why the defense of insanity should be singled out and governed by rules as to burden of proof different from those applicable to other cases, and we feel constrained to enunciate the rule as to the burden of proof, where the defense is insanity, to be this: Every person is presumed to be sane, or of sound mind, and able to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act; and the burden is upon the defendant in the first instance to overcome this presumption by introducing sufficient evidence to raise a reasonable doubt as to his sanity. When this is done, then the state must prove the defendant's sanity beyond a reasonable doubt, in order to secure a conviction; and if, taking the evidence all together, the jury entertain a reasonable doubt as to the defendant's sanity, he should be acquitted. As has been well said by some of our ablest jurists, to doubt the defendant's sanity is to doubt his intent, and where one has not capacity to form an intent there can be no crime. Hence the above rule, which is now the settled law of the following states: Illinois, Indiana, Kansas, Michigan, Mississippi, New Hampshire, New York, and Nebraska. Some of the authorities go to the extent of holding that the defendant is not required to introduce sufficient evidence to raise a reasonable doubt of his sanity, but, if he introduces any evidence tending to prove insanity in the slightest degree, that the state must then

prove his sanity beyond a reasonable doubt. This rule is manifestly unjust to the state. A defendant is presumed to be sane, and this presumption continues until a reasonable doubt of his sanity is raised by competent evidence, and, under our statutes, the burden of raising this doubt is placed upon the defendant. Stat. 1893, § 5227, provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." This statute was originally adopted in California, and has been repeatedly construed by the supreme court of that state. The early cases laid down the rule that in all trials for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation, or that justify or excuse the killing, devolves upon the defendant, and that such mitigation, justification, or excuse must be proved by a preponderance of evidence; but the later cases have repudiated this doctrine, and now hold that this section of the statute simply casts upon the defendant the burden of introducing sufficient evidence to raise a reasonable doubt of his guilt of murder (*People v. Ah Gee Yung*, 86 Cal. 144, 24 Pac. 860; *People v. Bushon*, 80 Cal. 160, 22 Pac. 127, 549); and this is the construction which we adopt. If the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable, no evidence need be introduced by him; but, if the proof of the territory does not tend to show justification, excuse, or mitigation, then the burden is on the defendant to introduce sufficient evidence to raise a reasonable doubt as to his guilt of murder. Therefore, under our statute, a defendant is required to do more than introduce some evidence tending to prove his insanity. He must introduce sufficient evidence to raise a reasonable doubt of his sanity before the prosecution is required to introduce any evidence upon that subject. There was no error in the instructions complained of, and the instructions on the question of insanity, when considered all together, state the law fully and very liberally for the defendant.

Only one other question is raised by the defendant, and that is: Did the trial court err in overruling defendant's motion in arrest of judgment? After the defendant committed the crime for which he was convicted, and while he was confined in the county jail of Blaine county awaiting trial, he was adjudged insane by the county board of insanity, by a vote of two to one, the probate judge finding that the defendant was sane. On the hearing of the motion in arrest of judgment, the defendant's attorneys introduced in evidence this order of the county board of insanity, adjudging the defendant insane. To rebut the inference that might

arise from this order, the territory filed certain affidavits from persons who had seen the defendant, and, among others, the affidavit of the deputy sheriff, who talked with him frequently while he was confined in jail. The court, after considering all of the evidence, overruled the motion in arrest of judgment, and the defendant excepted. Stat. 1893, § 5373, provides: "When an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant, the court must order a jury to be impaneled from the jurors, summoned and returned for the term, or who may be summoned by direction of the court, to inquire into the fact." Under this section, when an indictment is called for trial, or, upon conviction, the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant the court must order a jury to be impaneled to inquire into the facts, but the judge must necessarily determine for himself as to whether or not he entertains a doubt of the defendant's sanity. He has an opportunity to see the defendant, and, in this case, the judge had presided over his trial just prior to the time the motion was presented, and the judge's facilities for forming an opinion as to the defendant's mental condition were most excellent. An appellate court is authorized to say that the trial court erred in a matter of this kind only when it affirmatively appears from the face of the record that the evidence before the trial court was of such a character as to clearly raise a doubt of the defendant's sanity in the mind of the trial judge. A finding determining this question against the defendant is entitled to the same faith and credit as a finding of a jury against a defendant in the trial of a case. The finding of the county board of insanity was not the finding of a court, and, strictly speaking, was not proper evidence, as the only effect of such a finding is to admit one to the territorial asylum for treatment. So far as the issue on the motion in the trial court was concerned, it amounted to no more than the expression of an opinion by any other person out of court, and was therefore incompetent as evidence. *Maass v. Phillips* (Okla.) 61 Pac. 1057; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276; *Leggate v. Clark*, 111 Mass. 308; *Know v. Haug*, 48 Minn. 58, 50 N. W. 934. An adjudication to fix one's legal status must be by the probate judge under an entirely different provision of the statute, and a county board of insanity has nothing whatever to do with such adjudication. *Maass v. Phillips* (Okla.) 61 Pac. 1057. The trial court was justified, under the showing, in overruling the motion in arrest of judgment.

*The case should be affirmed*, and the judgment of the trial court carried into execution. It is so ordered.

All of the Justices concur, except **Mo-Atce, J.**, who presided at the trial below, not sitting.

## KENTUCKY COURT OF APPEALS.

METROPOLITAN LIFE INSURANCE  
COMPANY, *Appt.*,

v.

William A. SMITH.

(.....Ky.....)

1. It is within the sound discretion of the court to permit an amendment of a petition to be filed after the evidence in the case is all in, for the purpose of alleging that plaintiff has acted with reasonable diligence in bringing his action.
2. An insurance company may be compelled to repay a husband the amount of premiums received by it from his wife for insurance on his life, where the policy was taken without his knowledge, and the money was paid by her out of funds with which he had provided her for household expenses.

(November 21, 1900.)

NOTE.—*Wife's right to insure life of her husband.*

- I. Scope of note.
- II. The right at common law.
- III. The right under statutes.
  - a. The substance and design of statutes.
  - b. Their purpose, construction, and effect.
    1. Generally.
    2. With reference to creditors of the husband.
    3. With reference to title of wife and children.
  - c. What policies covered by.
- IV. Promised marriage and irregular marriages.
- V. Consent to use by wife of husband's funds.
- VI. Conclusion.

## I. Scope of note.

This note is confined to the right of a wife to, herself, procure insurance upon the life of her husband. The right of a husband to, himself, procure insurance on his own life, making the same payable to his wife, is an entirely different right, depending on different principles, since in such case the insurable interest upon which the insurance is based is that of the insured in his own life, and not that of a wife in the life of her husband, and cases with reference thereto are omitted, or only included when they have some bearing on the right of the wife to procure such insurance, or upon the validity of policies issued on the life of the husband upon the application of the wife.

## II. The right at common law.

The question whether or not a wife could insure the life of her husband at common law seems to turn on whether or not she is to be regarded as having an insurable interest in his life, or whether such a policy would be regarded as a mere wagering contract, and therefore void. It has been claimed that, previous to the enactment of 14 Geo. III., avoiding wager policies on lives, such policies were not void, and that no necessity existed for an insurable interest; and that that is the law of this country in states not having a statute similar to 14 Geo. III., since that act never became a part of our jurisprudence. But the doctrine would seem to be well settled, at least outside of New Jersey, that that and similar acts are merely declaratory of the common law as it previously existed, 53 L. R. A.

**A** PPEAL by defendant from a judgment of the Circuit Court for Kenton County in favor of plaintiff in an action brought to recover back money paid as premiums for life insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. W. Sackett and O'Hara &amp; Rouse, for appellant:

This action must depend on a claim of fraud by which the plaintiff and his money are parted.

He gives his money to another (here his wife) for a particular purpose, indefinitely termed "household." She treacherously, and by a breach of the trust imposed in her, diverts this money from its trust purposes and buys insurance. Can he follow the trust fund into the hands of the insurance company, and recover his wealth?

The plaintiff must "trace his money into

and that policies not based upon an insurable interest would have been void independently of such acts. And there are cases going to the extent of holding, or implying, that the interest of a wife in the life of her husband is not such as to sustain her insurance of his life.

Thus, in *Feirath v. Schonfield*, 76 Ala. 199, 52 Am. Rep. 319, it was held that, under the rules of the common law, a wife was disabled to make, or cause to be made, a contract by which she procured insurance upon the life of her husband, and that to any contract made by a third person for that purpose for the benefit of the wife the assent of the husband was required.

So, in *Leonard v. Clinton*, 28 Hun, 288, it was said that when the act of 1840 was passed there was no way, other than under its provisions, by which a husband's life could be insured for a gross sum for the benefit of his wife.

And in *Ruppert v. Union Mut. Ins. Co.* 7 Robt. 155, it was said that under the common law an insurance could not be effected for the benefit of a person having no pecuniary interest in the subject-matter insured at the time of the execution of the policy, and the only manner in which a husband or father could provide for his wife or minor children by way of a life policy upon his own life was to insure his life for his own benefit; and in that case the provision might not reach them, as the moneys would be subject to his debts.

But see the contrary New York cases of equal or greater weight, and other cases set forth below. The great weight of authority would seem to establish the opposite rule.

Thus, a married woman always has an insurable interest in the life of her husband. *Smith v. Missouri Valley L. Ins. Co.* 4 Dill. 353, Fed. Cas. No. 13,083; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Adams v. Reed* (Ky.) 86 S. W. 568, *dictum*.

A policy of insurance upon the life of a husband in favor of his wife, which purports to be a contract with the wife, and recites the payment of the first premium by her, is one which would be valid at common law, which recognised an insurable interest in a wife in the life of her husband. *Wilson v. Lawrence*, 13 Hun, 238, *Affirmed* in 76 N. Y. 585.

And if she pays the premiums for the risk out of her own estate she can insure his life for any sum upon which she and the insurer may agree. *Smith v. Missouri Valley L. Ins. Co.* 4 Dill. 353, Fed. Cas. No. 13,083; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245.

the hands of the party sought to be charged," and, to allow recovery, "such party sought to be charged must not be a bona fide purchaser for value without notice." The proof of both points is on the plaintiff.

*Commercial Nat. Bank v. Armstrong*, 39 Fed. 691; 27 Am. & Eng. Enc. Law, pp. 250, 251; *Parker v. Jones*, 67 Ala. 234.

The principle of following trust funds is not confined to express trusts or constructive trusts, or in fact to trusts at all, but applies to any money or other property held by a fiduciary, or funds given one for a purpose of any kind, and which was then converted or misused.

*Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696.

The conversion by a wife of money given her by her husband for household expenses is plainly within the rule.

And a policy issued to the wife upon such payment is a valid contract to pay to her the sum insured upon the event of his death, and constitutes a chose in action assignable by her, though the assignment is to one who has no insurable interest. *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245.

The law requires a husband to support his wife, and in most cases she is actually dependent upon him for support, and this creates an interest on her part in his life which will support a policy issued to her thereon, though issued before the adoption of a statutory provision expressly authorizing policies in the name of and for the separate use of the wife. *Gamb v. Covenant Mut. L. Ins. Co.* 50 Mo. 44.

And where a wife takes out insurance on her husband's life, she need not prove that she has an interest therein, as it is to be presumed that every wife has an interest in the life of her husband. *Reed v. Royal Exch. Assur. Co.* Peake N. P. Cas. pt. 2, p. 70.

And a wife who loans money to her husband has an insurable interest in his life, both as a creditor and by reason of the marital relation, which will support the issue or assignment of a policy of insurance upon his life to her. *Sheets v. Sheets*, 4 Colo. App. 450, 36 Pac. 310.

So, *Brummer v. Cohn*, 86 N. Y. 14, 40 Am. Rep. 503, affirming 58 How. Pr. 239, holds that the right of a wife to insure the life of her husband was not given by N. Y. act 1840; that she had an insurable interest at common law; and to bring an insurance by a wife upon the life of her husband within the operation of that act, it need not appear from the terms of the policy, or from extraneous evidence, that it was the intention of the parties to avail themselves of its provisions. And that the provision of the 2d section of that act, that insurance by a wife on the life of her husband may, in case of her death before the decease of her husband, be made payable to her children, does not confer any new power, or authorize a contract which before the statute would be unauthorized.

And, in *Packard v. Connecticut Mut. L. Ins. Co.* 9 Mo. App. 469, it was said that, in view of the common law, where the assured or beneficiary has a direct pecuniary interest in the continuance of the life insured, the policy will be valid and enforceable in favor of such beneficiary, as, for example, in case of the insurance by the wife of her husband's life, the wife having the direct interest of her own maintenance in the life of her husband.

And in *Rombach v. Piedmont & A. L. Ins. Co.* 35 La. Ann. 238, 48 Am. Rep. 239, it was said 53 L. R. A.

*Metropolitan L. Ins. Co. v. Reinks*, 15 Ky. L. Rep. 125; *Metropolitan L. Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924; *Taylor v. Metropolitan L. Ins. Co.* 20 Ky. L. Rep. 299, 45 S. W. 1051.

The proof does not show anywhere that the money paid was the plaintiff's money.

*Metropolitan L. Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924.

As to tracing the funds, not the identical coin, but the plaintiff's money or its substitute, is meant.

*Ibid.*

The petition must allege, and the proof show, that the defendant knew that the plaintiff's money was used to pay the premiums.

*Taylor v. Metropolitan L. Ins. Co.* 20 Ky. L. Rep. 299, 45 S. W. 1051.

A policy taken without the consent of the insured, like this, is not void as against

to be thoroughly settled, because universally held, that a wife has an insurable interest in the life of her husband on the ground of the support she is entitled to from him.

Likewise, in *Continental L. Ins. Co. v. Webb*, 54 Ala. 688, which was an action under the Alabama statute authorizing a wife to insure the life of her husband for her sole benefit, it was said that, without the statute, the wife could have insured the life of the husband for her own benefit or the benefit of herself and children, but that the proceeds of such a policy could have been pursued by his creditors if it had been purchased with premiums paid by him.

And in *Warnock v. Davis*, 104 U. S. 775, 23 L. ed. 924, an insurable interest in the life of another was defined to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life,—such as the interest of a wife in the life of her husband; and it is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation.

And in *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722, it was said by the court that no question is made in the case as to the validity of a policy taken out by a wife upon the life of her husband, or the right of the wife, if she survives her husband, to have and enjoy the proceeds of the policy as her own separate estate: but that it knew of no statute in force on the subject.

So, in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, it was said to be well settled that a woman has an insurable interest in the life of her husband; but the question in the case was as to the effect of divorce upon insurance of the life of the husband in favor of the wife.

And substantially the same statement was made in *McKee v. Phoenix Ins. Co.* 28 Mo. 383, 75 Am. Dec. 129, the question at issue being the same.

Also, in *Pullis v. Robison*, 78 Mo. 201, 39 Am. Rep. 497, it was said that it is settled that a wife has such an interest in the life of her husband as to make valid an insurance effected on his life for her benefit; but the question in the case was as to the effect of the payment of premiums on such insurance by the husband while insolvent upon the rights of his creditors.

And in *Harley v. Helst*, 86 Ind. 196, 44 Am. Rep. 285, which involved an insurance policy upon the life of a husband for the benefit of a



public policy, and a policy, being void in the sense that it is an illegal contract, cannot form the basis of a suit to recover back the premiums.

A wife has an insurable interest in the life of her husband.

3 Barbour's Dig. p. 682, \*197; 11 Am. & Eng. Enc. Law, p. 319; *Shaddinger v. Metropolitan L. Ins. Co.* 30 Ohio L. J. 337; *Brennan v. Prudential Ins. Co.* 148 Pa. 199, 23 Atl. 901; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180.

Lack of knowledge by the insured does not form a basis for a suit for the return of the premiums.

*Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203; *Davezac v. Seiler*, 12 Ky. L. Rep. 599, 14 S. W. 590; *Singer Mfg. Co. v. Ferrell*, 20 Ky. L. Rep. 1201, 48 S. W. 1078.

When an action for recovery on the ground of fraud is brought more than five years

after the act so complained of, the plaintiff must allege and prove that he did not, and could not by reasonable diligence, discover the fraud until within five years before the commencement of the action.

*Dye v. Holland*, 4 Bush, 635; *Woods v. James*, 87 Ky. 511, 9 S. W. 513; *Brown v. Brown*, 91 Ky. 639, 11 S. W. 4.

In order for the husband to recover in a case of this sort, not only must the money be his, but the defendant must know that it is his.

*Taylor v. Metropolitan L. Ins. Co.* 20 Ky. L. Rep. 299, 45 S. W. 1051.

*Messrs. H. D. Gregory and Cecil Pence* for appellee.

*Guffy, J.*, delivered the opinion of the court:

The appellee instituted this action against the appellant in the Kenton circuit court,

of the contracting parties, the wife, is ordinarily under a disability to make contracts. *Bruner v. Thiesner*, 12 Mo. App. 289.

And they are usually regarded as declaratory of the previously existing law. See *Continental L. Ins. Co. v. Webb*, 54 Ala. 688, *supra*, II., and other cases set forth in that division.

But, so far as a husband is permitted to withdraw from the claims of his creditors moneys paid for premiums on insurance for the benefit of his wife upon his life, and upon which, in the absence of the statute, they would have had a legal or equitable claim, the intent and purposes of the statute authorizing such insurance must be regarded as enabling, and not as declaratory of existing law. *Continental L. Ins. Co. v. Webb*, 54 Ala. 688; *Brummer v. Cohn*, 86 N. Y. 14, 40 Am. Rep. 508.

b. *Their purpose, construction, and effect.*

1. *Generally.*

The policy of these statutes finds its origin in the duty of maintenance and protection which every husband owes to his family, and the importance to the state that as few widows and orphans as possible shall be cast as paupers on the public charity. *Felrath v. Schonfeld*, 76 Ala. 199, 52 Am. Rep. 319; *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328.

A policy of insurance issued to a wife upon the life of her husband under such statutes constitutes a provision for a state of widowhood, and for orphan children. *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Dannhauser v. Walenstein*, 52 App. Div. 312, 65 N. Y. Supp. 219; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725.

And such statutes are founded in charity, and intended to subserve a beneficent object, and should be given a most favorable construction to carry out their humane purpose. *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328; *Felrath v. Schonfeld*, 76 Ala. 199, 52 Am. Rep. 319.

They are remedial in their character, and are in the nature of, though not strictly, an exemption law, and should therefore be liberally construed to effect the legislative policy contemplated in their passage. *Felrath v. Schonfeld*, 67 Ala. 199, 52 Am. Rep. 319.

But, so far as they confer a special privilege, and are in the nature of a law exempting property from liability to execution, in order to obtain the benefits intended to be secured, there must be a substantial compliance therewith. *Fearn v. Ward*, 65 Ala. 83.

after the act so complained of, the plaintiff must allege and prove that he did not, and could not by reasonable diligence, discover the fraud until within five years before the commencement of the action.

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### III. The right under statutes.

#### a. The substance and design of statutes.

Many of the states, as well as England, have statutes authorising married women to procure insurance upon the lives of their husbands. These statutes are generally uniform, and provide substantially that it shall be lawful for any married woman, by herself and in her own name, or in the name of any third person, with his assent as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and, in case of her surviving her husband, the amount becoming due and payable by the terms of the insurance shall be payable to her and for her own use free from the claims of the representatives of her husband, or of any of his creditors, subject to the limitation that the annual premium paid shall not exceed a specified sum. Among the states having such statutes are Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia, and Wisconsin.

These statutes make it lawful for a married woman, herself, and for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children. *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328; *Bruner v. Thiesner*, 12 Mo. App. 289; *Kerman v. Howard*, 23 Wis. 108; *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 116, 35 N. W. 863; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Baker v. Young*, 47 Mo. 453.

And a policy of insurance, written by a life-insurance company capable of contracting on the life of a married man at the request of his wife, is, under those statutes, a good contract of insurance, and is none the less good because one

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seeking to recover the sum of \$748.50, besides interest, which sum was paid to appellant by appellee's wife as premiums on sundry policies of insurance issued at the instance of appellant and plaintiff's wife upon the life of said appellee. It is alleged that plaintiff never made any application for insurance, and had no knowledge that any such policies were issued until the 31st day of July, 1898, and that he then immediately demanded the repayment of said money, which was refused. It is alleged that the payments, which were commenced in 1884, were paid out of money belonging to plaintiff. It is further charged that the procurement of said policies and the payment of the premiums aforesaid were fraudulently obtained, and all done without the knowledge or consent of plaintiff. By an amended petition it was alleged that plaintiff did not

discover, and could not by reasonable diligence have discovered, the payments aforesaid prior to said 31st of July, 1898. A demurrer to the petition was overruled, and, as we think, properly. The answer of the defendant may be taken as a traverse of all the averments of the petition which show a right to recover, except the issuing of the policies and the payments thereon are not denied. The ten-years and five-years statute of limitation was also pleaded and relied on by the defendant. A trial resulted in a verdict and judgment in favor of plaintiff for \$520, with interest for the period of five years; it being agreed that the interest thereon at the rate of 6 per cent per annum represents the average of the interest calculated on each payment made. It was also agreed that the jury should, if it found a verdict for the plaintiff, add thereto "with

And such statutes, being statutes of exemption, cannot operate upon contracts of insurance existing before the date of their adoption. *Ibid.*

Kentucky act March 12, 1870, § 31, however, providing that a policy of insurance on the life of any person, duly transferred or made payable to any married woman, or to any person in trust for her or for her benefit, whether such transfer be made by her, her husband, or other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the same, or his creditors, is not confined in its application to policies of insurance to be thereafter taken out, but includes all policies in which married women are the beneficiaries, whether issued before or after the enactment of the statute. *Thompson v. Cundiff*, 11 Bush, 567.

Acts authorizing insurance upon the life of a husband for the benefit of his wife are not affected by legislation enlarging the legal status of married women. *Brick v. Campbell*, 122 N. Y. 337, 10 L. R. A. 259, 25 N. E. 493; *Barry v. Equitable Life Assur. Soc.* 59 N. Y. 587.

## 2. With reference to creditors of the husband.

The purpose and object of these statutes with reference to the creditors of the husband were to enable the wife to effect such insurance for her own benefit, if she should survive the husband, or insuring to her children if he should survive her, exempt from the claims of creditors, though the premiums were paid by the husband, to the extent of that purchased by the prescribed annual premiums, which he is permitted to pay, or, if the whole premium was paid by her from her own means, or by another from his own means for her, then entirely exempt from the claim of her husband or his creditors, or his personal representatives. *Continental L. Ins. Co. v. Webb*, 54 Ala. 688; *Fearn v. Ward*, 65 Ala. 33.

But they are designed also to guard against the perversion of the right granted into a means of defrauding creditors. *Fearn v. Ward*, 65 Ala. 33.

And if insurance on a husband's life was procured payable to the wife or children, or for their benefit, his creditors upon his death are not entitled to the insurance moneys, though he paid the premiums. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

Thus, under the Alabama statute authorizing insurance upon the life of the husband and father for the sole benefit of the wife and children, free from the claims of his creditors, provided

he does not pay therefor premiums in excess of \$500 annually, it is not important whether more than one policy, or how many policies, may have been obtained, if the aggregate of annual premiums paid on the whole does not exceed \$500, as in such case the rights of the creditors would not arise. *Stone v. Knickerbocker L. Ins. Co.* 52 Ala. 589.

And the provisions thereof authorize the payment of a premium or premiums not exceeding \$500 for each year on one or more policies taken out in accordance with its provisions, and do not apply to the aggregate amount paid for the whole time the insurance has to run. *Fearn v. Ward*, 65 Ala. 33.

But while the object is to authorize insurance upon the life of the husband and father for the benefit of his surviving wife and children freed from the claims of his creditors, if the limit is exceeded the statute intervenes, and devotes the excess of insurance which may be realized to the payment of his debts. *Stone v. Knickerbocker L. Ins. Co.* 52 Ala. 589.

An insurance policy procured by a wife upon the life of her husband under such statutes, however, is not void where the husband pays more than the prescribed amount of premium; but the wife, if she recovers thereon, may hold in part in trust for the creditors as represented by the husband's administrator or assignee in bankruptcy. *Smith v. Missouri Valley L. Ins. Co.* 4 Dill. 353, Fed. Cas. No. 13,083.

And the proviso of the Kentucky statute, that if the premium on a policy thus issued is paid by any person with intent to defraud creditors of the insured, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of such creditors, will not be so construed as to validate transactions which under the laws theretofore in existence would, as to creditors of the husband, have been held and treated as fraudulent and void. But when it is shown with reasonable certainty that the husband acted from a sense of the moral duty he owed his family, and with no actual intention to defraud his creditors, the insurance will be applied to the benefit of the wife and children, though the husband was insolvent. *Thompson v. Cundiff*, 11 Bush, 567.

N. Y. Laws 1840, § 1, however, making it lawful for a married woman to cause the life of her husband to be insured, and providing that, in case she survives her husband, the amount of the insurance shall be payable to her or for her own use, free from the claims of the representatives of the husband or of any of his creditors, does not take away his common-law right in the amount insured as survivor, where she dies first. *Olmsted v. Keyes*, 85 N. Y. 593.

interest," without specifying time and computing the same. Appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The first three grounds relied on for a new trial are, in substance, that the verdict was against the law, and not sustained by sufficient evidence. The fourth ground is too vague to be considered, but not tenable even if considered. Fifth, error of the court in allowing plaintiff to amend his pleading after the evidence was in. Sixth, error in refusing instructions 1, 2, and 3 offered by defendant. Seventh, error in giving instructions 1 and 2, and for order of the court to peremptorily find for the defendant at the close of plaintiff's testimony.

We think the evidence fully authorized the verdict. We are also of the opinion that it was within the sound discretion of the

court to permit the amended pleading to be filed after the evidence was in. Nor do we think the court erred as to giving or refusing instructions. The instructions given by the court, in substance, told the jury that if they believed from all the evidence that the policies of insurance on the life of plaintiff were issued by defendant company without the knowledge or consent of said plaintiff, and that premiums were paid on said policies to the said defendant company or its agents during the period from August 29, 1888, to August 29, 1898, and that said premiums were paid by or through the wife of plaintiff, and without the knowledge or consent of plaintiff, and that said premiums were not paid by said wife by any money belonging to her, or received by her from any source other than the plaintiff, and that all of said premiums were paid by her with

And a policy of insurance issued by an insurance company to a wife upon the life of her husband, after which the wife dies intestate and leaves no children, under Mass. Gen. Stat. 1860, p. 330, providing that a policy of insurance on the life of any person, made payable to any married woman or to any person in trust for her or for her benefit, inures to her separate use and benefit, and to the benefit of her children, independently of her husband or his creditors, belongs to, and money arising therefrom goes to, the estate of her husband, and is recoverable by her husband's personal representatives. *Cole v. Knickerbocker L. Ins. Co.* 68 How. Pr. 442.

And the true construction of an insurance policy insuring the life of a husband, reciting that it was made in consideration of the payment of premiums by his wife, and made payable to her, and in case the said assured should die before the decease of the husband then the amount to be payable to their children or their guardian if they were under age, where they were drowned through the sinking of a ship upon which they were passengers, under the general laws of Massachusetts of February 19, 1851, authorizing a married woman to cause the life of her husband to be insured for her sole use, and providing that in case of her surviving her husband the amount of the insurance shall be payable to her to and for her own use free from the claims of the representatives of her husband or of his creditors,—is that the interest of the wife under the policy is contingent upon her surviving her husband, and neither her assigns nor her personal representatives have any right to the insurance money, except on proof of such survivorship. *Fuller v. Linzee*, 135 Mass. 468. See also *Chapin v. Fellowes*, 86 Conn. 132, 4 Am. Rep. 49; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474,—*infra*, III. b. 8; *Frank v. Mutual L. Ins. Co.* 102 N. Y. 266, 55 Am. Rep. 807, 6 N. E. 667; *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83,—*infra*, III. c.; and see cases set forth *supra*, III. b. 1.

### 3. With reference to title of wife and children.

A husband or father whose life is insured for the benefit of his wife or children or both can exercise no power of disposition over the same while they are living without their consent, and has no interest therein of which he can avail himself, and upon his death neither his personal representatives nor his creditors have an interest in the proceeds. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.  
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A policy of insurance upon the life of a husband, issued upon application of his wife, and of which she was the beneficiary, the contract having been made with her, descending in case of her death to her children, and, in the absence of children, to her legal representatives, is hers absolutely and solely, and the fact that the husband paid one premium thereon does not in any way affect her title to it. *Sheets v. Sheets*, 4 Colo. App. 450, 36 Pac. 310.

Nor is the title in any way affected, under the Massachusetts statute, by the fact that the husband paid the premiums after the wife's death, the wife having previously paid them. *Swan v. Snow*, 11 Allen, 224.

And a policy of insurance issued to a wife upon her husband's life, although the premiums were paid from his means, and though it was regarded as a provision for the wife, becomes, upon delivery, irrevocable so far as he is concerned; and where it was procured by the surrender of another policy belonging to the wife, the husband will be deemed to have acted as her agent in procuring it, so that his possession would be hers and he would have no power to surrender. *Stilwell v. Mutual L. Ins. Co.* 72 N. Y. 385.

And such a policy vests in the wife so as to descend to her heirs upon her death, notwithstanding the fact that the husband was still alive at that time, and does not remain in abeyance until the death of the husband, and then descend to and vest in those who were her heirs at that time. *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722. But see *Continental L. Ins. Co. v. Webb*, 54 Ala. 688, *infra*.

And the rights of a widow and her children in an insurance policy upon the life of the husband and father, made out for their benefit, exist before his death, and the liability of the insurance company becomes fixed by that event, so that such wife and minor children cannot be deemed, after the death of the husband and father, to be persons in indigent circumstances within the meaning of the Louisiana homestead act of 1852. *Re Kugler*, 23 La. Ann. 455.

Nor is the title of a wife in an insurance policy upon the life of her husband, issued upon her application and of which she was the beneficiary and for which she made the contract, affected by the fact that the insurance company, through excess of caution, required the husband to acquiesce in the transaction, and release all claims. *Sheets v. Sheets*, 4 Colo. App. 450, 36 Pac. 310.

So, under a charter and an insurance act authorizing an insurance company to issue policies of insurance upon the life of any person, expressed to be for the use of any woman, minor,

money belonging to plaintiff, and furnished by said plaintiff to his said wife to be used by her for the purposes of the household of said plaintiff, and the said plaintiff did not know of the issuance or existence of said policies, or either of them, until after August 29, 1898, and that he could not by the exercise of ordinary diligence have known of the same until after said date, and did not know and could not have known by the exercise of ordinary diligence of the payment of premiums, or any of the premiums, on said policies, or any of them, until after said 29th of August, 1898, then the jury should find a verdict for the plaintiff for the aggregate of the premiums paid, as set out herein, if any was so paid, with interest. The second instruction is as follows: "If the jury should believe from all the testimony that any of the facts required by in-

struction No. 1 do not exist, the jury should find a verdict for the defendant." The material portion of the instructions asked by the defendant and refused is embodied in the instruction given by the court, except that the refused instruction seems to require that appellant should have known that the money paid to it was the money of the plaintiff. This court, in the case of the appellant against Monohan (102 Ky. 13, 42 S. W. 924), decided that if the wife procured insurance upon the life of the husband without his knowledge or consent, and paid his money therefor, he would be entitled to recover same back from the insurance company. It was further decided in said case that it was against public policy for one to procure a policy of insurance on the life of another without his knowledge or consent; that the wife could not obtain

or minors, and providing that the same shall inure to the benefit of such person or persons independently of the one whose life may be thus insured, as well as his creditors, the persons named as beneficiaries in the policy thus issued are vested with the entire beneficial interest in the sum insured upon the delivery of the policy, so that where a husband's life is thus insured for the benefit of his wife and children, and the wife dies, the husband is not authorized to dispose of the policy by will. *Ruppert v. Union Mut. Ins. Co.* 7 Robt. 166.

And a policy of insurance on the life of a husband, issued upon application of his wife, and made payable to her for her sole use, and, in case of her death before her husband, to be paid to her children, cannot be surrendered by the husband upon her death leaving living children, so as to cut off the rights of the children; and where the husband surrenders the policy, and takes out another for the same amount in his own name and for his own benefit, dating it back so as to be of the same date as the one surrendered, and after the payment of a year's premium dies insolvent, the substituted policy will be deemed in equity to belong to the children, and they, and not the creditors of the husband, will be held entitled to the insurance money. *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49.

And *Swan's* (Ohio) Rev. Stat. 480, § 8, incorporating an insurance company, providing that policies of insurance may issue to any married woman in her name or in the name of a third person as trustee, for her sole use, upon the life of her husband, and, in case of her surviving him, the amount shall be payable to her for her sole use and benefit free from any claims of the creditors or representatives of her husband, providing the annual premium shall not exceed the sum of \$150, unless paid from the private property of the wife, authorizes a wife to take out insurance upon the life of her husband, and treats her as a *feme sole* in respect to such policies taken in her name, and they become her separate property, and are placed beyond the reach of her husband or his creditors, so that he is not authorized to surrender them. *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292.

So, the provision of such statutes, that the policy shall inure to the separate use and benefit of the wife and her children, applies to the manner of the descent and distribution; and where, after the wife has received and reduced the money to possession, she dies, it goes to her children, and not to her husband's representatives. *Baker v. Young*, 47 Mo. 453.

And where the wife dies before the husband, and no special trustee is appointed to hold and

manage her interest in the policy, it vests from the time of her death in the administrator of her estate for the benefit of her children, and neither the husband nor the administratrix of his estate can claim any property in it. *Swan v. Snow*, 11 Allen, 224.

Also, upon the issuing of an insurance policy to a wife upon the life of her husband, the amount to be payable to herself if living, if not, to her children, a transmissible interest vests in the children; and where she dies before her husband, and one of the children dies before the father leaving a child, the child of the deceased child takes by descent the interest of its parent, and is entitled to the portion of the fund which the parent would have received if living, and this without reference to whether the premiums were paid by the husband or the wife. *Continental L. Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530.

So, a policy of insurance upon the life of a husband for the benefit of a wife, as provided for by such statutes, is intended as a provision for the support of the widow and children of the husband after his death, and the proceeds thereof cannot be subjected to the claims of the creditors of the wife. *Leonard v. Clinton*, 26 Hun, 288.

And a policy of insurance upon the life of a husband and father cannot be assigned by the wife so as to defeat the intent of the statute that such policies shall be a security for the family, or so as to defeat the interest of the children. *Dannahauser v. Wallenstein*, 52 App. Div. 312, 65 N. Y. Supp. 219; *Eadie v. Slitmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725.

And such a policy becomes payable to such children, in case of the mother's death before her husband, as were living at the death of both the mother and father, to whom the duty of maintenance extends if they are in their minority, and not to such children as were living at the time of the death of the mother. *Continental L. Ins. Co. v. Webb*, 54 Ala. 688. But see *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722, *supra*.

The right of a wife to take out insurance upon the life of her husband under N. Y. Laws 1840, chap. 80, exempting policies of insurance on the life of the husband for the benefit of the wife from claims of the representatives of the husband, or any of his creditors, except where the amount of premiums paid exceeded a certain amount per annum, is not changed or affected by the fact that she has no children. *Baron v. Brummer*, 100 N. Y. 372, 8 N. E. 474.

insurance upon her husband's life without his knowledge and consent. It is further said that, if such practice was indulged in, it might be a fruitful source of crime. This court, in the case of this appellant against *Trende* (21 Ky. L. Rep. 909, 53 S. W. 412), adhered to the doctrine announced in the opinion *supra*. The court further said that "section 654, Ky. Stat., was not intended to, nor can it, authorize a married woman to cause to be issued a policy on the life of her husband without his consent to the issue of the policy." The contention of appellant is that plaintiff could not recover unless the appellant knew the money being received by it from the wife was the money of the plaintiff. This contention is not tenable. If such a rule was adopted, it would always be impossible for the plaintiff in such a case to recover the money thus wrongfully and fraudulently paid.

It is suggested by appellant that the money was intrusted to his wife, and that if she misapplied it he is without remedy, and, furthermore, that he never required any accounting by her of the money so intrusted to her. The evidence in this case conduces to show that the plaintiff gave his wife the money for general household or family expenses, and it would seem to be a very harsh rule to require him from time to time to call upon his wife for an account as to how she had spent the money. It would be impracticable to do so. Besides, it would annoy his wife, and tend to disturb the relation of trust and confidence so essential to conjugal happiness. It can hardly be contended that a policy of life insurance on the life of the husband would properly be considered household expenses. In fact, it is essentially different. It is a large and extensive business, totally dis-

*c. What policies covered by.*

All life-insurance policies issued upon the life of a husband for the benefit of his wife and children, which purport to be her contract, would seem to fall within the protection of these statutes.

Thus, a wife and her children are entitled to life-insurance policies on the life of the husband and father, purporting to be contracts made with her as the party assured, and not with the husband, though they were made without her knowledge and she remained in total ignorance of their existence until after his death, as in such case they will be deemed to be the persons assured through the agency of the husband and father. *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 55 Am. Rep. 787, 6 N. E. 287.

And a policy of insurance upon the life of a husband in favor of his wife, purporting to be a contract with the wife, and reciting the payment of the first premium by her, is to be regarded as within the equity of N. Y. act of 1840, providing for insurance upon the life of a husband for the sole benefit of his wife, so as to render the same unassignable under that act, though it appears that it was issued upon application of the husband, and that he actually paid the premiums. *Wilson v. Lawrence*, 13 Hun, 238, Affirmed in 76 N. Y. 585.

Nor is that act confined to cases in which the premiums are paid by or out of the funds of the husband, but it authorizes any married woman to cause to be insured for her sole use the life of her husband, the amount thereof to be payable to her free from the claims of the representatives of the husband or of any of his creditors, wherever the amount of the premium annually paid does not exceed \$300. *Frank v. Mutual L. Ins. Co.* 102 N. Y. 286, 55 Am. Rep. 807, 6 N. E. 667.

And that act does not require that it should appear by the policy that it was issued under the act, in order to secure to the wife the benefit of its provisions. *Brummer v. Cohn*, 86 N. Y. 14, 40 Am. Rep. 503; *Brick v. Campbell*, 122 N. Y. 337, 10 L. R. A. 259, 25 N. E. 493; *Dannhauser v. Wallenstein*, 52 App. Div. 312, 65 N. Y. Supp. 219.

The intention to take the benefit of the statute is to be presumed from the beneficial nature of the policy. *Brick v. Campbell*, 122 N. Y. 337, 10 L. R. A. 259, 25 N. E. 493; *Dannhauser v. Wallenstein*, 52 App. Div. 312, 65 N. Y. Supp. 219.

And an omission to provide, in an insurance policy upon the life of a husband for the benefit of the wife, for the disposition of the fund

in case of the death of the wife before that of her husband, or of a statement in the application that the insurance is for the benefit of the wife solely, does not rebut the presumption that in taking the policy the wife intended to avail herself of the provisions of N. Y. act 1840, chap. 80, authorizing insurance for her sole benefit. *Brick v. Campbell*, 122 N. Y. 337, 10 L. R. A. 259, 25 N. E. 493; *Brummer v. Cohn*, 86 N. Y. 14, 40 Am. Rep. 503.

Nor do the deliberate statement in the application, in answer to the question as to whose benefit the insurance was for, that it was for the benefit of the wife, and the striking out of the words "and her children," rebut the presumption that the wife, in taking the policy, had that act in view, that act as amended by Laws 1862, chap. 70, Laws 1866, chap. 656, expressly providing that the insurance may be made payable, in case of the death of the wife before it becomes due, to the husband, or to their children. *Brummer v. Cohn*, 86 N. Y. 14, 40 Am. Rep. 503.

So, the fact that a policy of insurance upon the life of a husband for the benefit of his wife was an endowment policy payable, not at death, but after a designated number of years, does not remove it from the operation of N. Y. act 1840, providing for insurance upon the life of the husband for the wife's sole benefit,—at least under the amendment thereto in Laws 1866, chap. 656, striking out the words of the first section in the original act, which made the insurance payable to the wife in case of her surviving her husband, and inserting the words "In case of her surviving such period or term." *Brummer v. Cohn*, 86 N. Y. 14, 40 Am. Rep. 503, Affirming 9 Daly, 36.

And the validity of an insurance policy originally issued for the sole use of a married woman, insuring the life of her husband in conformity with the statute, is not affected, and the character of the policy is not changed, by an indorsement upon it by which it became a paid-up policy. *Mutual L. Ins. Co. v. Terry*, 62 How. Pr. 325.

Likewise, where a wife suggests to her husband the taking out of a policy of insurance upon his life, and he does so, paying therefor with her money, and the wife pays all the subsequent premiums out of her separate estate, for which receipts are issued to her, though he signs the application in his own name, this comes within 1 Swan & C. Ohio Stat. 737, which allows a wife by herself and in her own name to insure her husband's life to any amount for which she can pay the premiums out of her separate estate, and entitles her to the insurance money free from the claims of her husband's

ting from general household or family expenses. It may be that a person selling necessary articles, or articles presumably for household and family purposes, would be protected, whether or not the articles were in good faith purchased for that purpose, because such purchases would be within the apparent authority of the agent making the same. Besides all this, we think the evidence tends to show that the appellant had reasonable grounds to believe that the premiums were paid out of plaintiff's money

and without his consent. It seems to us that it is not only illegal and against public policy for any insurance company to engage in such insurances as unquestionably existed in this case, but it is also to be condemned for the further reason that the tendency is to induce the wife to use money for insurance purposes that ought to be applied to the purchase of food and raiment for the family. It is also likely to produce discord in the family.

*Judgment affirmed, with damages.*

creditors, as the making of the application by the husband will be deemed to have been done by him as her agent. *Jacob v. Continental L. Ins. Co.* 1 Cln. Sup. Ct. Rep. 519.

And where insurance is procured by a husband upon his own life and made payable to his wife, though without previous authority from her, her subsequent acceptance of the policy from him is a sufficient adoption of his act to constitute a valid contract between her and the company, unless objection that the premium was not paid and that the policy was never duly delivered can be sustained. *Thompson v. American Tontine Life & Sav. Ins. Co.* 46 N. Y. 674; *Feirath v. Schonfeld*, 76 Ala. 199, 52 Am. Rep. 219.

And where a husband takes out a policy of insurance on his own life payable to his legal representatives, and afterwards assigns the policy to his wife, who surrenders it and takes out a new policy payable to herself, the policy thus taken out falls within the provision of N. Y. Stat. 1840, by which wives were authorized to insure the life of their husbands for their own benefit, and is therefore nonassignable without the consent of the husband. *Dannhauser v. Wallenstein*, 52 App. Div. 312, 65 N. Y. Supp. 219.

So, policies of insurance obtained by a husband upon his own life, by the terms of which they are payable to his wife upon his death, are in substantial conformity with the provision of N. Y. Laws 1858, chap. 187, as amended by Laws 1886, chap. 666, authorizing a married woman to insure the life of her husband in her own name or that of any other person with his consent for her sole and separate use, the insurance so effected to be free from the claims of his creditors or those of his representatives; and such policies are within the protection of that law. *Bloomington v. Lisberger*, 24 Hun, 355.

And the assignment by a husband of a policy of insurance, payable to him, his executors, administrators, and assigns, to his wife, is within the spirit of the provision of Ill. Rev. Stat. 1874, chap. 73, § 54, p. 607, that it shall be lawful for any married woman, by herself and in her own name, or in the name of any third person with his assent as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period or for the term of his natural life, and, in case of her surviving such period or term the amount of the insurance shall be payable to her for her own use, free from the claims of the representatives of the husband or any of his creditors; provided, that if the premium of such insurance is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid with interest thereon shall inure to their benefit; and the wife has a clear right, with the consent of the insurance company, to accept such an assignment; but premiums paid by the husband while insolvent can be recovered by the creditors. *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83.

But N. Y. Laws 1840, chap. 80, giving a wife the right to insure the life of her husband and a vested interest in the policy, does not apply to

a certificate of membership issued to a member by a mutual accident association. *Steinhausen v. Preferred Mut. Acci. Asso.* 59 Hun, 336, 13 N. Y. Supp. 86.

And the rights acquired by a beneficiary under a certificate of a benevolent society, the constitution of which provides that upon the death of a member the sum realized from the required payments by each member shall be paid to the widow or minor children of the deceased member, are not those existing under a contract of insurance upon the life of a party, under N. Y. Laws 1840, chap. 80, Laws 1858, chap. 187, empowering a wife to insure the life of her husband, so as to prevent a change in the constitution of the society making the benefit payable to a person designated by the member in his lifetime. *Durian v. Central Verein of Hermann's Sohne*, 7 Daly, 173.

And where a husband agrees for insurance, and causes his wife to be named as the beneficiary in the policy, and permits the insertion of a condition that if any annual premium is not fully paid at the time provided for the policy shall become null and void and wholly forfeited, though the policy is regarded as having been procured by the wife, and as the result of an agreement made between her and the insurance company, since the husband is the actor in the transaction and represents the wife, and she claims the benefit of his acts and the policy procured by his agency, she necessarily ratifies and affirms the contract as it is made, with all its terms and conditions, and is bound by the provision with reference to forfeiture. *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 283.

So, a policy of insurance upon the life of a father in favor of one of his several children is not within the provisions of Ala. Code 1876, § 2733, authorizing any married woman to have her husband's life insured for her sole benefit, or, in case of her death, for that of her children, free from the claims of any of the husband's creditors. *Fearn v. Ward*, 65 Ala. 33.

And an insurance policy upon the life of a husband, payable to his wife, or, in case of her death before him, to her executors, administrators, and assigns, and not to her children, is not within the provisions of Pa. act, April 9, 1850, § 14, providing that it shall be lawful for any married woman, by herself, in her name or in the name of any third person with his assent as her trustee, to cause to be insured for her sole use the life of her husband, and in case of her surviving her husband the sum or net amount of the insurance becoming due and payable by the terms thereof shall be payable to and for her own use free from the claims of the representatives of her husband or any of his creditors; and where in such case she dies first, the proceeds of the policy are to be paid to her administrator, who will hold them in trust for distribution among the persons entitled, under the laws of the commonwealth, to her estate, where she dies intestate. *Deginther's Appeal*. 83 Pa. 337.

Nor does Mo. Rev. Stat. § 5278, authorizing married women to insure the lives of their

husbands for their own benefit, authorize a number of married women to form a mutual insurance company for the purpose of insuring the lives of each others husbands. *Bruner v. Thiesner*, 12 Mo. App. 289.

Attention is here called to the fact that this note is not exhaustive as to cases construing statutes authorizing insurance upon the lives of married men for the benefit of their wives and children. Cases in which it appears that the insurance in question was procured upon the application of the husband, and the premiums were paid by him, have been omitted, as not involving the question of the right of a wife to insure the life of her husband, except in some instances in which, from the peculiar circumstances of the case in hand, that question has arisen.

#### IV. *Promised marriage and irregular marriages.*

Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when, from the personal relation between them, the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear loss from his death, an insurable interest exists, as in case of a man and woman between whom a contract of marriage exists (*Taylor v. Travelers Ins. Co.* 15 Tex. Civ. App. 254, 39 S. W. 185); or in case the marriage is illegal. *Lampkin v. Travelers Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040.

And a life-insurance policy insuring the life of a man, issued and delivered to a woman with whom he had an existing contract of marriage, and made payable to her as his intended wife, she paying the premium, is not a mere wagering contract, or one that in any wise conflicts with public policy, and is valid in case of his death before the contemplated marriage was solemnized, since she had an interest in his life, because, if he had lived and violated the contract, she would have had her action for damages, and, had he observed the contract, then as his wife she would have been entitled to support. *Chisholm v. National Capitol L. Ins. Co.* 52 Mo. 218, 14 Am. Rep. 414.

In the above case it was said, in effect, that a policy of insurance issued to a wife, or intended wife, upon the life of her husband, or intended husband, is not void at common law, since the contract of life insurance is not one of indemnity, but a mere contract to pay a certain sum of money on the death of a person, in consideration of due payment of certain annual premiums during his life; and that where there is no statute covering the right of an intended wife to take out insurance upon the life of her intended husband, such insurance can be declared invalid only on the ground that it is against public policy; and that there is nothing to show that the contract in question is in any way against public policy.

So, a policy of insurance issued upon the life of a man to a woman to whom he was married, upon his application as her agent, which marriage was void from the fact that she had a husband living to whom she was previously married, does not come within the reason of the rule prohibiting gaming policies, and is not open to the objection that such insurance offers inducement to crime, where the husband had no knowledge of the previous marriage; since, though the marriage was illegal, the woman had in fact an interest in the life of the man, as he treated her as his wife and supported her, and she passed in society as such. *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535.

And while the legality of a supposed marriage is a material fact which will affect the character

of the risk in case of an insurance by the supposed husband for the benefit of the supposed wife as her agent, the failure of the supposed husband on the procurement of such insurance to inform the company of the true relations between them is not such a false representation as will avoid the insurance policy, under Ga. Rev. Code, §§ 2670-2672, providing that any variation from the truth, by which the nature, extent, or character of the risk is affected, will avoid the policy, but if the party acts bona fide, and states what he thinks is the truth, this does not make the policy void, but the wilful concealment of a fact which enhances the risk does so, where the marriage between the parties was void because the woman had a previous husband living, but the man had no knowledge of that fact at the time. *Ibid.*

And where an insurance company seeks to avoid a policy on the ground of the false representations in the application, that the assured was the wife of the insured, the burden of proof rests upon it to show it. *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040.

And the fact that the assured was not the lawful wife of the insured because he had another wife living does not destroy her insurable interest in his life; and a direction in the application for the policy to pay Mrs. . . . (giving his name), "whose relation to me is that of wife," is neither a warranty nor a representation the falsity of which would affect the validity of the insurance. *Ibid.*

So, in Missouri, where marriage may be had by the mutual present consent of two competent persons, made in good faith, without the addition of any prescribed formalities, insurance procured by a woman upon the life of a man to whom she had been married, but who had another wife living at the time, is valid, where thereafter the former wife died, and subsequent to that time the insured and the assured agreed by mutual consent, given in good faith, to become husband and wife, and lived together as such thereafter. *Holabird v. Atlantic Mut. L. Ins. Co.* 2 Dill. 166, note, Fed. Cas. No. 6,587.

For validity of life insurance taken by a man for the benefit of a betrothed wife, see note to *Alexander v. Parker* (Ill.) 19 L. R. A. 187.

#### V. *Consent to use by wife of husband's funds.*

While a wife has an insurable interest in the life of her husband she cannot be permitted to obtain insurance on his life without his knowledge and consent, since such a practice might be a fruitful source of crime. *Metropolitan L. Ins. Co. v. Trende*, 21 Ky. L. Rep. 909, 53 S. W. 412; *Metropolitan L. Ins. Co. v. Sehlhorst*, 21 Ky. L. Rep. 912, 53 S. W. 524; *Metropolitan L. Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924.

And a husband whose wife procures insurance on his life, paying the premiums thereon without his knowledge or consent from moneys belonging to him which he has given her for household purposes only, is entitled to recover the premiums thus paid from the insurance company, the contract of insurance being void. *Metropolitan L. Ins. Co. v. Sehlhorst*, 21 Ky. L. Rep. 912, 53 S. W. 524; *Metropolitan L. Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924; *Metropolitan L. Ins. Co. v. Reinke*, 15 Ky. L. Rep. 125.

This is the rule of *METROPOLITAN L. INS. CO. v. SMITH*.

And Ky. Stat. § 654, authorizing insurance by a wife on her husband's life, enacted prior to the act of 1894, enlarging the rights of married women, was only intended to authorize a married woman to invest her means without the consent of her husband in life insurance, and to make the same her separate property free from

any claim of her husband or others, and does not authorize her to procure insurance upon his life and pay the premiums therefor with his means. *Metropolitan L. Ins. Co. v. Trende*, 21 Ky. L. Rep. 909, 53 S. W. 412; *Metropolitan L. Ins. Co. v. Sehlhorst*, 21 Ky. L. Rep. 912, 53 S. W. 524.

A contract of life insurance is a personal contract, and cannot be made without the knowledge and consent of the person whose life is insured; and the courts will not enforce a policy of insurance procured by a wife upon the life of her husband without his consent. *Metropolitan L. Ins. Co. v. Reinke*, 15 Ky. L. Rep. 125.

But a husband, whose life is insured by his wife in her favor, is not entitled to recover the premiums paid by her to the insurance company where the money used in payment of such premiums came from any source other than himself. *Metropolitan L. Ins. Co. v. Trende*, 21 Ky. L. Rep. 909, 53 S. W. 412; *Metropolitan L. Ins. Co. v. Sehlhorst*, 21 Ky. L. Rep. 912, 53 S. W. 524.

And a husband seeking to recover of an insurance company for premiums paid by his wife upon an insurance policy obtained by her upon his life without his knowledge or consent has the burden of proving that the money used in the payment of such premiums was his money. *Metropolitan L. Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924; *Metropolitan L. Ins. Co. v. Reinke*, 15 Ky. L. Rep. 125.

And the testimony of a husband in an action by him against an insurance company to recover premiums paid by his wife upon a policy procured by her upon his life without his knowledge or consent, that his wife had no income, and never earned any money, is not sufficient to warrant the jury in concluding that the money with which the premiums were paid was his money, so as to authorize a recovery therefor. *Metropolitan L. Ins. Co. v. Monohan*, 102 Ky. 13, 42 S. W. 924.

So, a husband upon whose life a policy of insurance is obtained by his wife, who signs his name as the person applying therefor, without his knowledge or consent, is estopped from denying the validity thereof, where, after acquiring knowledge thereof, he procures two other policies to be issued in his name by the same company, signing the applications therefor and referring to the preceding policies as current policies, and acquiesces in the payment of the premiums on all three of them; and in such case he cannot recover the premiums paid upon the policy procured by the wife. *Wakeman v. Metropolitan L. Ins. Co.* 30 Ont. Rep. 705.

See also *Feirath v. Schonfeld*, 76 Ala. 199, 52 Am. Rep. 819, *supra*, II.

## VI. Conclusion.

It has been claimed that, previous to the enactment of 14 Geo. III. no insurable interest on the part of the assured in the life of the insured was necessary to life insurance, and as that statute was not incorporated into the jurisprudence of this country, some inclination has been shown here to hold it to be unnecessary. By the decided weight of authority, however, insurable interest is necessary to the validity of life insurance, and a wife has an insurable interest in the life of her husband, and by virtue of this interest is entitled to procure insurance on his life, this being deemed to have been the common-law rule previous to 14 Geo. III. as well as since. A large number of the states, however, have enacted statutes expressly providing for such insurance by a married woman for her sole benefit, or for that of her children in case of her death before that of her husband, exempt from the claims of the representatives of the husband or of his creditors. These statutes are deemed declaratory of existing law, except so far as they effect an exemption of the insurance purchased, or of premiums paid by the husband, from the demands of his creditors. In that sense they are remedial, and, their object being to protect the widow and the orphan, they are to be liberally construed, though they are to be substantially complied with. Under these statutes, all control of the husband over the insurance is taken away so long as either his wife or any of his children survive, and neither he, his representatives, nor his creditors, can control it after his death, if any of them survive him. If he pays more for the insurance out of his own funds, however, than the statutory limit, a proper proportion of it may be reached by his creditors, though the balance remains valid and collectible by the wife and children. These statutes seem to apply to all insurance on the life of the husband for the benefit of the wife and children, including that obtained by him as well as that obtained by her, and including endowment insurance as well as regular life. Mutual and beneficiary insurances are not included.

So, the fact that the parties were merely engaged to be married, or that their marriage was irregular or illegal, does not affect the right to insure, as in such case the expectation of future support furnishes a sufficient insurable interest. A wife cannot be permitted to insure the life of her husband, however, without his knowledge or consent, and pay for it with his moneys intrusted to her for a different purpose; and if she does so the insurance is void, and the husband is entitled to recover the premiums paid from the insurance company, though he could not do so if the money was procured from any other source. F. H. B.

## WISCONSIN SUPREME COURT.

Amy I. HILDEBRAND, Admx., etc., of  
Alfred L. Hildebrand, Deceased, *Respt.*,  
v.  
AMERICAN FINE ART COMPANY, *Appt.*  
(109 Wis. 171.)

\*1. If a judgment be entered upon the

\*Headnotes by MARSHALL, J.

NOTE.—As to right to wages on part performance of contract, see *Timberlake v. Thayer* (Miss.) 24 L. R. A. 281, and *note*.

For statute requiring wages to be paid in full up to time of discharge, see, in this series, *St. Louis, I. M. & S. R. Co. v. Paul* (Ark.) 37 L. R. A. 504.

53 L. R. A.

verdict of a jury, and afterwards upon motion an order be entered setting it aside and granting a new trial unless the party in whose favor the same was entered submits to a specified reduction thereof, and such party does so submit, and the judgment is perfected accordingly, such order is an intermediate order as regards such perfected judgment, and

As to right to recover wages when wrongfully discharged by employer, see the following cases in this series: *Dall v. Noble* (N. Y.) 5 L. R. A. 554; *Cadman v. Markie* (Mich.) 5 L. R. A. 707; *McMullan v. Dickinson Co.* (Minn.) 27 L. R. A. 409; and *Olmstead v. Bach* (Md.) 22 L. R. A. 74.



- is reviewable on appeal from such judgment, under § 3070, Rev. Stat. 1898.
2. If a party accept a privilege granted to take judgment, upon the theory that all facts warranting a more favorable judgment are established against him, he cannot thereafter change his attitude as to the existence of such facts for the purpose of preventing a review of any question legitimately arising thereon, on an appeal from such judgment.
  3. The rule that where an employee under an entire contract wrongfully terminates it he cannot recover thereon, or at all, for services rendered up to the time of such termination, does not apply to a case where such a contract has been terminated by the employer for cause.
  4. The rule generally in this country is that, where a servant is prevented from performing his contract, either from sickness or death or by reason of being discharged from the master's service, whether rightfully or wrongfully, he is entitled to recover for the services actually rendered, subject to the right of a recoupment in case of a rightful discharge, as hereafter stated.
  5. In an action against an employer, by an employee who has been discharged for cause, to recover for services rendered, the employer may recoup such damages as he is legally entitled to by reason of the facts which rendered such discharge justifiable.
  6. Though the general rule is that where a contract is entire the consideration moving from each party to the other is entire and the rights of the parties reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other, it admits of exceptions, and one of them is that it does not apply to a party failing to complete his contract when prevented from so doing by the other party, regardless of the reason for such prevention.
  7. The circumstance of terminating an entire contract for labor bears on the right of one seeking compensation for part performance thereof, as follows:
    - (a) If one party withdraws by consent of the other after part performance of such a contract, he can recover thereon, at the contract rate, for what he has done.
    - (b) If a party to such a contract be wrongfully prevented by the other from rendering full performance, he can recover upon the contract for the services rendered prior to such prevention, and his damages for not being allowed to complete the contract, not exceeding the full amount he could have earned by such performance, such amount prima facie being full wages for the balance of the contract period, which may be reduced by proof that wages were or might reasonably have been earned during such time.
    - (c) If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for services rendered up to the time of such prevention, subject, however, to such damages as the other party may recoup in the action for the former's misconduct.
  8. In an action to recover for part performance of a contract, of the party who has rightfully terminated the same, prima facie the amount recoverable is the contract rate for services rendered up to the time of the discharge; and that will prevail in the absence of a claim for damages properly pleaded as a counterclaim and established on the trial.

9. A person circumstanced as last above indicated must sue upon the contract or for damages, not upon a *quantum meruit*, though his recovery must be upon that basis, it being presumed that he earned and is entitled to the contract rate for the time his services continued, till the contrary is shown by evidence to sustain a properly pleaded counterclaim.

(February 26, 1901.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to recovery salary alleged to be due and unpaid. *Affirmed.*

Statement by Marshall, J.:

Action for damages for breach of contract. The complaint was to the effect that plaintiff was duly authorized to prosecute the action for the benefit of the estate of Alfred L. Hildebrand, deceased; that about January 2, 1897, said Hildebrand and defendant made an agreement, whereby the former bound himself to work solely for the latter for one year from January 1, 1897, and the defendant, in consideration, agreed to pay Hildebrand thereafter the sum of \$5,000 as a yearly salary, together with his expenses in the performance of his duties, and to allow him in addition a compensation of 10 per cent on all orders taken for goods to be furnished by defendant in excess of \$50,000 in value; that Hildebrand faithfully carried out his part of the contract till wrongfully discharged by defendant, and would have continued to do so to the end of the period of his employment if permitted by his employer; that June 9, 1897, he was discharged without his consent, and without reasonable cause, and to his damage in the sum of \$3,587.54. It was stated in the complaint, by way of particulars, that the total sum paid to Hildebrand by defendant was \$2,513.46, of which \$1,101 was for expenses, and \$1,412.46 to apply on salary.

The answer was to the effect that \$1,638.46 of the payments made to Hildebrand was exclusive of expenses and was applicable to salary, though as a matter of fact nothing was due on the salary account till the expiration of the period of employment, and except upon condition of full performance of the contract of employment on the part of Hildebrand unless he was sooner discharged without cause; that he was discharged at the time alleged in the complaint, but that it was for an adequate cause, by reason of which no sum whatever was at any time due him from the defendant; that the cause of the discharge was that Hildebrand refused to obey the reasonable directions of the defendant, that he was dissolute in his habits and negligent in the performance of his duties to an intolerable degree. The answer was further to the effect that Hildebrand might have obtained employment after his discharge and in that way prevented any damages accruing to him by reason thereof. The answer also contained a counterclaim for money alleged to have been

wrongfully obtained from defendant by Hildebrand while in defendant's employ prior to January 1, 1897, on the false pretense that the same was due for expenses. The amount of the counterclaim was \$1,900. Issue was duly taken on the counterclaim. The evidence on the trial showed that the contract of hiring was made by an acceptance by defendant of a written proposition submitted to it by Hildebrand, which was as follows:

"Beginning January 1, 1897, I shall expect you to pay me a salary at the rate of \$5,000 per annum, and a commission of 10 per cent on all amounts realized by you, in cash or its equivalent, on orders or contracts secured by me, exceeding \$50,000 per annum. In consideration of this I will devote myself with all energy to your selling department, collection department, contested claims and such other work as you may assign to me, serving your interests to the very best of my ability. Should you not consider my services an equivalent, nor wish to speculate for the coming year to this extent, I would ask you to kindly notify me at once, writing me clearly and to the point, and without circumvention."

At the close of the evidence defendant's counsel moved the court for a verdict in its favor, which was denied. It was then conceded by defendant's counsel that if, as a matter of law, the corporation became liable to Hildebrand for wages at the rate of \$5,000 per year, up to the 1st day of June, 1897, plaintiff was entitled to recover the sum of \$517.04. The court ruled in plaintiff's favor on that point, and further that he was entitled in any event to recover wages at the rate of \$5,000 per year up to the time the deceased was discharged, June 9, 1897, and all that he could have earned thereafter during his term if permitted to serve it out, if the discharge was not for a reasonable cause. The issue on that subject was submitted to the jury, and they found in plaintiff's favor, assessing the total damages at \$3,321.27. Judgment was rendered accordingly. There was a motion to set aside the judgment on the exceptions taken on the trial and because it was contrary to the law and the evidence. The court decided on such motion that the judgment should be set aside and a new trial granted on the whole case, unless plaintiff consented to have such judgment stand for \$517.04, that being the amount necessary, with payments theretofore made, to compensate for Hildebrand's services to June 1, 1897, at the rate of \$5,000 per year. Plaintiff submitted to such condition and reduced the judgment accordingly. From that this appeal was taken.

**Messrs. Flebing & Killilea**, for appellant:

The court having held, on motion for a new trial, as a matter of law, that the uncontradicted evidence justified a discharge of the plaintiff, the plaintiff is not entitled to any compensation for services rendered 53 L. R. A.

under the contract, unless there had been a complete performance on his part.

*Mechem, Agency*, § 635, note 7, p. 459; *Spain v. Arnott*, 2 Starkie, 256; *Cutter v. Powell*, 6 T. R. 320; *Ellis v. Hamlen*, 3 Taunt. 51; *Sinclair v. Boules*, 9 Barn. & C. 92; *Stark v. Parker*, 2 Pick. 267, 13 Am. Dec. 425; *Lantry v. Parks*, 8 Cow. 63; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Henson v. Hampton*, 32 Mo. 408; *Schnerr v. Lemp*, 19 Mo. 40; *Brown v. Fitch*, 33 N. J. L. 418; *Kelly v. Bradford*, 33 Vt. 35; *Posey v. Garth*, 7 Mo. 96, 37 Am. Dec. 183; *Holmes v. Stummel*, 24 Ill. 370; *Preston v. American Linen Co.* 119 Mass. 400; *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57; *Diefenback v. Stark*, 56 Wis. 462, 43 Am. Rep. 719, 14 N. W. 621; *Koplits v. Powell*, 56 Wis. 671, 14 N. W. 831; *Warehouse & B. Supply Co. v. Galvin*, 96 Wis. 523, 71 N. W. 804; *Winkler v. Racine Wagon & Carriage Co.* 99 Wis. 184, 74 N. W. 793.

Had the contract between Hildebrand and the American Fine Art Company called for the salary of the defendant to be paid monthly, even then the contract would be entire.

1 *Beach, Contr.* (1896) § 733, p. 80; *Olmstead v. Bach*, 78 Md. 132, 22 L. R. A. 74, 27 Atl. 501; *Larkin v. Heeksher*, 51 N. J. L. 133, 3 L. R. A. 137, 16 Atl. 703; *Beach v. Mullin*, 34 N. J. L. 343; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 183.

A servant cannot recover under an entire contract for services rendered, when rightfully discharged.

*Wood, Mast. & S.* § 84; *Lilley v. Elwin*, 11 Q. B. 742; *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171, 4 Nev. & M. 797; *Turner v. Robinson*, 2 Nev. & M. 829; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Mechem, Agency*, § 214.

**Messrs. Quarles, Spence, & Quarles**, for respondent:

The contract is not entire and indivisible if it appears from its terms that the parties did not intend to make the entire performance of it a condition precedent to receiving payment for the portion of the work actually done.

*Upham Mfg. Co. v. Sanger*, 80 Wis. 41, 49 N. W. 28; *Clark v. Clifford*, 25 Wis. 597; *Jackson v. Cleveland*, 15 Wis. 108; *Gallum v. Seymour*, 76 Wis. 250, 45 N. W. 115; *Gill v. Benjamin*, 64 Wis. 368, 54 Am. Rep. 619, 25 N. W. 445.

When A is employed to work for B for a definite term at so much a month, payable monthly, the contract is severable, and a recovery can be had for the wages due for a full month, even though the servant has left the service before his term is completed.

*Wood, Mast. & S.* § 103, p. 201; *Clark v. Clifford*, 25 Wis. 597; *Davis v. Preston*, 6 Ala. 83; *Goodwin v. Merrill*, 13 Wis. 659.

**Marshall, J.**, delivered the opinion of the court:

The assignments of error are sufficient to raise the question of whether the trial court erred in ordering judgment for plaintiff for

§517.04. The determination of the court upon which the judgment rests is spoken of here as an order for judgment, because that is the effect of such determination, though the order, in form, was that a new trial be granted unless the plaintiff consented to reduce the judgment to \$517.04. It is contended on the part of appellant that in making such order the court decided, as a matter of law, that the discharge of Hildebrand was justifiable,—while it is contended by respondent's counsel that the issue as to whether the discharge was justifiable was submitted to the jury and was found in favor of plaintiff; that such finding has not been disturbed; that the judgment as finally perfected was in part based thereon; and that no motion was made for a new trial before judgment, so as to present for review here the question of whether the verdict is contrary to the evidence. Neither contention appears to be borne out by the record. The court decided that the judgment was wrong and could not stand. That necessarily involved a decision that the verdict was erroneous for some cause. The decision being general, it is impossible to say whether it was based upon the ground that the verdict was contrary to the evidence, or upon the ground that some error of law had been committed in neglecting to submit an issue of fact that, if found in appellant's favor, might have reduced the verdict to \$517.04. The indications from the record, however, are that the decision of the court was based on the idea that the finding of the jury on the issue submitted was contrary to the clear preponderance of the evidence. The court ordered the judgment to be set aside and a new trial granted unless the plaintiff consented to a reduction thereof to such an amount as would cover the wages earned and unpaid up to the 1st day of June, 1897. There was no controversy as to what that amount was, and no controversy, as to the facts upon which the question turned, of whether the contract was entire. Both were questions of law, to be determined by the court from undisputed evidence, and had been decided. The ruling as to the character of the contract had been duly excepted to, and such decision was adhered to in making the order. The order was submitted to by plaintiff, and the judgment was accordingly reduced. That as effectually took the verdict of the jury out of the case as a vacation of it.

The accepted option to take judgment, upon the theory that the controverted issues of fact were found against appellant, precludes respondent from insisting otherwise to prevent appellant from having the ruling of the court, ordering such judgment upon that theory, reviewed by this court. It must be considered that such issues have, in effect, been determined against respondent, and that such determination is a verity in the case. The judgment appealed from rests on the order of the court permitting it to stand for \$517.04. The order is intermediate the judgment as finally perfected. It involves the merits and necessarily affects

such judgment, and is therefore reviewable on this appeal, without any exception thereto. Rev. Stat. 1898, § 3070.

The sole defense to plaintiff's claim pleaded in the answer, that was supported by evidence on the trial, and was then and is now insisted upon, is that the contract of employment was entire and was terminated for cause. It is claimed that the rule, that where an employee wrongfully terminates such a contract he cannot recover upon it for services rendered, applies to a case where such a contract has been terminated by the employer for cause. Counsel for respondent seems to concede that such is the law. In that view it is insisted upon one side that the evidence shows conclusively that the contract was entire, and therefore that plaintiff cannot recover; and upon the other that it was not entire, and therefore that the judgment is right. Whether the trial court considered the turning point in the case to be the one in controversy between counsel and decided it in respondent's favor, and in that way reached the conclusion embodied in the judgment, does not definitely appear.

Both counsel have misconceived the principles governing the facts of this case. The rule that an action cannot be maintained by an employee upon an entire contract without first fully performing on his part, does not apply where such performance is prevented by the employer, though such prevention be for cause. In the leading case in this court on the scope of the rule contended for, *Diefenback v. Stark*, 56 Wis. 462, 468, 43 Am. Rep. 719, 14 N. W. 621, it was recognized that the rule does not apply where performance is prevented by act of God or the conduct of the party charged with the liability. In *Mechem, Agency*, § 435, it is said that the rule that no recovery can be had on an entire contract, without full performance, does not extend to those cases where the contract, between the employer and employee is terminated by consent of the employer.

In England it appears that if an employee is prevented from carrying out his contract to the end, because of the conduct of his employer in discharging him for cause, he cannot recover for services rendered up to the time of the discharge. *Smith, Mast. & S. ed. 1895*, pp. 220-222; *Wood, Mast. & S. § 129*. But, generally speaking, such is not the law in this country. *Id. § 130*; 14 Am. & Eng. Enc. Law, p. 793, and cases cited; 2 *Sutherland, Damages*, 2d ed. p. 1546; *Taylor v. Paterson*, 9 La. Ann. 251; *Lawrence v. Gullifer*, 38 Me. 532. The rule in England and this country is thus stated by *Wood on Master & Servant*, at § 84: "If the contract is for a term, although the rate of compensation is at so much a day, week, or month, yet if the contract is silent as to the time of payment, it is entire and indivisible, and full performance must precede a right of recovery," in the absence of circumstances showing that the contract was not understood by the parties as entire. "So inexorable has this rule been regarded in

England that it has been held that where a servant hired for a term dies before full performance no recovery could be had by his executors for the wages earned at the time of his death, and the same rule is held in the case of a servant dismissed for cause. But such is not now the rule in this country, but in all cases where the servant is prevented from performing his contract, either by sickness or death, or by reason of being discharged from the service, whether rightfully or not, he is entitled to recover for the services actually rendered."

Circumstances may exist that will enable an employer, who has discharged an employee for cause, to defeat, in whole or in part, any claim for wages up to the time of the discharge, but the mere fact that the contract is entire will not give him that power. He may recoup such damages as are allowable to him in such a case under the rules of law, because of the conduct of the employee rendering his discharge necessary. But they must be claimed in the pleading and established on the trial. *Mechem, Agency*, § 619; 2 *Sutherland, Damages*, 2d ed. p. 1546; *Newman v. Reagan*, 63 Ga. 755. The text in *Sutherland* is well supported by the notes, and is as follows: "The general rule, when a servant is discharged for cause, is to allow him his wages to the time of discharge, subject to deductions for his torts or deficiencies." No such damages were claimed here. On the contrary, as we have seen, it was conceded on the trial that plaintiff was entitled to the judgment rendered, unless precluded therefrom by reason of the contract of employment being entire.

There is danger, as is evidenced by this case, of confusing the law applicable to a case where an employee under an entire contract voluntarily abandons it, and that applicable where such an employee is prevented from carrying out his contract by the justifiable conduct of his employer in discharging him. In the former case he cannot maintain an action upon the contract at all; in the latter he can maintain such an action for wages up to the time of the discharge, subject, however, to the right of the employer to recoup damages.

What has been said does not militate at all against the general rule laid down in *Diefenback v. Stark*, 56 Wis. 462, 468, 43 Am. Rep. 719, 14 N. W. 621, to the effect that when a contract is entire, the consideration moving from each party to the other is entire, and their rights are reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other. However, like most general rules, it admits of exceptions, and there are several of them, one being that which is the key to plaintiff's right of recovery here, viz.: the condition precedent, of full performance by one party, is waived if the contract be terminated by the other party, regardless of whether it is by his mere consent or by his rightfully or wrongfully preventing such performance. The only bearing the cause for terminating an entire con-

tract by one party has on the rights of the other seeking compensation for what he has done under it, may be stated as follows: If one party to a contract withdraws from it by consent of the other after part performance thereof, he can recover for what he has done at the contract rate. If a party to an entire contract, after part performance thereof by him, be prevented by the wrongful conduct of the other from rendering to such other complete performance, he can recover upon the contract for what he has done, at the contract rate, and his damages for not being allowed to fully perform, not exceeding the full amount he could have earned by such performance. If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for the part performance, not exceeding the contract rate, being liable to respond in damages to the adverse party to the amount of the latter's legal damages caused by the acts that justified the termination of the contract.

The foregoing is in harmony with *Walek v. Fisher*, 102 Wis. 172, 43 L. R. A. 810, 78 N. W. 437; *Winkler v. Racine Wagon & Carriage Co.* 99 Wis. 184, 74 N. W. 793; *Dickinson v. Norwegian Plow Co.* 101 Wis. 157, 76 N. W. 1108; and other cases decided by this court. In this class of cases it is said the basis of recovery is the contract, though the amount recoverable is by no means absolutely fixed thereby. It prima facie furnishes the standard from which to compute the value of the claimant's services, and while the recovery cannot exceed the amount computable by such standard it may be reduced by damages suffered. The rule is laid down in *Wood, Mast. & S.*, at § 128 thus: "A dismissal for cause before the expiration of the term does not operate as a rescission of the contract so as to entitle the servant to sue upon *quantum meruit*, but he must either sue upon the contract . . . or for damages for its breach, and in either event the limit of his recovery is the contract price, subject to such deductions as the master is legally entitled to." That is to say, while the person dismissed from service for cause cannot sue upon a *quantum meruit*, his recovery must be upon a *quantum meruit* on the contract basis, it being presumed that he earned and deserves the contract price for the time his services continued, till the contrary be shown by evidence establishing a right to deductions therefrom as recoverable damages. In short, as said by one of the authorities above quoted, the discharged servant is entitled in any event "to his wages to the time of discharge, subject to deductions for his torts or deficiencies."

It follows from the principles stated that the judgment appealed from is right, regardless of any question presented in the briefs of counsel for either side. Plaintiff's intestate, after part performance of his contract with appellant, was for good cause prevented from completing his term. Such performance, at the contract rate, with interest,

amounted to the sum for which judgment was rendered. No damages were claimed for the acts, of which the intestate was guilty, that necessitated his discharge. That being the situation at the time the judgment was ordered, there was nothing before the court entitling appellant to any diminution of the amount earned by the intestate at the contract rate.

*The judgment of the Circuit Court is affirmed.*

Sealy F. O'CONNOR, *Respt.*,

*v.*

City of FOND DU LAC, *Appt.*

(109 Wis. 253.)

- \*1. Failure to perform a condition precedent to the existence of a right, as that prescribed by § 1839, Rev. Stat. 1898, prevents the acquirement thereof, and may be insisted upon at any stage of judicial proceedings in respect thereto.
2. Failure to perform a condition of the use of a judicial remedy to enforce a right having no dependence thereon for its existence—such as the condition requisite to the continued existence of a claim against a railway for the negligent killing of stock by a railway train, or damages for the negligent setting of fires by a locomotive engine, under § 1816b, Rev. Stat. 1898—is waived if objection is not taken by answer or demurrer, the statute, to all intents and purposes, being a statute of limitations and governed as such.
3. Failure to perform a statutory condition precedent to the commencement of an action—as one that no action shall be commenced to enforce a city liability until notice shall have been given of the existence thereof and the common council of the city have had an opportunity to pass upon the same—has the same effect as failure to comply with a statute of limitations. It is in the nature of such a statute, though failure to comply with it may only abate the action if objection be taken by answer or demurrer. If not so taken, the objection is waived.
4. The words “from and after,” used in a statute in regard to time, are ordinarily held to signify exclusion of the day from which reckoning is to be made; and such meaning should prevail in the absence of some clear legislative intent to the contrary.
5. Publication of an act of the legislature prior to its taking effect, being for the purpose of enabling persons affected to shape their course accordingly, a provision therefor in the form, the act shall take effect from and after publication thereof, is consistent with such words being used exclusively, and inconsistent with their being otherwise used.
6. Chapter 247, Laws 1897, which attempted to extend the term of office of the chief of police in the defendant city, among other such corporations, beyond

the term for which he was specifically elected, if valid, entitled him to hold such place and receive the emoluments thereof till succeeded by a person appointed to his place under such act.

7. Section 9, art. 13, of the Constitution, prohibits the legislature from interfering in any way with the question of what person shall hold any office in any city in this state, of a character known at the time of the adoption of the Constitution, whether then known by the same name as subsequently or not, and limits all power in that regard to the electors of the particular locality interested, to be exercised directly or by some municipal agency selected directly or indirectly by them.
8. City governments, at the time of the adoption of the Constitution, commonly included a police department; and all offices pertaining thereto, whether now known by the names they bore prior to such adoption or not, must be considered as in the class which the Constitution expressly declares must be filled by election by the electors of the particular localities interested, or by appointment by such authority of such localities as the legislature shall designate.
9. The idea expressed in the Constitution is, not that all officers of towns, cities, and villages whose election is not provided for in the Constitution may be elected or appointed in such manner as the legislature may deem best, but that all officers corresponding to town, city, and village officers as regards official duty, that were known at the time of the adoption of the Constitution, shall be elected or appointed by some authority of the particular locality interested, designated by the legislature.
10. An act of the legislature appointing members of a police force in a city is an unconstitutional interference with local affairs.
11. An act of the legislature, so far as it expressly or by its effect extends the term of office of a member of the police force of a city beyond that for which he was specifically elected or appointed by legitimate municipal authority, so as to keep such officer in place for any period of time regardless of such authority, is unconstitutional and void.

(February 26, 1901.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Fond du Lac County in favor of plaintiff in an action brought to recover compensation for services rendered as chief of police. *Reversed.*

Statement by Marshall, J.:

Action to recover for services rendered defendant as chief of police. Plaintiff was elected such chief May 1, 1896, for the year ending May 1, 1897, and till his successor should be legally elected and qualified, the salary of the office being fixed at \$50 per month, payable monthly. He qualified for the office and performed its duties till excluded therefrom as hereafter mentioned. April 17, 1897, an act of the legislature, known as chapter 247 of the General Laws of 1897, was duly published. It provided, among other things, as follows: In cities of the third class, to which defendant belonged, a board of police and fire commissioners, consisting of four citizens, shall be

\*Headnotes by MARSHALL, J.

NOTE.—As to interference by legislature with right of local self-government in the appointment of municipal officers, see note to *State ex rel. Bulkley v. Williams* (Conn.) 48 L. R. A. on page 479; and *Newport v. Horton* (R. I.) 50 L. R. A. 330, and note. See also the case next following.

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appointed, in a manner indicated, before the first Monday of May, 1897, one to hold his office for the term of one year, one for two years, one for three years, and one for four years, from the said first Monday of May following, and until his successor should be appointed and qualified. No person shall be appointed to any position on the police force or in the fire department in any such city except with the approval of said board, after said act goes into effect. Said board shall, as soon as practicable, prepare and adopt rules and regulations governing the selection and appointment of persons to be employed on the police force and in the fire department of any such city. Whenever the term of office of any chief of police or chief engineer of a fire department heretofore appointed or elected in any such city shall expire after the act goes into effect, and before the board of police and fire commissioners shall have adopted the necessary rules and regulations with reference to the appointment of police officers, or when any such officer is holding over at the time the act goes into effect, such officer shall hold his office until his successor shall have been duly appointed in accordance with the rules and regulations of the board. All other members of the police force in any such city at the time the act goes into effect shall hold their respective positions for six months from the date when the rules and regulations adopted by the board shall go into effect, and thereafter under certain specified conditions. The act further provided for the suspension of police officers by the board of police commissioners under certain circumstances. In defendant city, prior to May 1, 1897, a board of police commissioners was duly appointed, and the members thereof duly qualified, and on the first Monday of May, 1897, entered upon the duties of their offices. About May 24th, thereafter, said board, in compliance with said act, promulgated its rules for the appointment of members of the police department of the city and other employees and officers affected by said act. In April, 1897, the common council of the city appointed Thomas McGrath chief of police thereof for the year commencing May 1, 1897. He took the oath of office of such chief April 17, 1897, and filed such oath and his official bond with the clerk of said city. Such bond was not presented to or approved by the council of the city until April 22, 1897. On May 1, 1897, defendant caused plaintiff to be excluded from the office of chief of police upon the pretense that his term of office expired on that day, and that said McGrath was entitled to enter upon the duties thereof. From the time of such exclusion until November 1st thereafter plaintiff held himself in readiness to perform the duties of chief of police of said city, and offered to perform such duties, but was not allowed to do so. At the end of each month during said period, plaintiff in due form of law made his claim against the city for \$50 as salary of chief of police of said city, all of which claims were rejected by the common council there-

of. Plaintiff was never removed from his office by the said board of police commissioners, or displaced by any other person under its rules and regulations.

The pleadings raised merely the issue of whether the city of Fond du Lac was indebted to plaintiff for salary of chief of police for the six months subsequent to May 1, 1897. There was no dispute but that the facts were as above stated. The court found, as a matter of law, that plaintiff was chief of police of the defendant when the act of 1897 went into effect, and was entitled to hold said office till November 1st thereafter, since he was not removed or displaced by the board of police and fire commissioners; that his exclusion from the office was wrongful, and that he was entitled to recover the salary of the office claimed. Judgment was rendered accordingly.

**Messrs. Maurice McKenna and E. J. Phelps, with Mr. O. H. Eeke, for appellant.**

**Mr. Edward S. Bragg for respondent.**

**Marshall, J., delivered the opinion of the court:**

Section 5 of the city charter of the appellant provides as follows: "No action shall lie or be maintained against the city of Fond du Lac on contract until the claimant shall have presented to the common council a statement of the claim and the amount thereof, and the circumstances out of which it arose, duly verified on the oath of the claimant, and the council shall have allowed a regular meeting to pass without an adjournment with such claimant, of such claim or demand." Laws 1883, chap. 152, subchap. 18. The complaint does not show that such charter condition to the maintenance of this action exists. No objection was taken by appellant on that ground, either by answer or demurrer. The record does not show that evidence of the existence of such condition was produced. The point is now made that such situation is fatal to the judgment, the following cases being cited in support thereof: *Stocks v. Sheboygan*, 42 Wis. 315; *Hill v. Fond du Lac*, 56 Wis. 244, 14 N. W. 25; *Kelley v. Madison*, 43 Wis. 638, 28 Am. Rep. 576; *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226, 77 N. W. 175. *Stocks v. Sheboygan* is unlike this case, because there the question of the existence of the condition was raised by demurrer. In *Hill v. Fond du Lac* the question here raised was not involved, because the action sounded in tort and was held not to be included in the charter provision. *Kelley v. Madison* is unlike this case for two reasons: First, because the question was raised by a demurrer to the complaint; second, because it was held that the action was one sounding in tort and not affected by the charter provision against the maintenance of an action on a claim or demand till the same should be first filed as therein required. In *Weed & G. Mfg. Co. v. Whitcomb*, a statutory condition to the enforcement of a common-law right was treated as a condition of the right

itself, confusing a limitation statute acting on the remedy only, which may be and is waived by a failure to insist upon it by answer or demurrer (Rev. Stat. 1898, § 2654), with a statutory condition to the existence of a right, as, for instance, one necessary to a cause of action against a municipality for compensation for an injury caused by a defective highway under § 1339, Id. The same error was committed in *Ryan v. Chicago & N. W. R. Co.* 101 Wis. 506, 77 N. W. 894. It was corrected, as far as possible, in *Relyea v. Tomahawk Paper & Pulp Co.* 102 Wis. 301, 78 N. W. 412, which was affirmed in *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033, and *Malloy v. Chicago & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130.

So we see that none of the cases cited by counsel support their proposition, while *Relyea v. Tomahawk Paper & Pulp Co.* and *Meisenheimer v. Kellogg*, are to the effect that charter provisions of the kind under consideration are in the nature of statutes of limitations and governed by rules applicable thereto. If not complied with, the objection must be taken by answer or demurrer or be considered waived. Care must be taken not to confuse such statutes with one imposing a condition to the existence of a right. Noncompliance with the latter condition goes to the cause of action, not to the remedy for the redress of the wrong. The distinction between the two classes of rights is so clear that no one need go astray. In one case the right depends on the statute; in the other the right is independent of the statute, but its enforcement is regulated and limited by law. In the former, failure to comply with the statute prevents the creation of the right, hence it is not waived by failure to raise the point by demurrer or answer, while in the latter the condition relates to the remedy only, and is waived unless insisted upon by answer or demurrer. That was the rule at common law, and the statute (Rev. Stat. 1898, § 2654) expressly preserves it. Failure to comply with a statutory condition of the use of a remedy does not go either to the jurisdiction of the court or to the cause of action.

The foregoing is in harmony with *Sheel v. Appleton*, 49 Wis. 125, 5 N. W. 27, and *Benton v. Milwaukee*, 50 Wis. 368, 7 N. W. 241. In *Beware v. Pine Valley*, 53 Wis. 527, 10 N. W. 695, the court said that failure to comply with the condition of § 1339, as regards a claim for damages caused by a defective highway, and to allege such compliance in the complaint, was fatal to plaintiff's cause of action, though the point be not raised by answer or demurrer; and that anything said to the contrary in the other two cases above referred to is wrong. The idea seems to have been in mind that the cases were somewhat in conflict in that the court fell into the error of not observing clearly the distinction between compliance with a statute which is the foundation of a right, and compliance with one which merely regulates or limits the enforcement thereof. The *Beware Case* was decided right, because service of the notice of the injury un-

der Rev. Stat. 1898, § 1339, was a condition of the right there in question. The other two cases were also decided right, because the statutory condition involved operated only upon the remedy. Those cases were affirmed in *Bradley v. Eau Claire*, 56 Wis. 168, 14 N. W. 10; *Collette v. Weed*, 68 Wis. 428, 32 N. W. 753; *Lombard v. McMillan*, 95 Wis. 627, 70 N. W. 673; and *Bigelow v. Washburn*, 98 Wis. 553, 74 N. W. 362.

The case, on the merits, turns on the effect of chapter 247, Laws 1897, on respondent's right to hold the office of chief of police of the appellant, from the 1st day of May, 1897, till the 1st day of November thereafter. On that, these questions are presented for solution: When did the act take effect? Was McGrath the legal successor of respondent by the terms of the act and entitled to the office in dispute from the 1st day of May, 1897, at least till displaced by an appointee of the board of police and fire commissioners? If not, and the law by its terms took from appellant the power to elect a successor of respondent, or extended his term of office beyond the 1st day of May, 1897, was it in that regard constitutional? We will consider each of such propositions, though it pretty clearly appears that the first is immaterial.

1. Appellant contends that the act in question became a law on the 18th day of April, it having been regularly published on the previous day; that the day of publication should be excluded in determining when the law became effective. That turns on the meaning of the words "from and after" in the last section, which says: "This act shall take effect and be in force from and after its passage and publication." The word "from" and that in connection with the word "after" is sometimes used inclusively and sometimes exclusively. They have no certain literal or legal meaning that can be accepted as a guide under all circumstances. They are open to construction in many cases, so that courts sometimes hold that they are used exclusively, and at other times inclusively, as seems best calculated to effect the legislative intent; though it has come to be quite generally accepted as the rule that the meaning of the words in connection, "from and after," excludes the day from which the reckoning is to be made, and in order to avoid the application of it as a rule of construction, there must be something in the act, or the result of a literal application of the words to the subject treated by it, to indicate a contrary intent. *Sedgw. Stat. & Const. Law*, 356; *Smith, Const. & Stat. Constr.* § 616. That has been recognized as the law by this court. *Stewart v. McSweeney*, 14 Wis. 468; *McGinley v. Laycock*, 94 Wis. 205, 68 N. W. 871. There is no reason why "from and after," in the act in question, should not be considered as having been used in what we say has come to be regarded as their literal sense. On the contrary, the purpose of the publication strongly supports that view. That purpose was to give notice, to persons affected by

the law, of its existence, before it went into effect. Clearly, such purpose could not be accomplished without a completed publication. That would exclude the day on which the act was done, as fractions of a day are not ordinarily counted. The contrary view would lead to the absurd result that an act designed to give notice of the existence of a law in advance of its going into effect might occur subsequent thereto. It cannot be held that any such an absurdity was intended, by mere judicial construction. The other view accords with the literal sense of the words. It gives significance to the use of the word "after" in connection with the word "from," and makes the meaning sensible in the light of the purpose of the publication. That idea has been adopted elsewhere. *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *Parkinson v. Brandenburg*, 35 Minn. 294, 59 Am. Rep. 326, 28 N. W. 919.

2. There is no controversy but that McGrath was regularly elected as respondent's successor by the common council of appellant before the act in question went into effect. The learned trial court does not appear to have regarded the date of such election as of sufficient significance to require a mention thereof in the findings of fact, but he gave prominence to the date of the circumstance of qualification by the approval of the official bond. The latter circumstance does not appear to have been made material by the law of 1897 in any view of it. If the act was valid it took from the common council power to elect a chief of police after the 17th day of April, 1897, not before. Election to an office is one thing; a condition precedent to the person elected taking possession thereof is quite another thing. It was with the first circumstance that the law dealt, and that is the significant one on this branch of the case. Those provisions of the law affecting McGrath's right to the office are in the main as follows: "After this act goes into effect no person shall be appointed to any position, either on the police force or in the fire department, . . . except with the approval of the board." "Whenever the term of office of any chief of police . . . or other officer performing the duties of chief of police . . . by whatever name designated, heretofore appointed or elected, . . . shall expire after this act goes into effect and before the board of police and fire commissioners shall have adopted the necessary rules and regulations with reference to the appointment of police officers and members of the fire department, . . . or when any such officer is holding over at the time this act goes into effect," he shall hold his office "until his successor shall have been duly appointed by the board." "All other members of the force in either department named, . . . at the time this act goes into effect, shall hold their respective positions for six months from the date when the rules and regulations adopted by the board shall go into effect, and thereafter," under certain conditions mentioned. It seems quite clear that the legislative idea was that the per-

sons elected to official positions affected by the act, before it took effect, whose terms of office should expire thereafter and before the board of police and fire commissioners should be competent to fill their places, should remain in such places till that time, regardless of the specific terms for which such officers were elected or appointed. It says distinctly, as to the particular office in question, if the term of an officer elected or appointed before the taking effect of the act shall expire thereafter, he shall nevertheless continue in office till the place shall be filled by the board according to rules and regulations to be adopted by it, as soon as possible after the first Monday of May, 1897. That contemplated, as to such office, these circumstances in combination: A person elected or appointed prior to the taking effect of the act, the expiration of the term for which he was elected or appointed prior to the creation of the board of police and fire commissioners, and its qualification to act pursuant to the rules and regulations adopted for its government. We should say in passing that the making of such rules was not contemplated till after the 1st day of May, 1897, and that the terms of office of the members of the board did not commence till that time. The respondent satisfies the conditions mentioned, and McGrath does not. The latter was elected before the act in question went into effect, but the term for which he was elected did not expire prior to the time when the board of police and fire commissioners were required to be in readiness to fill the place by appointment under its rules and regulations. It follows that the second proposition advanced by appellant must be resolved in favor of respondent. By the wording of the law his term of office was extended beyond that for which he was elected, and since his place was not sooner filled by the board of police and fire commissioners, such extension included the six months from May 1 to November 1, 1897. He was therefore entitled to recover of appellant the salary for which this action was brought, if the legislative extension of his term of office was valid.

3. The validity of the legislation extending the term of office of respondent, regardless of the will of the appellant, must be tested by § 9, art. 13, of the Constitution, which provides that, "all city, town, and village officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of such cities, towns, and villages, or of some subdivision thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct." Counsel for both sides seem to appreciate fully that such constitutional provision was adopted here from New York, it having existed there as early as 1846; that it was construed by the highest courts of that state at an early day, and



that such construction has been approved here so far as the subject has been presented to this court; but they draw very different conclusions from the decisions.

It will be observed that the language of the Constitution deals with several classes of officers: First, city, town, and village officers whose election or appointment is provided for by the Constitution; second, such officers not provided for by the Constitution; third, all other officers whose election or appointment is not provided for by the Constitution; fourth, all officers whose offices were created by law subsequent to the adoption of the Constitution. It was absolutely taken out of the power of the legislature to appoint any officer of the second class mentioned, such power being expressly conferred upon the people of the municipality served by such officers. The purpose of that is plain and has often been declared by the courts. It was to render secure the important right of local self-government,—to give to the people of each locality the power to say and determine as directly as practicable who shall perform the governmental functions that concern such localities only as organized subdivisions of the state. That right, under our system of government, has from the start been regarded as the very foundation thereof, and absolutely necessary to its success. The New York court, in a very recent case, expressed the idea indicated, thus: "As to offices known and in existence at the time of the adoption of the Constitution, this provision is absolute in its prohibition of an appointment by the central government or its authority, or by any body other than the local electors or some local authority designated by law." "This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or invasion of it to be promptly met and condemned especially by the courts when such acts become the subject of judicial investigation." *Rathbone v. Wirth*, 150 N. Y. 459, 469, 34 L. R. A. 408, 419, 45 N. E. 15, 24. That language is none too strong. It voices correctly the views of the framers of the Constitution as they were unmistakably written into it. Therefore, if it appear that the office in question in this case was one of the class the legislature was rendered powerless to fill, and that the law, so called, extending appellant's term was in effect an appointment thereto, the duty of the court to condemn the usurpation of power is plain.

We shall not take time to analyze at length the constitutional provision under consideration, because the questions in regard to it are too well settled to require or justify such labor. The class of officers which the legislature is prohibited from directly interfering with, includes, as indicat-

ed, all city, town, and village officers known and in existence at the time of the adoption of the Constitution, whether known by the same names as they now bear or not. All of the New York authorities on the subject so hold. *People ex rel. Wood v. Draper*, 15 N. Y. 532; *People ex rel. Loew v. Batchelor*, 22 N. Y. 128; *People ex rel. Brown v. Woodruff*, 32 N. Y. 355; *People ex rel. Fowler v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374; *People ex rel. Le Roy v. Foley*, 148 N. Y. 677, 43 N. E. 171; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15. This court has likewise passed upon the same question. *State ex rel. Hamilton v. Krez*, 88 Wis. 135, 59 N. W. 593.

The learned counsel for respondent argues that an office is a mere legislative creation and belongs to the fourth class mentioned in § 9, and may be filled by legislative appointment where there is no express constitutional provision for otherwise filling it. That overlooks the fact that power is not left with the legislature in its discretion to appoint or elect all officers whose election or appointment is not provided for in the Constitution, and that it has never been so understood from the earliest treatment of the subject by Mr. Justice Denio in *People ex rel. Wood v. Draper*, 15 N. Y. 532. From the fact that provision is not made in the Constitution for the appointment of an officer to serve a town, city, or village in the performance of some duty as regards local government therein, it by no means follows, as suggested, that such appointment or election can be made directly by the legislature. The language of the Constitution clearly indicates the contrary. Town, city, and village officers whose election or appointment is provided for in the Constitution are mentioned as a class only to exclude them from officers generally that have to do with the government of such local governmental subdivisions of the state. After making such exclusion, the balance of such local officers is put in the class to be selected only by the electors of the particular localities affected, by the direct vote of such electors or by some local agency designated by the legislature for that purpose. The idea, as we understand the counsel, that all officers whose election or appointment is not provided for in the Constitution may be elected or appointed by the legislature, is as novel as it is contrary to the plain meaning of the Constitution. If adopted, one of the fundamental ideas of the framers of that instrument would certainly be lost sight of. They intended that all local officers, according to the then known schemes for local self-government, should be chosen by the people of the localities affected. That such was the idea intended to be embodied in the Constitution is voiced by every court that has spoken on the subject. The presence of the provision in the Constitution in regard to the election or appointment of local officers by the people, evidences the importance

which the people, when the Constitution was framed, attached "to the preservation of their right to the management of their local affairs. It means the right to choose their local officers in all its reality, or it means nothing. If it does not mean that the people have reserved the right of administering existing local offices by officers of their own choosing, whether it be done directly through an election or indirectly through the method of an appointment by some of their local authorities, I am at a loss to understand its significance or in what consists its peculiar value." Justice Gray in *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15. "The obvious purpose of the provision of the Constitution . . . was to secure to the people of the cities, towns, and villages of the state, the right to have their local offices administered by officers selected by themselves." Andrews, J., in *People ex rel. Williamson v. McKinney*, 52 N. Y. 374. "Faithfully observed and effect given to it [such provision] in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers, without let or hindrance from the state government, and none can be deprived of the rights and franchises thus guaranteed to all." Allen, J., in *People ex rel. Bolton v. Albertson*, 55 N. Y. 50. The offices of policeman and chief of police or city marshal (the particular name of the office being immaterial) in cities and villages, were as well known at the time of the adoption of the Constitution as any other. Such offices were understood to be essential to good order in large communities, and they were universally provided for in all city and village organizations. So there can be no question but that the power of electing or appointing such officers was prohibited to the legislature by the provision of the Constitution under consideration.

But it is said that the mere continuance in office by legislative enactment, of a person whose installation in the position was by a constitutional agency is not a legislative appointment, and that the term of office of respondent, regardless of the law of 1897, having commenced by a municipal appointment and being for one year and until his successor should be elected and qualified, strictly speaking and in a constitutional sense, it was not extended by such law. That proposition was advanced in *People ex rel. Loew v. Batchelor*, 22 N. Y. 128, and was there adopted, but the case was soon overruled and has not been considered authority for nearly half a century. The rule in New York is the same as that declared in *State ex rel. Hamilton v. Kres*, 88 Wis. 135, 59 N. W. 593, that the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appoint-

ment or election. *People ex rel. Fowler v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374; *People ex rel. Le Roy v. Foley*, 148 N. Y. 677, 43 N. E. 171. The right to fill an office by a new selection at the expiration of each term thereof is secured to the people of the locality specially concerned, the same as the power to fill the place in the first instance, and any attempt to interfere with that right, working a continuance of an incumbent in office, under the general rule that his incumbency shall continue till a successor is elected and qualified, is held to be as much a legislative appointment and usurpation of power as an express appointment to the place. In *People ex rel. Le Roy v. Foley*, 148 N. Y. 677, 43 N. E. 171, it was said that the power to appoint in such cases cannot be directly exercised by the legislature, nor indirectly by extending the term of an officer after his election. It is clear, it would seem, that if an officer be kept in office by legislative interference for any period after he could, but for such interference, be displaced by the power that originally selected him for the place, is to all intents and purposes one of the very legislative intermeddlings with local affairs that the Constitution was designed to prevent.

It follows that it is the duty of the court to declare the act in question, so far as the effect thereof would otherwise be to extend the term of office of any officer mentioned in it, either expressly or by taking from cities the power to elect and install his successor, an excess of legislative authority and void.

Before leaving the subject we should refer to *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87, which the learned counsel for respondent contends supports the power of the legislature to do the thing called in question in this case. That case affirms the power of the legislature to shorten the term of an office not fixed by the Constitution. That is quite a different question from the one considered here. It is one thing to elect or appoint a person to an office, or to extend the term of one already elected or appointed; that is what § 9, art. 13, in the cases covered by it, prohibits. It is quite another thing to shorten a term of office, leaving the power of the people of the locality affected unimpaired to fill the place anew, if it is to be filled at all. There is no constitutional restriction upon legislative power as to that, where the term of office is not fixed by the Constitution.

Some other questions are suggested by appellant's counsel for consideration, but they do not appear to possess sufficient merit to call for special notice. The attempted extension of respondent's term of office was invalid. McGrath was entitled to take possession of the office at the time he did. The term of office of the respondent then expired.

The judgment is reversed and the cause remanded with directions to render judgment in favor of the defendant for costs.

## PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania *ex rel.*  
John P. ELKIN, Attorney General, *Appt.*,

v.

James MOIR, Recorder of Scranton.

(199 Pa. 534.)

1. In determining the question of the validity of a statute for the government of cities the courts have nothing to do with its wisdom, propriety, or justice, or with the motives which are supposed to have inspired its passage.
2. Imperfection of an act for the government of cities in failing to provide a complete system for the passage of ordinances does not make the act unconstitutional, in the absence of anything to show that the municipal government cannot be administered on account of such imperfection.
3. An act for the government of cities of a certain class cannot be declared unconstitutional because it provides for methods of government and administration different from those required in the other classes, in particulars where there is no real difference, if the classification is made with reference to municipal, and not to irrelevant or wholly local, matters.
4. The expedients provided by the schedule for the temporary adjustment of the changes necessitated by the substitution of a new system of municipal government for one under which a city had been previously carried on would need to be very clearly unconstitutional to justify a court in overturning them.
5. A temporary and transitory provision in an act for the government of cities of a certain class, which applies to all the present members of the class, meets all the requirements of the temporary situation, and ends with the end of that situation, does not make the whole act local or special, although there is no provision as to other cities which ought to be included within the class during its operation.
6. The prolongation of the term of the executive of a city, appointed by the governor, beyond an election not unduly close at hand, thereby depriving the citizens of the power of election, does not render unconstitutional a statute devising a scheme of government for the city.
7. An act providing a system of government for a city is not rendered unconstitutional by the fact that, as a temporary expedient to prevent a gap in the government, the governor is given power to appoint a temporary executive, the time of whose appointment, and therefore that of the taking effect of the act, is left to his discretion.
8. Substituting an executive officer of a municipality under a different name, but with similar powers and duties, for one elected by the people, before his term of office has expired, does not render void a new charter making the change.
9. A statute for the government of cit-

ies is not made unconstitutional by a provision for a temporary appointment by the governor of an executive having the powers of a justice of the peace, who, under the Constitution, is an elective officer, since the provision as to his powers, if invalid, is a subordinate and severable feature of the statute.

10. The requirement of confirmation by the senate of the governor's appointments to office, made by Const. art. 4, § 8, has no application to municipal officers.
11. The repeal of previous acts upon the same subject is always germane to the title of a statute.
12. A provision in a statute providing a government for cities of a certain class, that cities passing into the class by reason of increase of population shall retain all their old laws except so far as they are in conflict with the new statute, even if invalid for lack of uniformity, will not invalidate the whole act.
13. A statute for the government of cities based upon classification cannot be held unconstitutional as local or special, although it was intended, and the classification made, so as to apply to only a limited number of existing cities.
14. A statute providing a system of government for cities cannot be held unconstitutional for violating the spirit of the Constitution, or that general intent which preserves to the people the right of local self-government.

(*McCollum, Ch. J., and Dean and Mestresat, JJ., dissent.*)

(May 27, 1901.)

**A**PPEAL by relator from a decree of the Court of Common Pleas for Lackawanna County in favor of defendant in a quo warranto proceeding to oust defendant from the office of recorder of the city of Scranton, which he claimed to hold under provisions of a statute passed March 7, 1901, for the government of cities of the second class. *Affirmed.*

The facts are stated in the opinions.

*Messrs. Joseph O'Brien, M. J. Martin, I. H. Burns, and Frederick W. Fleitz,* for appellant:

The Constitution does not authorize classification of cities. On the contrary, it expressly provides that regulation of the affairs of cities shall be by general laws.

Suppose this court should overrule *Wheeler v. Philadelphia*, 77 Pa. 338, and the offshoots resulting from it, the Constitution would remain the same, line for line and letter for letter, and yet there could be, under it, no classified legislation for cities. If the power to classify had been given to the legislature it would necessarily follow that the extent of its exercise would be for that

**NOTE.**—As to interference by legislature with right of city to local self-government, see *State ex rel. Bulkeley v. Williams* (Conn.) 48 L. R. A. 465, and *note*; *Newport v. Horton* (R. I.) 50 L. R. A. 330, and *note*; and *O'Connor v. Fond du Lac* (Wis.) *ante*, 831.  
53 L. R. A.

As to right of courts to consider expediency or wisdom of statute, see, in this series, the earlier cases of *Chicago, B. & Q. R. Co. v. State ex rel. Omaha* (Neb.) 41 L. R. A. 481; *Bennett v. Pulaski* (Tenn.) 47 L. R. A. 278; and *State v. Foster* (R. I.) 50 L. R. A. 339.

body itself to judge. In such case this court could not, as in *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356, have struck down four classes of cities with a single stroke of the pen. Neither would this court, as it has in almost every instance, have judged as to the necessity of the law in order to justify its existence.

*Kilgore v. Magee*, 85 Pa. 401; *Com. ex rel. Fertig v. Patton*, 88 Pa. 258; *Soowden's Appeal*, 96 Pa. 422; *Wheeler v. Philadelphia*, 77 Pa. 338; *McCarthy v. Com. ex rel. Griffiths*, 110 Pa. 246, 2 Atl. 423; *Morrison v. Bachert*, 112 Pa. 322, 5 Atl. 739; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356.

Classification with a view of legislating for either class separately is essentially unconstitutional, unless a necessity therefor exists,—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately, that would be useless and detrimental to the others.

*Ayars's Appeal*, 122 Pa. 281, 2 L. R. A. 577, 16 Atl. 356.

This law is special because it operates differently on different incumbents of the same office.

The act is void because it contains more than one subject not clearly expressed in the title.

The repealing of an act or section of an act is a separate subject.

*Com. v. Mercer*, 9 Pa. Co. Ct. 461; *Ruth's Appeal*, 10 W. N. C. 498; *Perkins v. Philadelphia*, 156 Pa. 539, 27 Atl. 356; *Ridge Ave. Pass. R. Co. v. Philadelphia*, 124 Pa. 219, 16 Atl. 741; *Re Road in Phoenixville*, 109 Pa. 44.

The act is void because it does not apply equally to all the cities of the second class.

*Messrs. John G. Johnson, Knox & Reed, Clarence Burleigh, Lyon & McKee, Lewis McMullin, George M. Hosack, and William W. Smith*, for the mayors of Pittsburgh and Allegheny city:

The act is impossible of execution, and therefore is void, inasmuch as no ordinances can be enacted, and no powers of the cities can be validly exercised, thereunder.

The act is unconstitutional because it attempts a classification in the method of filling municipal offices and of exercising municipal powers, resting upon no proper discrimination or foundation.

If local self-government is requisite in cities of the first and third classes, it is equally requisite in cities of the second class; and a classification which allows such government to some cities and denies it to others rests upon no proper legal or constitutional foundation.

*Com. v. Oellers*, 140 Pa. 457, 21 Atl. 1085; *Allegheny v. Millville, F. & S. Street R. Co.* 159 Pa. 415, 28 Atl. 202; *Shaub v. Lancaster*, 156 Pa. 365, 21 L. R. A. 691, 26 Atl. 1067; *Kepner v. Com. ex rel. Harrisburg*, 40 Pa. 129.

The act is unconstitutional because it is a local act changing the charters of cities, 53 L. R. A.

creating offices, and prescribing the powers and duties of officers in cities.

*Perkins v. Philadelphia*, 156 Pa. 554, 27 Atl. 356.

The act is unconstitutional because it vests in the governor the discretion of determining when it shall become operative.

While there is a direction that the appointment shall be made "within thirty days from the approval of this act," this is directory, and not mandatory.

19 Am. & Eng. Enc. Law, p. 427; *Re Census Superintendent*, 15 R. I. 614, 15 Atl. 205; *Dyer v. Bayne*, 54 Md. 87; *People v. Allen*, 6 Wend. 486; *People ex rel. Van Wyok v. Wheeler*, 18 Hun, 540; *People ex rel. McMackin v. Board of Police*, 46 Hun, 296.

The act is unconstitutional because it removes from their respective offices, during the terms for which they were elected, the mayors of the cities of the second class, and puts other persons therein.

The act did not abolish the office, but removed the incumbent.

It was not within the power of the legislature to remove the mayors, duly elected, during their respective terms.

*Donohugh v. Roberts*, 11 W. N. C. 186; *Com. ex rel. Braughler v. Weir*, 165 Pa. 284, 30 Atl. 835; *Com. ex rel. Holland v. Schneipp*, 166 Pa. 401, 31 Atl. 118; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; *State ex rel. Abbott v. Beddingfield*, 125 N. C. 256, 34 S. E. 412; *State ex rel. McCall v. Webb*, 125 N. C. 243, 34 S. E. 430; *State ex rel. White v. Hill*, 125 N. C. 194, 34 S. E. 432; *Dalby v. State ex rel. Hancock*, 125 N. C. 325, 34 S. E. 516; *State ex rel. Gattis v. Griffin*, 125 N. C. 332, 34 S. E. 429; *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113; *Walser ex rel. Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139; *Silvey v. Boyle*, 20 Utah, 205, 57 Pac. 880; *Womsey v. Jersey City*, 61 N. J. L. 499, 39 Atl. 710; *Houseman v. Com. ex rel. Tener*, 100 Pa. 231; *State ex rel. Holmes v. Wiltz*, 11 La. Ann. 439.

Conceding that with the abolition of the office the incumbent fell, so long as the office continued the incumbent could not be removed by the legislature.

*Com. v. Waller*, 145 Pa. 235, 23 Atl. 382; *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199.

The act is unconstitutional because of the lack of power in the legislature to do what is therein attempted, viz., in the same act to make the office of mayor both elective and appointive.

The act is unconstitutional because, after making the office of recorder an elective one, it provides for a continuance in the office by appointment by the governor for such length of term as dispenses with an election at the time fixed by the Constitution, viz., the next municipal election in February.

A vacancy existed in the office of city recorder if it was a new and validly created one. Being elective, it was the duty of the legislature, under the Constitution, to provide that it should be filled by an election on

the 3d Tuesday of February following the enactment, *viz.*, on the 3d Tuesday of February, 1902.

*People v. Chaves*, 122 Cal. 138, 54 Pac. 596; *Re Election Dist. Judges*, 11 Colo. 373, 18 Pac. 282; *Com. ex rel. Magee v. McCarthy*, 3 W. N. C. 477; *Brooke v. Com. ex rel. Philadelphia*, 5 W. N. C. 416.

The act is unconditional because it gives to the governor a power to remove an elected officer without cause.

It is unconstitutional because it violates those provisions of the new Constitution which preserve to the people local self-government, and especially the right to choose their own local officers for the administration of local affairs.

An implied prohibition is just as imperative as an express one.

*Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Com. v. Zephon*, 8 Watts & S. 386; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Citizens' Sav. & L. Assn. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Cooley, Const. Lim. 6th ed. p. 206*; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175.

The very purpose of adopting a new Constitution was to change the old order of things, and to secure to the populous local districts the right to govern themselves in local affairs.

*Allegheny v. Millville, E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202; *Livingston v. Wolf*, 136 Pa. 519, 20 Atl. 551; *People ex rel. Le Roy v. Huribut*, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen. ex rel. Laurence v. Trombly*, 89 Mich. 50, 50 N. W. 744; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *State ex rel. Howe v. Des Moines*, 103 Iowa, 76, 39 L. R. A. 285, 72 N. W. 639; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L. R. A. 79, 21 N. E. 252; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; *State ex rel. Yancey v. Hyde*, 121 Ind. 20, 22 N. E. 644; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; *Maynard v. First Representative Dist. Bd. of Canvassers*, 84 Mich. 228, 11 L. R. A. 332, 47 N. W. 756; *Prouty v. Stover*, 11 Kan. 235; *Re Flatbush*, 60 N. Y. 398.

The act is unconstitutional because it attempts to create an additional justice of the peace, permits the election of such justice of the peace at an improper time, and permits the appointment of such justice by the governor, although the Constitution requires the office to be filled by election.

The recorder has not been legally appointed, even though the act be constitutional. 53 L. R. A.

al, because of the failure to obtain the consent of the senate.

*Houseman v. Com. ex rel. Tener*, 100 Pa. 232; *Lane v. Com. ex rel. Atty. Gen.* 103 Pa. 485.

*Messrs. A. A. Vosburg, H. A. Knapp, James H. Torrey, and Richard C. Dale*, for appellee:

The whole lawmaking power is committed to the legislature, and its command must prevail unless it clearly transgresses the constitutional prohibition.

*Lloyd v. Smith*, 176 Pa. 218, 35 Atl. 199; *Re Sugar Notch*, 192 Pa. 355, 43 Atl. 985; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 169, 5 Am. Rep. 360; *Powell v. Com.* 114 Pa. 293, 60 Am. Rep. 350, 7 Atl. 913; *Com. ex rel. Wolfe v. Butler*, 99 Pa. 540; *Philadelphia v. Field*, 58 Pa. 324; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 300; *Butler's Appeal*, 73 Pa. 451.

A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution.

*Cooley, Const. Lim. 5th ed. p. 197*; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Weister v. Hade*, 52 Pa. 474; *Com. ex rel. Dysart v. M'Williams*, 11 Pa. 61; *Com. v. Maxwell*, 27 Pa. 444; *Com. v. M'Closkey*, 2 Rawle, 374; *Com. ex rel. McCormick v. Reeder*, 171 Pa. 505, 33 L. R. A. 141, 33 Atl. 67.

A municipal corporation is a creature of the state; it derives its powers from the state; the power that makes can unmake, change, or modify. No municipal officer has any property right in his office, but the office may be abolished or changed by the legislature, or new offices may be created.

*United States v. Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Erie v. Erie Canal Co.* 59 Pa. 177; *Burns v. Clarion County*, 62 Pa. 425; *Donohugh v. Roberts*, 11 W. N. C. 186; *Gas & Water Co. v. Downingtown*, 175 Pa. 344, 34 Atl. 799; *Philadelphia v. Fox*, 64 Pa. 180; *Butler v. Pennsylvania*, 10 How. 416, 13 L. ed. 478; *Orenshaw v. United States*, 134 U. S. 104, 33 L. ed. 827, 10 Sup. Ct. Rep. 431; *Thompson v. Com. ex rel. Althouse*, 81 Pa. 314; *Mechem, Pub. Off. §§ 463-465*; *Conner v. New York*, 5 N. Y. 285; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 19 N. E. 224; *Mervioether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; 1 Hare, Am. Const. L. p. 630; *Baird v. Rice*, 63 Pa. 489; *Perkins v. Slack*, 66 Pa. 283; *Philadelphia v. Field*, 58 Pa. 320.

There is no provision in the Constitution securing to cities the right to elect their own chief executives, however they may be styled.

Even supposing that our Constitution, by implication, secures to cities the right to select their own chief executives, yet the legislature in passing the act in question here has not infringed such principle.

Whether or not the legislature could per-

manently deprive a city of its supposed right to elect its chief executive officer as an incident of its right to confer and recall corporate power, the legislature may certainly make provisional or initiatory appointments to effect a change, and put a new system of local government into operation.

*People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 403.

It is not unconstitutional for the legislature to authorize the appointment of the chief executive officer of a city beyond a general or special election.

*Com. ex rel. Atty. Gen. v. Callen*, 101 Pa. 375; *People ex rel. Osborne v. Osborne*, 7 Colo. 605, 4 Pac. 1074; *Com. v. Clark*, 7 Watts & S. 127; *Baltimore v. State ex rel. Baltimore Bd. of Police*, 15 Md. 377, 74 Am. Dec. 572; *People ex rel. Dunham v. Morgan*, 90 Ill. 558.

So far from being exceptional, it is the rule, in putting in operation new systems of municipal government, to legislate out of office a greater or less number of the old officers.

The act of March 7, 1901, is not within the constitutional prohibition against local and special legislation.

For some years after the decision in *Wheeler v. Philadelphia*, 77 Pa. 338, this court showed a marked disposition to restrain the doctrine of classification to the narrowest practicable limits.

*Reading v. Savage*, 120 Pa. 198, 13 Atl. 919; *Re Ruan Street*, 132 Pa. 257, 7 L. R. A. 193, 19 Atl. 219.

From *Re Ruan Street* on, the tendency of the court has been more and more toward such liberal construction of the power of the legislature to classify for purposes of legislation as would enable it in some measure to perform "the task of steering through constitutional restrictions, well meant, but destructive of necessary governmental powers," and to meet the difficulty of "constructing statutes conferring forms and modes of procedure suitable to all the diverse needs, situations, and wishes of the multitude of municipal organizations in the state."

*Hanover's Appeal*, 150 Pa. 204, 24 Atl. 669; *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199; *Re Sugar Notch*, 192 Pa. 349, 43 Atl. 985; *Com. v. Gilligan*, 195 Pa. 504, 46 Atl. 124.

The transition from the one class to the other works no change in its government except such as the law makes necessary to adjust it to the class into which it goes. It repeals no ordinances; it vacates no offices except those which it abolishes, and makes no vacancies to be filled except by the creation of new offices.

*Com. v. Wyman*, 137 Pa. 508, 21 Atl. 389; *Com. ex rel. McKirdy v. Macferron*, 152 Pa. 244, 19 L. R. A. 568, 25 Atl. 556.

Mitchell, J., delivered the opinion of the court:

Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of con-

venience and public policy. They are created, governed, and the extent of their powers determined, by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania. In *Philadelphia v. Fox*, 64 Pa. 169, 180, 181, this court, speaking through Sharswood, J., said: "The city of Philadelphia is beyond all question a municipal corporation, that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation. . . . It is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government,—essentially a revocable agency, having no vested right to any of its powers or franchises; the charter or act of erection [creation?] being in no sense a contract with the state,—and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangements, or destroy its very existence, with the mere breath of arbitrary discretion. . . . The sovereign may continue its corporate existence, and yet assume or resume the appointments of all its officers and agents into its own hands; for the power which can create and destroy can modify and change." The fact that the action of the state towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens is not one which can be made the basis of action by the judiciary. "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. . . . If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution." Cooley, Const. Lim. chap. 7, §

4, 6th ed. 1890, p. 201. "If the legislature should pass a law in plain, unequivocal, and explicit terms within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to principles of natural justice; for this would be vesting in the court a latitudinarian authority, which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well being of society, or, at least, not in harmony with the structure of our ideas of natural government." *Rogers, J., Com. v. M'Closkey*, 2 Rawle, 374. "It is no part of our business to discuss the wisdom of this legislation. However vicious in principle we might regard it, our plain duty is to enforce it, provided it is not in conflict with the fundamental law." *Scovden's Appeal*, 96 Pa. 422. This subject will be further discussed, with reference to our own cases, in considering the argument that the statute violates the spirit of the Constitution.

Nor are the motives of the legislators, real or supposed, in passing the act, open to judicial inquiry or consideration. The legislature is the lawmaking department of the government, and its acts in that capacity are entitled to respect and obedience, until clearly shown to be in violation of the only superior power, the Constitution. "It is urged that the act before us was not passed for this purpose [as a police regulation], but, as its title expresses, 'to provide for cases where farmers may be harmed by such railroad companies;' and it is contended that this shows conclusively that it was the design of the legislature to impose this new burden upon the railroad company for the benefit of the landholders, and not for the security of the traveling public.

... We cannot try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority, it must stand, and we are bound to make it stand if it will upon any intentment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void. *Sharswood, J., in Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 5 Am. Rep. 360, cited with approval by the present chief justice in *Com. v. Keary*, 198 Pa. 500, 48 Atl. 472. "The merits of the act of 1877, March 22, in, relation to cities of the second class, . . . are not a subject for our opinion. The only question before us in these cases is upon the power of the legislature to pass this law." *Per Curiam, Kilgore v. Magee*, 85 Pa. 401.

It ought not to be necessary to restate principles so fundamental, nor to cite authorities so familiar and so long established. But the range of the argument, and the energy with which it was pressed, have seemed

to make it proper to set forth clearly the only question before the court, the constitutionality of the statute in question. Much of the argument and nearly all of the specific objections advanced are to the wisdom and propriety and the justice of the act, and the motives supposed to have inspired its passage. With these we have nothing to do. They are beyond our province, and are considerations to be addressed solely to the legislature. This court is not authorized to sit as a council of revision to set aside or refuse assent to ill-considered, unwise, or dangerous legislation. Our only duty and our only power is to scrutinize the act with reference to its constitutionality, to discover what, if any, provision of the Constitution it violates. We proceed, therefore, to the consideration of the specific objections made.

First, it is said that the act is void because it is impossible of execution, and some very serious difficulties are pointed out in regard to the passage of ordinances, etc., by the lack of a complete system in the act itself, the failure to repeal the requirements in that respect of the general act of May 23, 1874, and yet the inconsistency of those requirements with such partial action as can be regularly taken under the provisions of this act. The imperfection of the act in this respect is manifest, but that does not make it unconstitutional. The effect may be to leave the affairs of the cities in a state of very regrettable confusion, but it has not been shown that the municipal government cannot be administered notwithstanding. Every city, in passing from one class to another, and *a fortiori* in passing from one charter to another in the same class, retains and carries with it all its ordinances, and makes no change in its government, except such as the law renders necessary to adjust it to the class into which it goes. *Com. v. Wyman*, 137 Pa. 508, 21 Atl. 389. It may require consideration by the courts to determine how much of the general system of municipal government under the act of 1874 is compatible with the provisions of the present act, and how far the new system is self-sustaining, and not improbably legislative assistance will be required for a smooth and harmonious working under one or both. But these matters must be determined as they arise. For the present, nothing has been shown against the practical operation of the act beyond great inconvenience.

Secondly, it is objected that the act attempts a classification in the method of filling municipal offices and of exercising municipal powers resting on no proper discrimination or foundation, in that it provides for methods of government and administration of cities of the second class different from those required in cities of the first and third class in particulars where there is no real difference. It is sufficient to say of this that it is a legislative, not a judicial, question. The very object of classification is to provide different systems of government for cities differently situated in regard to their municipal needs. It was recog-

nized that cities varying greatly in population will probably vary so greatly in the amount, importance, and complexity of their municipal business as to require different officers and different systems of administration. Classification, therefore, is based on difference of municipal affairs, and, so long as it relates to and deals with such affairs, the question of where the lines shall be drawn, and what differences of system shall be prescribed for differences of situation, are wholly legislative. What is a distinction without a difference is largely matter of opinion. No argument, for example, could be more plausible than that there is no real difference, in municipal needs, between a city of 99,000 and one of 100,000 population. But it is a sufficient answer that the line must be drawn somewhere, and the legislature must determine where. So long as it is drawn with reference to municipal, and not to irrelevant or wholly local, matters, the courts have no authority to interfere.

Stress was laid, in the argument of this objection, on the provision making the chief executive in cities of the second class, called a "recorder," appointive, while in cities of the first and third classes he is elected and called a "mayor." It would not follow that the legislature had exceeded its powers if this feature had been made one of the permanent provisions of the act; but we are not called upon to consider that question now, for the appointment directed is only part of the temporary adjustments provided in the schedule for the change.

The substitution of a new system for one under which government has been previously carried on is always accompanied with some shifting of offices and duties, and some inconvenience. To reduce this to a minimum by temporary adjustment of the changes is the province of a schedule. In well-considered legislation, which involves such changes, a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional to justify a court in overturning them. In *Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199, it is said: "In an exchange of offices there may naturally be some overlapping of terms and duties, and if, in the legislative view, the need for a controller was immediate, but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would have been not unwise, certainly not unconstitutional, to meet the case by a temporary expedient." The provision in the schedule of the present act, that the governor shall within thirty days appoint a recorder in each of the existing cities of the second class, is a temporary expedient, to put the machinery of the new system of government in immediate operation. We could not say that it is an unreasonable expedient for that purpose, even if the question of its reasonableness was not one for the legislature alone.

In this connection, two other objections, based on the same provision, may be con-

veniently considered—First, that the act is local because the power of appointment of a recorder is confined to existing cities; and, secondly, that the recorder appointed is to hold office until 1903, thus passing over an election, and depriving the citizens of an opportunity to elect their executive. These provisions are not part of the substantial and permanent features of the act, but of the temporary adjustment of the change. The reference to "existing" cities was in view of the existing, but temporary, situation. There are no other cities about to enter the second class, and if, by any unforeseen possibility, there should be another before 1903, it is by no means clear that the proper construction of the word "existing" should not refer to that date. However that may be, a temporary and transitory provision that applies to all the present members of the class, meets all the requirements of the temporary situation, and ends with the end of that situation, does not make the whole act local or special. In this connection, the language of this court in *Pittsburgh's Petition*, 138 Pa. 401, 427, 21 Atl. 757, 759, 761, is very pertinent. It was urged that certain sections of the act then in question made the act local "by fixing dates at which acts necessary to put the government in operation are to be done, which were possible only to one city, the city of Pittsburgh, and which are impossible to the city of Allegheny, which has come into the class since the act was passed. The reply to this objection is that at the date when the act became a law there was but one city in the second class. The provisions of the act were general in their character. They related to all cities of the second class. If there had been several such cities, the terms employed would have applied to all alike. It was necessary, in order to give effect to the change in the system of municipal government, that a definite time should be fixed upon at which the change should take place and the new system be put in operation. The trouble with the act is not that it made such a provision for cities then entitled to a place in the second class, but that it did not also make similar provisions for cities that should thereafter be entitled to come into the class. We cannot hold, however, that the failure to provide a date for the organization of cities afterwards to come into the class deprives such cities of the benefit of the law, or renders it local, and so inoperative, in the cities to which it would otherwise be applicable."

Of the objection that the citizens are deprived of an opportunity of electing the chief executive, it is sufficient to say that there is no constitutional right of election in reference to that office. The legislature might make it permanently appointive, and what they could do permanently they may do temporarily. *Philadelphia v. Fox*, 64 Pa. 169. It is conceded that, if the act bore date of approval so near the day of election that the electors would have no proper opportunity to prepare for the election, the postponement would be free from objection.



But what is a reasonable or proper opportunity is a question for the legislature. That the prolongation of a temporary appointment to a vacancy beyond an election, not unduly close at hand, is unusual and contrary to what citizens are accustomed to regard as their moral and political rights, may be conceded, but that does not make it unconstitutional. Being an exercise of a legal and constitutional right by the legislature, they are answerable for their action only to their constituents.

The objections we have been considering, and in fact nearly all that have been raised in the case, are based on the provisions of the schedule, rather than on the permanent provisions of the act. Much legislative latitude must be allowed to temporary measures incident to the adjustment of changes of municipal system, and this consideration deprives the objections of some of the weight they might otherwise have.

It is further said that the act is unconstitutional because it vests in the governor the discretion of determining when it shall become operative by the appointment of recorders. This, again, is an objection founded on the temporary expedients of the schedule, and would be sufficiently answered by the considerations already discussed under that head. That statutes making important changes in the law should provide definitely when they shall go into effect is desirable, but not essential. The legislature may make them operative from a future date, or within certain limitations make them retroactive. The present act, in its first section, abolishes the office of mayor, and substitutes that of recorder. This, without more, would operate, as the rest of the act does, from the date of its approval. But to prevent a gap in the government, and the resulting confusion of the city business, the schedule in § 2 continues the office of mayor temporarily until the new office of recorder is filled by the governor's appointment, under § 1. There is nothing in this that is not entirely within the reasonable province of a schedule for the initial operation of necessary changes.

A further objection made is that the act removes an elected officer, the mayor, from office during the term for which he was elected, by a mere change in the name of the office. The right to grant a new charter to the city, imposing a new form of government, is conceded, even though the effect is to abolish the office, and to deprive the officer of his place. But it is argued that the merely nominal abolishing of the office by the substitution of one with the same powers and duties, only under a different name, is beyond the legislative power. It does not appear how this conclusion follows. There is no right to a public office, unless it is under the express protection of the Constitution (*Lloyd v. Smith*, 176 Pa. 213, 35 Atl. 199), and such protection is nowhere given to municipal officers. On the contrary, the universal rule is that, unless otherwise directed by the new act, the officers go out with the charter under which they held, and 53 L. R. A.

the officers under the new charter take their places, whether under the same or a different name. Merely official positions, unprotected by any special constitutional provisions, are subject to the exercise of the power of revision and repeal by the legislature. *Kilgore v. Magee*, 85 Pa. 401. "The argument of the appellant is that the act is unconstitutional because it transfers the duties and emoluments of the office of district attorney to another. . . . The office of district attorney is not one of those offices which are usually denominated constitutional. . . . Not having been mentioned by the Constitution, the legislature was left with unrestricted power to prescribe what the duties of the office should be, what the length of its tenure, what its emoluments, and how it should be filled. Having the power to create, they have also the power to regulate, and even destroy. Undoubtedly the legislature may at any moment repeal the act of 1850, and abolish the office. They may provide a substitute for it." *Strong, J., Com. v. McCombs*, 56 Pa. 436. "As this decision will deprive the respondent of a portion of the term of his office, some question arises as to the power of the legislature to enact a law having such an effect. But this is fully met by the decision of this court in the case of *Com. v. McCombs*, 56 Pa. 436. We there held as to offices which are legislative only, and not constitutional, the power which created them may abolish or change them at pleasure, without impinging upon any constitutional right of the possessor of the office, and without violating any duty of the legislative body." *Com. ex rel. Braughler v. Weir*, 165 Pa. 284, 30 Atl. 835.

It being conceded that the legislature may abolish municipal offices by a change of the charter, the question how great or how small the changes by the new charter shall be, and to what particulars they shall apply, is one wholly for legislative consideration. In the act under discussion the changes in the general scheme of government are many and important. With respect to the offices of mayor and recorder, each being the chief executive of a city, a similarity in their powers and duties is natural, if not essential, but the offices are not identical either in substance or in name. The recorder has far greater executive powers than his predecessor, the mayor, and yet lacks some of the other powers that the latter had. The very argument of the appellants first noticed, on the impossibility of execution of the act, was based on the recorder's want of the authority in the passage of ordinances which the mayor had, and which it was contended was essential to the operation of the new system.

A closely analogous objection is that the act gives the governor the power to remove an elected officer without cause. But this is not a correct reading of the act. Section 1 of the act itself removes the mayor by abolishing the office, but § 2 of the schedule continues the mayor in office *pro tempore*, until his successor has been duly appointed

under § 1. This is not a removal by the governor, whether that would be valid or not, but a legislative adjustment of the conditions of the change made necessary by the new charter. This has already been sufficiently discussed in considering the necessity and province of the schedule.

The objection that the act attempts to create an additional justice of the peace, permits his election at an improper time, and allows the governor to appoint to an office made elective by the Constitution, need not be discussed at any length at this time. Clothing the chief executive of a city, *virtute officii*, with the powers and authority of a police magistrate, or even of a "justice of the peace," technically so called, is not necessarily void, as providing for an additional justice of the peace, and, if it should be so held on direct presentation of the question, it would not invalidate the present act, of which it is a subordinate and severable feature. The provision for appointment by the governor is part of the schedule, which has already been sufficiently discussed.

The objection that, even if the appointment of a recorder were valid at all, the appointment of the respondent is void for want of confirmation by the senate, is based on § 8 of article 4 of the Constitution, and it is sufficient to say that that section has no application to municipal officers. *Com. ex rel. Atty. Gen. v. Callen*, 101 Pa. 375.

It is further said that the act has more than one subject, and one not expressed in the title. This is based on the last section of the schedule, which is a repealing clause. It is enough to say at present that the repeal of previous acts on the same general subject is always germane to the title. Usually the repealing clause is only declaratory of what would be the legal effect without it, but it is useful as preventing doubt upon the legislative intent; and a clause saving from repeal an act that is not within the intent, but might have appeared to come within the language, of the repealing clause, merely operates as a proviso, and is in no sense a re-enactment or extension of the act so executed. It makes no new law. If the section in question repeals expressly any act not germane to the general subject in the title, which has not yet been shown, the repeal might be ineffective, but would not vitiate the whole act.

Again, it is said that the act is unconstitutional because it provides, by article 20, different laws for cities of the same class. The article reads: "From and after the passage of this act, all laws relating to cities of the third class shall continue to apply to cities of that class which have passed or may pass into a city of the second class by reason of increase in population, except so far as such laws are supplied by, or in conflict with, laws relating to cities of the second class." It would be sufficient to say that, even if this article cannot stand, it will not affect the rest of the act. It is an independent and easily severable provision. But the article is, at least, partly declaratory, and 53 L. R. A.

it does not at present appear that it is anything more. Local and special laws are not repealed by subsequent general ones, unless such is the legislative intent, either expressed or unavoidably implied by the irreconcilability of the continued operation of both. How far this principle may be applicable to a city passing from one class to another is yet an open question. Thus, for example, when the city of Allegheny passed from the third to the second class, it carried with it certainly all its local and special laws, enacted prior to 1874, which it had retained in the third class, and which were not in irreconcilable conflict with the laws governing the second class. Whether it carried also the powers and privileges which it had acquired as a city of the third class, subject, of course, to the same limitation that they are not in conflict with the system prescribed for the second class, has not yet been expressly considered. There is strong reason why that should be the rule. The sweeping away in one breath of a whole system, the growth of years and experience, and the substitution of an entirely new one, is fraught with great inconvenience, if not with more serious consequences. This court has said in *Com. v. Wyman*, 137 Pa. 508, 21 Atl. 389, and *Com. ex rel. McKirdy v. Macferron*, 152 Pa. 244, 19 L. R. A. 568, 25 Atl. 556, that the changes in the transition are to be confined to those absolutely necessary for adjustment to the new class. Some of the language used in *Com. ex rel. McKirdy v. Macferron* would appear to indicate a presumption that each class is so distinct that in leaving it a city leaves everything that it acquired while in it. But the principle of minimizing the changes was again stated by our Brother Fell in *Shroder v. Lancaster*, 170 Pa. 136, 32 Atl. 587, without any such qualification. It is to be remembered that there is no constitutional requirement of uniformity. The mandate of the Constitution is negative, that laws on certain subjects shall not be local or special. That means that they must be general, and the uniformity which is discussed in the decisions is not a necessary requirement, but only a test of the generality, which is what the Constitution commands. Article 20 of the present act settled the legislative intent in favor of the view that cities passing from the third to the second class shall carry with them all the laws not in conflict with the system provided for the second class. Whether such intent violates the required generality of the act may become the subject of consideration hereafter. But, even if the article must fall on this account, it will not carry down the rest of the act, and that is all we need decide now.

It is further argued that this act is local and special, and therefore contrary to § 7 of article 3 of the Constitution, because, although it relates in terms to cities of the second class, it is intended to apply only to the three existing cities of Pittsburgh, Allegheny, and Scranton. This objection is based mainly on the schedule, and has been sufficiently discussed already, except with

reference to the intimation in the dissenting opinion, that it is an abuse of the power of classification, and perhaps that the principle of classification itself may be a departure from correct constitutional construction. It is far too late to discuss this question. Classification was sanctioned deliberately and unanimously by our predecessors, more than a quarter of a century ago, and has never been shaken since. No judge now on this bench had any part in the original decision (*Wheeler v. Philadelphia*, 77 Pa. 338), and to start a question of its correctness would be a most flagrant and unjustifiable violation of the salutary maxim, *Stare decisis*. Nor is there any disposition to do so. On the contrary, every year's experience, and every new question presented, have vindicated the wisdom and correctness of the principle there enunciated, and the steady tendency has been to broaden instead of narrowing its applicability. As has been said by this court, the Constitution of 1874 was a new departure in the history of American law. Instead of being confined, as all previous Constitutions had been, to the framework of the government, and to general principles for the protection of individuals and minorities against the oppression of irresponsible majorities, the people voluntarily tied their own hands, in the persons of their legislative agents, by a binding code of particulars and details, that stand in the path of much just, desirable, and necessary legislation. The most emphatic expression of this limitation upon the powers of the legislature is found in article 3, § 7, under which most of the cases have arisen. The real evils, however, at which that article was directed, are pointed out in *Com. v. Gilligan*, 195 Pa. 504, 46 Atl. 124, and *Clark's Estate*, 195 Pa. 520, 48 L. R. A. 587, 46 Atl. 127; and every decision in the last decade has shown the steady trend of the court, under the guidance of wider experience, not to extend that article to cases not really within the evil prohibited, though the form may have the appearance of coming within the words of the prohibition. As an illustration of the effect of a contrary view, we may look at the case of the city of Philadelphia. The present charter (the act of 1885, commonly known as the "Bullitt Bill") was undoubtedly framed and passed in the most honest and patriotic effort for reform in municipal administration, whatever its success may have been in that direction. But its intent was just as distinctly local as that of the act of 1901 is alleged to be, and the construction that would strike down the latter would as inevitably strike down the former, and send Philadelphia back irremediably to its former discredited system. The sound result, after all views have been considered, is that the control of the general subject of municipal administration is a necessary governmental power that has been left by the Constitution where it has always been, in the legislature, and that for any misuse of it the remedy must be applied by the constituencies in their dealing with their representatives.

The public interest of the questions involved, though not always their difficulty, has led us to discuss thus in detail the specific objections to the act that the learning and ingenuity of eminent counsel have been able to suggest. There remains one which is based upon broader and more far-reaching considerations than the others, though, like most of them, it is directed against the schedule. Indeed, the objections to this act may be summed up in the classic phrase, *In cauda venenum est*. It is urged that it violates the spirit of the Constitution in those provisions, and that general intent which preserves to the people the right of local self-government. The objection is serious, and there can be no denial that some of the provisions of the schedule infringe upon what the citizens generally are accustomed to regard as their political rights. But our view must be confined closely and exclusively to the Constitution. It may be admitted that even an act of the legislature can so far violate the spirit of the Constitution as to be void, though not transgressing the letter of any specific provision. But such violation is exceptional, and must be made to appear beyond all doubt. Such, for example, is the illustration given by Chief Justice Thompson in *Page v. Allen*, 58 Pa. 338, 346, 98 Am. Dec. 272: "To illustrate this idea: The executive power of the state, under the Constitution, is lodged in a governor . . . it would be manifestly repugnant to these provisions of the Constitution if an act of assembly should provide for the election of two executives . . . at the same election, yet it would be unconstitutional only by implication, there being no express prohibition on the subject." Prima facie the legislative authority is absolute, except where expressly limited. This is the uniform principle of all political and legal views, and of all constructions recognized by constitutional law. "To me it is as plain that the general assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the Federal Constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the Constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever, in our opinion, ought to have been put there by its framers." Black, Ch. J., in *Sharpless v. Philadelphia*, 21 Pa. 147, 161, 59 Am. Dec. 759. "However easy it may be to demonstrate that public debts [subscriptions to railroad and other enterprises] ought not to be created for the benefit of private corporations, and that such a system of making improvements is impolitic, dangerous, and contrary to the principles of

a sound public morality, we can find nothing in the Constitution on which we can rest our consciences in saying that it is forbidden by that instrument." Black, Ch. J., in *Moers v. Reading*, 21 Pa. 188, 200. "To justify a court in pronouncing an act of the legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act." Sharswood, Ch. J., in *Com. ex rel. Wolfe v. Butler*, 99 Pa. 535. "In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete authority as it vests in, and may be exercised by, the sovereign power of any state, subject only to such restrictions as they have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specially defined legislative powers, but is intrusted with the general authority to make laws at discretion." Sterrett, J., in *Powell v. Com.* 114 Pa. 265, 293, 60 Am. Rep. 350, 7 Atl. 913. "Whatever the people have not, by their Constitution, restrained themselves from doing, they through their representatives in the legislature may do. This latter body represents their will, just as completely as a constitutional convention in all matters left open by the written Constitution. Certain grants of power, very specifically set forth, were made by the states to the United States, and these cannot be revoked or disregarded by state legislation. Then come the specific restraints imposed by our own Constitution upon our own legislature. These must be respected. But in that wide domain not included in either of these boundaries the right of the people, through the legislature, to enact such laws as they choose, is absolute. Of the use the people may make of this unrestrained power it is not the business of the courts to inquire." Dean, J., in *Com. ex rel. McCormick v. Reeder*, 171 Pa. 505, 513, 33 L. R. A. 141, 33 Atl. 67. "Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words. 'When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument.'" Cooley, Const. Lim. chap. 7, § 6. "It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations; but this maxim is subject to such exceptions as the legislative power of the state shall see fit to make, and, when made, it must be presumed that the public interest, convenience, and protection are sub-

served thereby. The state may interfere to establish new regulations against the will of the local constituency, and, if it shall think proper in any case to assume to itself those powers of local police which should be executed by the people immediately concerned, we must suppose it has been done because the local administration has proved imperfect and inefficient, and a regard to the general well being has demanded a change." Cooley, Const. Lim. chap. 7, § 5.

These citations might easily be multiplied, but I have not thought it necessary to lengthen this opinion by going outside of the text-books of recognized authority and our own decisions. These established beyond question the general rules of constitutional law, and show that nowhere have they been more uniformly and strongly enforced than in Pennsylvania. Some of the cases arose before the adoption of the present Constitution, but this does not affect the principles of the decisions, even though some of the actual questions might now be decided differently under the provisions of the present Constitution; for when the Constitution has once expressly spoken all further debate is at an end. The present Constitution, as has been said more than once by this court, displays a strong intent to limit to the power of the legislature with reference to interference in local affairs. As said by our Brother Dean in *Perkins v. Philadelphia*, 156 Pa. 554, 565, 27 Atl. 356: "Assuming what was the settled law, that the general assembly had all legislative power not expressly withheld from it in the organic law, they [the convention] set about embodying in that law prohibitions which should in the future effectually prevent the evils the people complained of. Article 3 is almost wholly prohibitory. It enjoins very few duties, but the 'thou shalt not's' number more than sixty." This incontrovertible evidence that the Constitution is the result of a full, detailed, exhaustive consideration of the subject of legislative control over merely local affairs is of itself a conclusive argument against any further additions by the courts to its sixty and more expressed prohibitions. There is no sounder or better settled maxim in the law than *Expressio unius, exclusio est alterius*, and when the authorities which have the right to control any subject, be they only parties to a private contract, or the sovereign people in the adoption of their Constitution, have fully considered and determined what shall be the rights, the powers, the duties, or the limitations under the instrument, there is no longer any room for courts to introduce either new powers or new limitations. To do so would, in the language of Chief Justice Black, already quoted, "be assuming a right to change the Constitution; to supply what we might conceive to be its defects; to fill up every *oasis omissus*, and to interpolate into it whatever, in our opinion, ought to have been put there by its framers."

The most earnest consideration of the objections to the act of 1901 has convinced us that they are not such as authorize the

courts to declare the act void for conflict with the Constitution, but must be addressed only to the legislators and their constituencies.

*Judgment affirmed.*

**Dean, J., dissenting:**

If this act were not clearly in conflict with the fundamental law, or if the consequences to which the judgment may lead were not deplorable, or if it affected only the immediate parties to it, and would not serve as a precedent for future cases, I would not feel myself called upon to dissent of record. But all these reasons exist, and it is not without regret that I feel constrained to express a decided dissent from the judgment.

To my mind, this act is palpably unconstitutional, because it violates § 7 of article 3 of that instrument, which section is as follows: "The general assembly shall not pass any local or special law . . . regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; . . . incorporating cities, towns, or villages, or changing their charters; . . . creating offices or prescribing the powers and duties of offices in counties, cities, boroughs, townships, election or school districts." The act before us affects but three cities in the commonwealth, Pittsburgh, Allegheny, and Scranton. It does not touch Philadelphia city, nor any one of the many other cities of the state, nor is there a single provision in it for any city which may hereafter reach the population of these three cities. It applies specially to these three; changes their charters; puts them under special provisions different from all other cities; to all intents and purposes for a long period governs them by a high executive officer of the commonwealth, resident at Harrisburgh, many miles distant, necessarily ousting local officers elected by the people, whose terms have not yet expired. There is nothing peculiar in the geographical location of these cities, or in the character of their population or business interests, which calls for peculiar legislation such as this; nor is it intimated in the bill that any reason existed for depriving them of self-government, and subjecting them to a foreign one, that would not apply to every other city in the state. It is given as the controlling reason in the majority opinion for declaring the act constitutional that nowhere does that instrument expressly forbid such legislation, and therefore, not being expressly forbidden, the legislature has all power not withheld. This proposition has been stated more than once in like language by courts when discussing constitutional questions, and, while the facts in the cases before them did not render the language inapplicable, it was never intended to be of universal, or even of common, application. It is conceded by all that the main reason for calling the constitutional convention of 1873 was to devise some means by which the annual flood of local legislation should be stopped. Local laws were being passed every year for every

imaginable selfish and sordid purpose, without the least regard for the public good; the legislature was demoralized; the people were becoming debauched. That convention, after most careful deliberation, adopted article 3, in which occurs § 7, heretofore quoted. If enforced, it created an effectual barrier against the evil. Many attempts were made to evade it in the legislature immediately following its adoption, and many acts were either vetoed by the governor, or declared invalid by the courts, because of its violation. But there came before this court the act of 23d of May, 1874 (see *Wheeler v. Philadelphia*, 77 Pa. 338), which divided the cities of the state into three classes for the purpose of corporate legislation, and which authorized the legislature, by general laws applicable to each class, to legislate only for the cities of that class. I always doubted the authority of this court to uphold this act. The reasoning in vindication of the judgment is not satisfactory or convincing. It is based upon the necessity for classification because of the inconvenience that would result if classification of cities was not held constitutional. It seems to me to be judicial legislation of the gravest character. It wrote into the Constitution what was not there, and was not intended by the framers of it to be there. While I admit the inconvenience of enforcing strictly article 3 in all its provisions, it was but a temporary inconvenience, which could have been, and should have been, remedied by an amendment to the Constitution, according to the method pointed out in it, and not, practically, by an amendment adopted by this court. The court gave way, and more than once since it has been placed in the same dilemma as it was on the question of retroactive legislation, discussed by Chief Justice Gibson in *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567, where he says: "But retroactive legislation began and has been continued because the judiciary has thought itself too weak to withstand. . . . Yet, had it taken its stand on the rampart of the Constitution at the onset, there is some little reason to think it might have held its ground. Instead of that, it pursued a temporizing course till the mischief had become intolerable, and till it was compelled . . . to reverse certain legislative decrees." The court, out of a tender regard for the doings of a co-ordinate branch of the government, had yielded time after time to encroachments upon the judiciary department, until in *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493, and in *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567, it was confronted by acts which, in effect, took from one man his land and gave it to another. This was a little too much for the court to stand. So it stopped just there, with the keen regret expressed by Chief Justice Gibson that it had not stopped sooner. In a very short time the whole series of retroactive laws were, in effect, swept from the statute book by the very court which had at first upheld them. By our decision in

the case before us, we are going a step beyond anything heretofore allowed in the line of special legislation. It is purely a question of law whether § 7 of article 3 of the Constitution has been violated, yet we, in effect, say it is the province of the legislature to decide the question, and that we will not inquire into it. This, on our part, is a grave mistake. I would not encroach 1 inch on the authority of the legislature, but I would not allow that body, nor the executive, to encroach 1 inch on ours. We have now before us an act which, it is true, does not take one man's land and give it to another, but it does take from one set of men the offices given them by the people, and hands them over to the governor, that he may confer them on others. Here we should call a halt upon such unconstitutional usurpation of power. What the next step in this direction will be we can only conjecture. Factional politics and partisan politics are not troubled by scruples. Under the principle of this decision, there is nothing to hinder a hostile partisan majority in the legislature from ousting the party in power in Philadelphia, a city of the first class, and placing its government in possession of the minority. The time is not very remote in the past, in English politics, when the victorious political party, as soon as it was seated in power, promptly proceeded to cut off the physical heads of their leading antagonists and confiscate their property. It is not very remote in the future when the victorious political party will promptly proceed to cut off the political heads of its opponents where they hold office by the municipal votes of cities.

But to continue the judicial history of § 7 of article 3: *Wheeler v. Philadelphia* added classification. The law opened the gate, and we were time and again confronted by acts which, under the guise of general legislation, sought to evade the inhibitions of article 3. In *Ayars's Appeal*, 122 Pa. 286, 2 L. R. A. 577, 16 Atl. 356, we were forced to say: "Subsequent legislation [that is, subsequent to *Wheeler v. Philadelphia*] clearly indicates that the scope of the decision in *Wheeler v. Philadelphia* was either misunderstood or ignored. It was never intended to license indiscriminate classification as a mere pretext for the enactment of laws essentially local or special." We held in *Scowden's Appeal*, 96 Pa. 422, that classification not grounded on an imperious necessity was special legislation, and would be stricken down. Hence, when the legislature undertook to increase the classes to five, afterwards to seven, we declared the acts unconstitutional, because such increase was without the slightest foundation in necessity. This court, after having decided that necessity warranted three classes, soon found itself forced to decide that it warranted no more. It was thus in the inconsistent position of acknowledging the authority of the legislature to determine the necessity of three classes, but denying its authority to say that more than three were necessary. This was plainly passing

on the merits of the acts, when it was attempted to increase the classes. And I do not disclaim the power or wisdom of the court in so doing after it had acknowledged the authority of the legislature to classify at all, in the total absence of such authority in the Constitution. It was bound to prevent the abuse of its own decision.

What I object to here is that the majority of the court disclaim the right to inquire into the purposes of this act, because it is sanctioned by the ostensible legality of general legislation for a class. More than thirty cases followed *Wheeler v. Philadelphia*, wherein the distinction between local and general legislation was involved. Not only was the question of the necessity for classification discussed, and the judgments determined by inquiry into the merits of the acts, but in *Scranton School Dist.'s Appeal*, 113 Pa. 176, 6 Atl. 158, in *Philadelphia v. Haddington M. E. Church*, 115 Pa. 291, 8 Atl. 241, and in *Weinman v. Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192, 12 Atl. 288, the merits of the pretended general legislation for a class were inquired into, and the acts pronounced unconstitutional. In the first-named case we said: "All our recent decisions are to the effect that, if local results either are or may be produced by a piece of legislation, it offends against" the article prohibiting local and special legislation. It is too late, after these decisions, to disclaim our judicial power to inquire whether the act before us is an adroit attempt to evade the constitutional prohibition against local and special legislation. From its very terms, it touches no subject which is not common to every other city in the commonwealth, and, if there be a necessity for such legislation in these three cities, then there is the same necessity in all the others. This fact of itself stamps it as local and special legislation; for as is said in *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577, 16 Atl. 356, there must be a necessity for the legislation "springing from manifest peculiarities, clearly distinguishing those of one class from each of the others." No peculiarities in cities of the second class demanding such a law are even pretended. Every member of this court concedes that this legislation is vicious. Why? They do not answer; but, to my mind, it is apparent that its vice consists in its flagrant violation of the fundamental law. We know its purpose was to oust one set of municipal officers in three certain cities, put in place, either directly or indirectly, by the people, and give their offices to others, through the chief executive of the state. This is the inevitable result from the bill itself. Can we assume that our lawmakers do not intend the obvious results of their acts?

It will be noticed that I have given no attention to the many objections of appellants to the details of the bill. It is argued that each one of them is fatal. This may be correct. I will not pass upon them without a thorough examination. I place my dissent upon the broad ground that it is local and special legislation, under the guise of a gen-

eral law. Therefore it is in direct violation of § 7, art. 3, of the Constitution. The majority opinion is, in the main, based on the authority of the legislature to pass a general law for a class, and a disclaimer of our authority to inquire into the merits to ascertain whether the law was intended to be, and is in fact, a local and special law in its results. I concede there is no express prohibition in the Constitution forbidding such legislation if it be in general terms a general law, but if it be only in terms general, nevertheless in intent and results special, then its unconstitutionality is a necessary implication, and we are not shut off in our inquiry by general terms. The argument to sustain the act, because of no express prohibition in the Constitution, must fail in face of the plainly implied one. In *Com. v. Zephon*, 8 Watts & S. 386, it is held: "A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them." In *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272, Justice Thompson, in expressing the opinion of the court, says: "It is usual on the part of those who insist on the constitutionality of any given statute to claim that it must be regarded as constitutional, unless expressly prohibited by some provision in the Constitution. In other words, in construing the Constitution of the state, whatever is not expressly denied to the legislative power is possessed by it. The opposite of this rule, I may remark, is the construction of the Federal Constitution. I assent to this, but not that the inhibitions of the Constitution must be always express. They are equally effective, and not less to be regarded, when they arise by implication, and this is the case when the legislative provision is repugnant to some provision of the Constitution." There are many other authorities to the same effect. I fear the time is not far distant when the pernicious results of our decision will either bring about a constitutional enactment to remedy the mischief, or move us to overrule it.

We concur in the foregoing dissent: **McCullough**, Ch. J., and **Mestresat**, J.

**John H. SMITH et al.**, Exrs., etc., of Joseph Beabout, Deceased,  
v.

**Oliver L. BLACHLEY**, *Appt.*

**John McCULLOUGH**

v.  
**SAME**, *Appt.*

(198 Pa. 173.)

**That money is obtained by fraud will**

not prevent the running of the statute of limitations, against an action to recover it back, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer.

(January 7, 1901.)

**APPEALS** by defendant from judgments of the Court of Common Pleas, No. 3, for Allegheny County, in favor of plaintiffs in actions brought to recover back money alleged to have been placed in defendant's possession for the purpose of compromising a suit against the plaintiffs, and which defendant was alleged to have fraudulently retained. *Reversed*.

The case sufficiently appears in the opinion.

**Messrs. J. S. Ferguson and E. G. Ferguson**, for appellant:

When the injury, however slight, is completed at the time of the act, the statutory period then commences; and when the act is not legally injurious until certain consequences occur the statute begins to run from the consequential injury; and this is so whether the party injured is ignorant of the circumstances from which the injury resulted, or not.

*Bank of Hartford County v. Waterman*, 26 Conn. 324; *Campbell v. Boggs*, 48 Pa. 524; *Sankey v. McElevey*, 104 Pa. 273, 49 Am. Rep. 575; *Wood*, Limitation of Actions, §§ 274-276.

The fraud which defeats the operation of the statute is not the fraud which gives the cause of action, but that which conceals it. *Gibbs v. Guild*, L. R. 9 Q. B. Div. 59.

Constructive fraud is not sufficient.

*Wilmerding v. Russ*, 33 Conn. 67.

There must be actual fraud involving moral turpitude.

*Glenn v. Cuttle*, 2 Grant Cas. 273; *Fleming v. Culbert*, 46 Pa. 499; *Walker v. Soule*, 138 Mass. 570.

The fraud must be produced by affirmative acts, and mere silence or concealment will not check the operation of the statute.

*Brown v. Edes*, 37 Me. 318; *Deake*, *Appellant*, 80 Me. 50, 12 Atl. 790.

**Messrs. Iams & Brock**, for appellees:

The statute of limitations will not screen defendant from liability if the suits were brought within six years of the discovery of the fraud.

*Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619.

Blachley cannot be permitted to set up the statute of limitations as a defense in these cases, because of his fraud and concealment, and because by his fraud and false pretenses he made himself a trustee, *ex maleficio*, of the money received by him for the benefit of plaintiffs.

**NOTE**.—For the running of the statute of limitations as affected by fraud, see earlier cases in this series, as follows: *Peck v. Bank of America* (R. I.) 7 L. R. A. 826, and *note*; *Amatter v. New* (S. C.) 8 L. R. A. 687, and *note*; *Carrier v. Chicago, R. I. & P. R. Co.* (Iowa) 6 L. R. A. 799, and *note*; *Texas & P. R. Co. v. Gay* 53 L. R. A.

(Tex.) 25 L. R. A. 52; *Sanborn v. Gale* (Mass.) 26 L. R. A. 864; *Morrill v. Palmer* (Vt.) 33 L. R. A. 411; *Liebermann v. First Nat. Bank* (Del.) 48 L. R. A. 514; *Mereness v. First Nat. Bank* (Iowa) 51 L. R. A. 410; and cases in *note* to *Shellenberger v. Ransom* (Neb.) 25 L. R. A. 564.

*Philadelphia v. Brown*, 19 Phila. 379; *Bricker v. Lightner*, 40 Pa. 199; *Mitchell v. Buffington*, 10 W. N. C. 361; *Pennock v. Freeman*, 1 Watts, 401; *Harrisburg Bank v. Forster*, 8 Watts, 12; *Bartholemew v. Leech*, 7 Watts, 472; *Ferris v. Henderson*, 12 Pa. 49, 51 Am. Dec. 580.

*Mitchell, J.*, delivered the opinion of the court:

The general rule that statutes of limitation run from the act complained of in cases of tort as well as of contract admits a well-settled exception on account of fraud. The exception was not originally in the statutes themselves, but was introduced by the courts acting upon principles of equity, though in many states (not, however, including Pennsylvania) the statutes have now been framed to cover and define the excepted cases explicitly. But the limits of the exception, and the circumstances under which it will be permitted, have led to much conflict in the authorities. It is said, in general, that in cases of fraud the statute runs only from discovery, or from when, with reasonable diligence, there ought to have been discovery. But a distinction is made in regard to the starting point of the statute between fraud completed and ending with the act which gives rise to the cause of action and fraud continued afterwards in efforts or acts tending to prevent discovery. On this distinction there are two widely divergent views. It is held, on the one hand, that the fraud, though complete and fully actionable, nevertheless operates as of itself a continuing cause of action until discovery; while, on the other hand, it is held that, when the cause of action is once complete, the statute begins to run, and suit must be brought within the prescribed term, unless discovery is prevented by some additional and affirmative fraud done with that intent. The United States courts have adopted the first view in treating the limitation of actions in the bankruptcy acts. *Bailey v. Glover*, 21 Wall. 342, 22 L. ed. 636; *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155. On the other hand, in *Troup v. Smith*, 20 Johns. 33, it was held that in a court of law the statute runs from the act, "whether there was a fraudulent concealment or not, so as to prevent the plaintiff's discovering the fraud;" and Chief Justice Spencer said that even in a court of equity the plaintiff must fail, as "the concealment of the fraud is not imputed to the testator. What he did was visible, and what he neglected to do would or might have been discovered by repairing to the land." This view appears to be still held in New York (*Miller v. Wood*, 116 N. Y. 351, 22 N. E. 553), and in other states. In many states, however, the decisions are so influenced by statutory provisions that they afford us little light on the subject as governed by the common law. In England, as late as 1882, the Queen's bench division differed on the question. In *Gibbs v. Guild*, L. R. 8 Q. B. Div. 296, the plaintiff declared for fraud by which he was

induced to purchase stock which was worthless, and to the plea of the statute he replied that the defendant, in order to prevent the discovery of the fraud, had "actively and deliberately concealed the same," etc. On demurrer, Field, J., gave judgment for the plaintiff, noticing specially this averment in the replication. On appeal the judgment was affirmed by two justices to one dissenting. The majority stated their conclusions in very broad terms, without adverting to the replication, and thereby leaving some doubt as to how far it was considered as material. *Gibbs v. Guild*, L. R. 9 Q. B. Div. 59. In *Wood, Limitation of Actions*, the general rule is stated thus: "The cause of action, except where the statute otherwise provides, in cases of fraud arises from the time of its commission." Section 275. "Something more than mere silence is necessary, unless the relationship of the parties is such that the party is bound to speak; it is necessary that some effort to conceal the fraud should have been made, either by preventing an investigation or by misleading the party making inquiry; or that misrepresentations were made by the party which were calculated to mislead him. In other words, some affirmative acts to conceal the fraud must be shown." Section 276. And in *Darby & B. Limitations*, 2d ed. 46, it is said: "In an action of deceit the statute will run from the date of the fraudulent act complained of, unless such fraud has been actively concealed by the defendant,"—referring to *Gibbs v. Guild*, L. R. 9 Q. B. Div. 59, already cited *supra*. The cases in this state are not in harmony, and it is doubtful if they can be altogether reconciled; the difficulty being that the earlier ones were decided without reference to the distinction now under consideration. *Jones v. Conoway*, 4 Yeates. 109, was an action on the case as for deceit for selling plaintiff a negro man as a slave, and the court held that the statute only ran from the discovery of the fraud by the negro claiming and obtaining his freedom. *Ferris v. Henderson*, 12 Pa. 49, 51 Am. Dec. 580, was a bill by a former slave for the value of his services after he had become free by the failure to register him, and it was averred that the master by fraudulent concealment and threats had kept him in ignorance of his rights. The lapse of time was thirty-six years, and Lowrie, J., in the district court of Allegheny, dismissed the bill as too late. This court, however, reversed, on the ground that the statute runs only from discovery of the fraud, and also fortified itself by taking into account the plaintiff's condition of servitude and habit of submission. In *Bricker v. Lightner*, 40 Pa. 199, the defendant had given notes for money which he owed, and on the morning after the death of his creditor had stolen the notes from the desk where they were kept in the decedent's room. It was held that the statute was no bar. All of these cases, however, were of the hard kind that are said to make bad law, and all of them were decided on the



general proposition that in cases of actual fraud the statute runs only from discovery, without any reference in any of them to the principle requiring affirmative acts of concealment after the fraud is complete. On the other hand, it has been repeatedly held that in an action against an attorney in fact or at law to recover money collected and embezzled or not paid over, the statute runs from the date of collection, and not from the time of discovery, unless the plaintiff has been misled or induced to delay by misrepresentations subsequent to the collection. In *Glenn v. Cuttle*, 2 Grant, Cas. 273,—a case much quoted and relied on,—(also reported in 48 Pa. 524, as *Campbell v. Boggs*), it was held that the statute was a bar, and the principle was indicated, though not distinctly announced, that the rule would be different in case of subsequent active misrepresentations. In *Fleming v. Culbert*, 46 Pa. 498, however, it was expressly stated by the same judge who had written the opinion in *Glenn v. Cuttle* that the statute runs from the collection; "but, if there be fraudulent concealment on the part of the attorney,—as, for example, if he give false or evasive answers to the inquiries of his client or principal,—the statute begins to run only from discovery of the fraud." Subsequent cases of that class have all been decided expressly on that distinction, which is now firmly settled. *Morgan v. Tener*, 83 Pa. 305; *Wickersham v. Lee*, 83 Pa. 416; *Hughes v. First Nat. Bank*, 110 Pa. 428, 1 Atl. 417. In the recent case of *Sankey v. McElevy*, 104 Pa. 265, 49 Am. Rep. 575, this subject was very fully considered in an opinion by the late Chief Justice Green. After referring to *Bricker v. Lightner*, 40 Pa. 199; *Ferris v. Henderson*, 12 Pa. 49, 51 Am. Dec. 580, and *Wickersham v. Lee*, 83 Pa. 416, he cites *Troup v. Smith*, 20 Johns. 33, and other cases, with the comment that, "even in courts of equity we apprehend that there must be some relation of trust and confidence between the parties imposing a duty to give information or some affirmative act of fraud, something more than mere silence, which will suffice to defeat the operation of the statute where the basis of the reply to the statute is concealment of the cause of action;" and quotes with approval the language of Wood, Limitation of Actions, § 276: "The provision that, if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud as well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence. It must be of an affirmative character, and must be alleged and proved, so as to bring the case clearly within the meaning of the statute." And in *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.* 167 Pa. 136, 31 Atl. 484, our late Brother Williams says: "What an owner might know if he was personally present by himself or his

employees on the surface of his possessions, he is bound to know unless his attention is diverted by the fraudulent artifices of the wrongdoer. Silence or concealment will not prevent the running of the statute,"—citing *Sankey v. McElevy*, 104 Pa. 265, 49 Am. Rep. 575.

From this examination of our cases it is clear that, while the earlier ones were decided without reference to the distinction under discussion, yet from the recognition of it in *Glenn v. Cuttle* the uniform trend of the decisions has been towards its approval and establishment, and in no case since then has it been disregarded. How far the application of it would have modified the decisions in the earlier cases, we need not now consider. In *Bricker v. Lightner*, for instance, it might be that the continued possession and concealment of the stolen notes should be regarded as a continuous fraud, so that the statute would only run from discovery. Such questions we must leave to be determined when they arise. We regard the distinction as sound, well marked, and in harmony with the spirit and letter of the statute. The cases which hold that, where fraud is concealed, or, as sometimes added, conceals itself, the statute runs only from discovery, practically repeals the statute *pro tanto*. Fraud is always concealed. If it was not, no fraud would ever succeed. But, when it is accomplished and ended, the rights of the parties are fixed. The right of action is complete. If plaintiff bestirs himself to inquire, he has ample time to investigate and bring his action. If both parties rest on their oars, the statute runs its regular course. But, if the wrongdoer adds to his original fraud affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character, by virtue of which he deprives it of the protection of the statute until discovery. Tried by this test, the present actions must fail. When the cases were here before (188 Pa. 550, 41 Atl. 619) our Brother Dean said: "There was ample evidence, if believed by the jury, that defendant had by systematic falsehood and artifice not only concealed the fraud, but for a long time had deterred his employers from inquiry. Under such circumstances the plea will not avail him;" and so it appeared to the court at that time. But the cases were argued mainly on the right of the plaintiffs as *particeps criminis* to maintain the action. The opinion was chiefly devoted to showing that defendant, having received the money as agent of the plaintiffs to pay it over, could not shield himself from liability for not doing so on the ground of the illegality of the original transaction. On the record as now presented the question is entirely different. There is no evidence to show that, after the transaction was complete by the receipt of the money, the defendant ever did anything to prevent inquiry. The only act alleged is the representation that he had paid \$5 to Sayers for drawing the papers. But this had no tendency to deter investi-

gation. It was rather an additional clue by which plaintiffs, if they had been diligent, could have tested the truth of the whole story. It is true that defendant obtained the money, as the jury have found, by a scheme of the grossest fraud and deception, and used all possible efforts to prevent plaintiffs from finding out the truth; but all these were in the transaction itself, and prior to its consummation. There was nothing said or done by him after that bearing in any way on investigation, and plaintiffs knew no facts in 1895, when they brought suit, which they did not know in 1888. The gradual leaking out of the circumstances, and the gossip and suspicions

of others, started an investigation by plaintiffs, which the most ordinary prudence would have prompted at the beginning, and which would then have either foiled the scheme or led to its discovery, and the trial of this action while all the witnesses were alive, and the matters fresh in their memories. As it is now, the evidence is so meager that one jury has disagreed upon it, and another has decided it on oath against oath with very little collateral evidence to help out either,—an illustration of the very evil the statute of limitations was intended to prevent.

*Judgment reversed.*

#### NORTH CAROLINA SUPREME COURT.

William T. LAMB, by Next Friend, *Appt.*,  
v.

I. LITTMAN.

(128 N. C. 361.)

**An employer is liable for an assault committed upon a child in his employ by his overseer, who, by conduct extending back for a period of years, has established a reputation for being high tempered and cruel to children and other help, and who is therefore incompetent for the position in which he is placed.**

(May 28, 1901.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Rowan County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

**Messrs. R. Lee Wright and B. B. Miller**, for appellant:

It is negligence *per se*, culpable and continuing up to time of injury, for a cotton factory to expose its servants to the hazard of life and limb by the use of open, uncased, and uncovered, rapidly revolving wheels and cogs, when such a method of operating machinery has become antiquated and defective, and has been discarded by the intelligence and humanity of other employers, and the dangers and perils incident thereto have been obviated, and the safety and protection of employees secured, by the use of hoods, coverings, and casings.

*Mason v. Richmond & D. R. Co.* 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Wit-*

*sell v. West Asheville & S. S. R. Co.* 120 N. C. 557, 27 S. E. 125; *Greenlee v. Southern R. Co.* 122 N. C. 977, 41 L. R. A. 399, 30 S. E. 115; *Trosler v. Southern R. Co.* 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Ward v. Odell Mfg. Co.* 126 N. C. 946, 36 S. E. 194.

Approved appliances and safeguards now in general use are the test.

*Witsell v. West Asheville & S. S. R. Co.* 120 N. C. 557, 27 S. E. 125; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611.

If the master intrusts the conduct of his business, or a part of it, to an employee, the latter stands in the master's place, and is not to be regarded as a fellow servant of other employees.

12 Am. & Eng. Enc. Law, 2d ed. pp. 928, 968; *Tiffany*, Personal & Dom. Rel. pp. 405, 496; *Dobbin v. Richmond & D. R. Co.* 81 N. C. 446, 31 Am. Rep. 512; *Mason v. Richmond & D. R. Co.* 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698; *Shadd v. Georgia, C. & N. R. Co.* 116 N. C. 970, 21 S. E. 554; *Patton v. Western N. C. R. Co.* 96 N. C. 455, 1 S. E. 863; *Logan v. North Carolina R. Co.* 116 N. C. 940, 21 S. E. 959; *Turner v. Goldsboro Lumber Co.* 119 N. C. 387, 26 S. E. 23; *Ward v. Odell Mfg. Co.* 126 N. C. 946, 36 S. E. 194.

The test of the question whether one in charge of other servants is to be regarded as a fellow servant or a vice principal is whether those who act under his orders have just reason to believe that neglect or disobedience of orders will be followed, or can be followed, by a discharge; and if he can

**NOTE.**—For another case as to liability of master for assault by superior upon inferior servant, see *Gabrielson v. Waydell* (N. Y.) 17 L. R. A. 228.

As to duty of master with respect to the employment of competent servants, see *Smith v. St. Louis & S. F. R. Co.* (Mo.) 48 L. R. A. 368, and *note*.

As to liability of master for malicious acts of his servants toward one to whom he sustains no contractual relation, see *note to Ritchie v.* 53 L. R. A.

*Waller* (Conn.) 27 L. R. A. 161; *Davis v. Hough-tellin* (Neb.) 14 L. R. A. 737, and *note*; *Texas & P. R. Co. v. Scoville* (C. C. App. 5th C.) 27 L. R. A. 179; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (Ind.) 27 L. R. A. 840; *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 28 L. R. A. 433; *Pierce v. North Carolina R. Co.* (N. C.) 44 L. R. A. 316; *Nelson Business College Co. v. Lloyd* (Ohio) 46 L. R. A. 314; and *Baltimore Consol. R. Co. v. Pierce* (Md.) 45 L. R. A. 527.

discharge those under him, then he is a vice principal, and not a fellow servant.

*Turner v. Goldsboro Lumber Co.* 119 N. C. 387, 26 S. E. 23; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Johnson v. Armour*, 5 McCrary, 620, 18 Fed. 490; *Gorrah v. Kansas City, St. J. & C. B. R. Co.* 25 Fed. 258; *Wolcott v. Studebaker*, 34 Fed. 8; *Van Avery v. Union P. R. Co.* 35 Fed. 40; *The A. Heaton*, 43 Fed. 593; *Ward v. Odell Mfg. Co.* 126 N. C. 952, 36 S. E. 194.

Whether the act of Burruss, complained of, was within the scope of his employment, was at least a question of fact for the jury.

*Daniel v. Petersburg R. Co.* 117 N. C. 605, 23 S. E. 327; *Wood, Mast. & S.* 594.

Upon the uncontroverted facts in the case Burruss, as a matter of law, was acting within the general scope of his employment, and the jury should have been so instructed.

*Pierce v. North Carolina R. Co.* 124 N. C. 98, 44 L. R. A. 316, 32 S. E. 399; 14 Am. & Eng. Enc. Law, p. 807.

It is not necessary that the master authorize the particular act. It may be in violation of express orders of the master. It is sufficient to establish the master's liability if it is shown that the servant was acting at the time within the general scope of his authority, and this, although the servant abused his authority, and was reckless in the performance of his duties.

*Daniel v. Petersburg R. Co.* 117 N. C. 592, 23 S. E. 327; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399.

The master is liable for the wrong done by his servant, whether through the negligence or malice of the latter, in the course of the employment in which the servant is engaged to perform a duty which the master owes to the person injured.

*Oraker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; 2 Am. & Eng. Enc. Law, p. 990; *Geraty v. Stern*, 30 Hun, 426; *Cohen v. Dry Dock, E. B. & B. R. Co.* 69 N. Y. 170; *Ritchie v. Waller* (Conn.) 27 L. R. A. 161, note; *Redf. Railways*, 5th ed. p. 534; *Reeve, Dom. Rel.* 3d ed. p. 519.

The rule as to fellow servants is a judge-made law.

Modern developments of steam and electricity, the wonderful speed and enormous weight and marvelous power of modern machinery, the great and constantly increasing number of coemployees, the impossibility of knowing or ascertaining their character, the inability of men to estimate the dangers to which they are exposed,—make the rule work great injustice and unjustifiable hardships on employees.

2 Jaggard, Torts, p. 1029.

The doctrine of assumption of risks being contractual in its nature, it does not bind the plaintiff, who is a minor and may disaffirm his contract, and has done so by this suit.

*Id.* p. 1032.

A minor employee can be held to have assumed only such risks as one of his age, 53 L. R. A.

discretion, and experience could reasonably comprehend and understand.

7 Am. & Eng. Enc. Law, p. 407; *Union P. R. Co. v. Fort*, 17 Wall. 553, 21 L. ed. 739; *Southern Agricultural Works v. Franklin*, 111 Ga. 319, 36 S. E. 693; *Ward v. Odell Mfg. Co.* 126 N. C. 948, 36 S. E. 194.

The plaintiff only assumed the risk that his coservants might fail in the care essential to his safety; and the doctrine cannot apply where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it.

*Dr. Manning's Commentaries* on 1 Bl. Com. p. 51; *Union P. R. Co. v. Fort*, 17 Wall. 553, 21 L. ed. 739; 12 Am. & Eng. Enc. Law, 2d ed. p. 989.

To be wilfully and wantonly assaulted and shoved into a cog wheel running at a high rate of speed is not an ordinary risk of the employment.

Burruss was an incompetent fellow servant, and by reasonable diligence the master might have known it, and the fellow-servant doctrine has naught to do with this case.

*Ponton v. Wilmington & W. R. Co.* 51 N. C. (6 Jones L.) 245; *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 25 L. R. A. 710, 29 Atl. 994; 12 Am. & Eng. Enc. Law, 2d ed. p. 917.

It was culpable negligence *per se* for defendant to employ a boy of the immature age of ten years, and expose him to the hazards incident to operation of a great factory, and especially in this factory, where the machinery was so grossly defective and the servants so brutally savage.

*Ward v. Odell Mfg. Co.* 126 N. C. 946, 36 S. E. 194; 14 Am. & Eng. Enc. Law, p. 900; *Goff v. Norfolk & W. R. Co.* 36 Fed. 299.

*Messrs. Overman & Gregory* for appellee.

Cook, J., delivered the opinion of the court:

From a careful review of the evidence, we find that it establishes a *prima facie* case; and his honor erred in sustaining the motion to dismiss as in case of nonsuit, and in not submitting the issues to the jury. The evidence shows that defendant, in running his mill through agents, had one general superintendent, who hired and discharged hands, and also had spinning-room superintendents, bosses, or overseers, who controlled and directed the hands in the performance of their work, and also sometimes hired, and, in case of disobedience, of which they were the judges, discharged the hands under them. Burruss was a spinning-room superintendent or boss or overseer, and was in command of the department in which plaintiff, a ten-year-old boy, was a floor sweeper. Burruss' reputation was bad among mill men (that is, he was mean to children and his help); and it was generally known, and had been so for years, at Albemarle, Concord, Salisbury, and elsewhere, where he had worked in mills. Notwithstanding this fact, which ought to have been known to defendant, he was employed in this mill and placed in control of others, in-

cluding this boy of tender years. And herein lies the principle involved in this appeal. In employing servants, the master is under obligation not to associate incompetent ones with the skilled and competent, to their hurt and injury. So much the more, then, is it the duty of the master not to employ unskilled and incompetent bosses or overseers, who are to act in his place and stead over subordinates who are under their care and control and subject to their orders. It does not appear that Burruss was unskilled, but his incompetency for the supervision of children and other like help is apparent, and emphasized by his bad character for being mean to children and other help. We have no reason for judging that such character was not actually known to defendant. It was generally known among mill men, from whom he might have informed himself if he had inquired, and it was his duty to have been reasonably diligent in obtaining the information before intrusting such care and responsibility to him. In the enlargement of our business and industrial enterprises made necessary by the rules of economy, it is frequently impossible for the master to give a personal supervision and direction to the business. "It is now universally held in American courts that a master always may, and sometimes must, have a servant who acts as his representative or *alter ego* towards other servants, and that for the negligence of such representative, while acting as such, the master is responsible to the other servants, precisely as if it were his own." Shearn. & Redf. Neg. 5th ed. § 226. While he is responsible to fellow servants for a failure in duty in not using ordinary care in selecting competent servants, he is also under obligation to them to exercise due care and caution in the selection of his representative or *alter ego*, who orders, commands, and controls those committed to his charge.

In the case now being considered there is no evidence of the unskilfulness of the boss, Burruss, but the evidence shows that he was unfit and incompetent to perform the duties of supervising children and the help under him, by reason of his cruel nature and high temper, demonstrated by his treatment of the plaintiff on the day before as well as on that of the injury, which had become so well known as to establish for him a general reputation, extending back for six or more years, in the divers mills and towns in which he had worked. It is clear that the master would have been responsible for injuries inflicted upon the servants by him, had he (the master) known of such traits of character; and it is equally as clear that he could have obtained the information had he seen fit to inquire, or, having inquired, knowingly and voluntarily assumed the responsibility, in employing him and placing him in that responsible position. It is true that the burden of proof is upon the plaintiff to show negligence upon the part of the master, but in this case it is done, and is not contradicted. 53 L. R. A.

ed. Had the master committed the assault, his liability would not be questioned. Then why not be responsible for his representative, whom he knew, or ought to have known, to have been of such nature and character that the like result would follow? Under the contractual relations existing between plaintiff and defendant, it was the duty of plaintiff to render proper service and obey the commands and directions of his superiors in the service. It was likewise the duty of defendant, under those relations, to appoint as his representative a fit and competent person, not one of a cruel and mean nature, who would use violent means in urging the performance of duty. We do not wish to be understood as holding that the master is generally an insurer of the good conduct of his representative, or an insurer against his violence resulting from his own malice or ill will or sudden outbursts of temper, although in charge of the master's business, but only when he puts in such representative as is by him known, or ought to have been known, to be violent and mean, and the injury is the natural result of such character. It was the duty of Burruss to keep the servants at work and superintend the same, but it was no part of his employment to inflict corporal punishment in behalf of the master. In *Daniel v. Petersburg R. Co.* 117 N. C. 592, 23 S. E. 327, in which Wood, Mast. & S. 592, is cited with approval, the master was a common carrier, who had the actual care and custody of plaintiff's intestate, and was an insurer of his safety against its own servants as well as co-passengers and intruders. In the case at bar defendant's relation with plaintiff was in no sense similar. Plaintiff was a servant and performing service, and it was his duty to look out for and protect himself, and to obey and to conform to the rules and requirements within the scope of his employment,—quite different from that of a passenger who was paying for the protection and service being rendered to him. Had the plaintiff been injured by dangerous or defective machinery used by defendant in running his mill, while in the performance of the work assigned him, we would consider the contention upon that subject. But it appears that the injury received was caused by the violent handling of plaintiff by defendant's *alter ego* in urging him to the proper performance of his work. The obligation to furnish reasonably secure machinery and appliances is limited to the use of those in its employ, and not to provide against accidents to those who might, by violence not anticipated, or negligence, or those uninvited, come in contact with it. The injury inflicted by the shoving of plaintiff by Burruss might have been even more serious, had he fallen upon the floor, by the breaking of a limb, or still more serious by the falling downstairs, or out of the door, or upon some pointed implement lying in the wayside.

There is error.

J. M. MOODY, *Appt.*,  
v.

STATE'S PRISON OF NORTH CAROLINA.

(128 N. C. 12.)

1. General statutory authority to corporations to sue and be sued does not apply to a public corporation under control of the state, such as a state's prison.
2. No liability exists on the part of the state for injuries caused to a prison guard by a defective ladder which he was compelled to use by the officers in charge of the state's prison, which is a mere agent of the state in the administration of its government.

(March 12, 1901.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Wake County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by negligence of defendant's officers. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Douglass & Simms*, for appellant:

Appellant relied upon the following authorities.

N. C. Laws 1899, chap. 24, incorporating state's prison, coupled with Code, § 663, defining the general powers of corporations; *Granville County Bd. of Edu. v. State Bd. of Edu.* 106 N. C. 81, 10 S. E. 1002; *Oklahoma Agri. & Mechanical College v. Willis*, 6 Okla. 593, 40 L. R. A. 677, 52 Pac. 921; *Gross v. Kentucky Bd. of Managers of World's Fair Columbian Exposition*, 20 Ky. L. Rep. 1418, 43 L. R. A. 703, 49 S. W. 458.

*Messrs. Busbee & Busbee*, for appellee: No action lies against the defendant for a tort.

The state is not answerable to an individual for an injury resulting from the alleged misconduct or negligence of its officers or agents.

*Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440; *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453; *Robertson v. Sichel*, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286; *Bourn v. Hart*, 93 Cal. 327, 15 L. R. A. 431, 28 Pac. 951; *Melvin v. State*, 121 Cal. 22, 53 Pac. 416; *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607; *Bowen v. State*, 108 N. Y. 166, 15 N. E. 56; *Splitstorf v. State*, 108 N. Y. 205, 15 N. E. 322.

*Messrs. Argo & Snow* also for appellee.

**Clark, J.**, delivered the opinion of the court:

The plaintiff brings this action against the state's prison for damages sustained by him while a prison guard by the breaking of a ladder under him, which he alleges was in a dilapidated condition, and which he

says he was compelled to use, though its defective condition had been repeatedly called to the attention of the officers. The defendant demurred that the complaint did not state a cause of action, because: (1) This is an action against the state, as such; the state's prison being merely an agency of the state to secure certain public and general services. (2) For the above reason and even if it were a corporation, the state's prison is not liable to an action for tort.

The court properly sustained the demurrer and dismissed the action. Being an agency of the state, the state's prison could only be sued when expressly authorized to be sued. *Granville County Bd. of Edu. v. State Bd. of Edu.* 106 N. C. 81, 10 S. E. 1002. The statute incorporating the defendant (Acts 1899, chap. 24) does not contain the authority "to sue and be sued." The general authority to that purport conferred on corporations by Code, § 663, has reference only to private and quasi public corporations, and not to corporations like the present, which are merely governmental agencies. As to those latter, the authority to be sued must be expressly given. *Oklahoma Agri. & Mechanical College v. Willis*, 6 Okla. 593, 40 L. R. A. 677, 52 Pac. 921, and cases there cited. But, even if such authority was given, it would cover only actions ordinarily incidental in its operation, and would not extend to causes of action like the present. There is a distinct difference between conferring suability as to "debts and other liabilities for which the state's prison is now liable," and extending liability for causes not heretofore recognized. *Murdock Parlor Grate Co. v. Com.* 152 Mass. 28, 8 L. R. A. 399, 24 N. E. 854. "The exemption of the state from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon grounds of public policy which deny its liability for such damages." *Bourn v. Hart*, 93 Cal. 321, 15 L. R. A. 431, 28 Pac. 951. This is substantially a suit against the state. The defendant is a mere agent of the state in the administration of its government. The management and control of the state's prison is essentially a governmental function, being an indispensable part of the administration of the criminal laws of the state. The matter is so fully and completely settled that nothing is left us, beyond the citation of authority. In *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440, it was held that even an action instituted before this court under Const. art. 4, § 9, would not lie where a convict had lost his eyesight by the gross negligence of the supervising manager of the penitentiary, because, says Smith, Ch. J., "the state, in administering the functions of government through its appointed agents and officers, is

**NOTE.**—For other cases in this series as to nature of incorporated institutions belonging to the state, see *State ex rel. Little v. Regents of University* (Kan.) 29 L. R. A. 378, and note; *Lane v. Minnesota State Agri. Soc.* (Minn.) 29 L. R. A. 708; *Sterling v. Regents of University* (Mich.) 34 L. R. A. 150; *Oklahoma Agri. & Me-*

*chanical College v. Willis* (Okla.) 40 L. R. A. 677; *Gross v. Kentucky Bd. of Managers of World's Columbian Exposition* (Ky.) 43 L. R. A. 703; *Maia v. Eastern State Hospital* (Va.) 47 L. R. A. 577; and *Trevett v. Prison Asso.* (Va.) 50 L. R. A. 564.

not legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence. That the doctrine of *respondent superior*, applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled, upon authority and practice, to admit of controversy." If judgment upon such liability could be awarded against the defendant, it would be in effect a judgment against the state, to be enforced by execution against the state's property placed in the hands of its agency to be used for governmental purposes,—the operation of the state's prison. In the note to *Clodfelter v. State* (N. C.) 41 Am. Rep. 442, among cases cited to some purport are *Alamango v. Albany County Supers.* 25 Hun, 551, which held that a convict injured by the negligent and illegal operation of a sawmill could not maintain an action therefor; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *Brown v. People*, 75 N. Y. 441. The editor adds: "It is not necessary to discuss the reason of this rule, for there is no break in the long line of authorities by which it is established. *Russell v. Devon County*, 2 T. R. 667; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Hollenbeck v. Winnebago County*, 95 Ill. 148, 35 Am. Rep. 151; *Kincaid v. Hardin County*, 53 Iowa, 430, 36 Am. Rep. 236, 5 N. W. 589; *Woods v. Colfax County*, 10 Neb. 552, 7 N. W. 269; *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393." "No government," says Justice Miller, "has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents." *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453. And Judge Story says in his work on Agency (§ 319): "The government does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests." This is approved with citation of other authorities, in *Robertson v. Siebel*, 127 U. S., at page 515, 32 L. ed. 206, 8 Sup. Ct. Rep. 1290. In a case where a convict was injured by the breaking of a ladle in which he was carrying molten metal, whose defect had been called by him to the attention of the overseer, it was held, on above grounds (*Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607), that an action did not lie; the court saying: "The doctrine is so uniformly asserted by writers of approved authority and the courts that fresh discussion would be superfluous." To same purport, 53 L. R. A.

*Splitstorf v. State*, 106 N. Y. 205, 15 N. E. 322; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. In the late case of *Murdock Parlor Grate Co. v. Com.* 152 Mass. 28, 8 L. R. A. 399, 24 N. E. 854, already cited, where the statute gave the superior court jurisdiction of "all claims against the commonwealth, whether at law or in equity," which could not be done in this state (Const. art. 4, § 9), it was notwithstanding held that the suability thus conferred only applied to recognized liabilities of the state, and did not, therefore, extend to a claim for damages resulting from the misfeasance or negligence of the commonwealth's officers and agents in performing their duties. The reason given is that liability founded on the neglect or torts of public officers engaged as servants in the performance of duties which the state, as a sovereign, has undertaken to perform, has always been denied, not on the narrow ground that such liability cannot be enforced, but on the larger ground that no liability arises therefrom. Even as to counties, we have an unbroken line of authorities that they can be sued only in such cases and for such cases of action as are authorized by statute, and such cases do not embrace liabilities for negligence or other torts of their officers and agents. *White v. Chowan County Comrs.* 90 N. C. 437, 47 Am. Rep. 534; *Manuel v. Cumberland County Comrs.* 98 N. C. 9, 3 S. E. 829; *Threadgill v. Anson County Comrs.* 99 N. C. 352, 6 S. E. 189; *Prichard v. Morganton Comrs.* 126 N. C. 908, 36 S. E. 353; *Bell v. Johnston County Comrs.* 127 N. C. 85, 37 S. E. 136. To same purport, *Moffit v. Asheville*, 103 N. C. at page 258, 9 S. E. 698; Dill. Mun. Corp. §§ 963, 965. As to cities and towns, though by their charters they are broadly authorized "to sue and be sued," it is equally well settled that this suability does not create any liability for damages caused by the torts of their officers and agents when acting in a governmental capacity. *McIlhenny v. Wilmington*, 127 N. C. 146, 50 L. R. A. 470, 37 S. E. 187, and numerous cases there cited. For a stronger reason there can be no liability incurred by the state, or its agent, the defendant, for the negligence of the officer in question, if it caused the damage complained of.

*Affirmed.*

Montgomery, J., concurring, thinks it unnecessary in this case to pass upon whether the state's prison is or is not an incorporated institution. In either view of that matter, this action cannot be maintained, being founded on a tort for the recovery of damages for a personal injury.

## TENNESSEE SUPREME COURT.

Charles H. MOSES, Exr., etc., of Mary P. Moses, Deceased,  
v.

Fannie M. GRAINGER et al.  
S. C. JARNAGIN, Intervener, Appt.

(106 Tenn. 7.)

1. The sale of a note held as collateral to another, without notice to the maker of the principal note, is illegal when made four years after the principal note has matured, and when it has been reduced to a small part of its original amount, although the contract of pledge expressly provides that in case of default the collateral may be sold without notice.
2. An appeal by a purchaser of a pledged note at an invalid sale of it, from

NOTE.—Rights of pledgee and pledgee in respect to sale of collateral bonds and commercial paper.

I. Authority to sell.

a. Express contract.

1. Bonds.

2. Commercial paper.

b. Implied contract.

1. Bonds.

2. Commercial paper.

II. Notice of time, place, and manner of sale.

III. Judicial and execution sales.

IV. Who may purchase.

V. Remedy of pledgee.

I. Authority to sell.

a. Express contract.

1. Bonds.

A sale of bonds held as collateral will be valid where the contract of hypothecation expressly authorizes the pledgee to sell the same without demand of payment and without notice to sell, publicly or privately, and the pledgee makes personal demand of payment and gives personal and public notice of the sale, at which all parties interested are present. *Morris & Whitehead v. East Side R. Co.* 43 C. C. A. 605, 104 Fed. 409.

2. Commercial paper.

It is generally held that a sale of commercial paper by the pledgee in accordance with a contract to that effect will be valid. The pledgee cannot purchase, nor can he sell to the obligor of the pledged paper unless the contract so provides. The case of *Moses v. Grainger* is an exceptional case, holding that long delay in selling may render the sale void, even under a contract authorizing such sale, where no demand is made of the debtor to redeem.

In *Moses v. Grainger* it was held that a purchaser of a collateral note from the pledgee at public sale obtained no title where the collateral was a \$500 note, and four years overdue, and was purchased for \$87.50, and only about \$50 of the original debt remained unpaid. This was on the ground that no demand was made on the pledgee to redeem, nor was any notice of sale given him. The contract provided, "with authority to sell the same at public or private sale on the nonperformance of this promise, and without notice." The court held that the acceptance of payments from the pledgee, and indulgence given for nearly four years, lulled

a decree allowing his claim against the estate of an indorser only for the amount which he paid for the note, and denying his right to the face value, brings up the question of his title to the note, and authorizes the court to reverse the decree, not only so far as it is against him, but also that part of it which is in his favor.

(October 20, 1900.)

APPEAL by intervener from a decree of the Court of Chancery Appeals reversing a decree of the Court of Chancery for Knox County allowing a portion of his claim filed in a proceeding to settle the estate of Mary P. Moses, deceased. *Affirmed.* The facts are stated in the opinion.

him into a sense of security. The court said: "He had a right to suppose, under the circumstances and after his note had been reduced to a trifling balance, that before exercising the right to sell a demand would be made upon him to redeem his collateral."

The pledgee of commercial paper may sell the same to satisfy the debt, if the contract of pledge authorizes such a sale. *Hunter v. Hamilton*, 52 Kan. 195, 34 Pac. 782; *Cole v. Dalsiel*, 18 Ill. App. 23.

So where the pledge is a mortgage and note. *Watson v. Smith*, 60 Minn. 206, 62 N. W. 265; *Williams v. United States Trust Co.* 38 N. Y. S. R. 701, 14 N. Y. Supp. 502, *Affirmed* in 133 N. Y. 660, 31 N. E. 29.

Or where the collateral is a chattel-mortgage note. *Fraker v. Reeve*, 36 Wis. 85.

But a pledgee holding commercial paper as collateral security for a debt due to him, under a contract authorizing a sale of the pledged paper at public or private sale without notice, cannot sell the same to the original obligor for the amount of the debt for which the pledge was made. This will be held to be a compromise, and the pledgee will be liable to the pledgee or for damages in surrendering the security. *Union Trust Co. v. Bigdon*, 93 Ill. 458; *Zimbleman v. Veeder*, 98 Ill. 613.

A contract authorizing a sale of notes publicly or privately without notice was held not to sustain a purchase by the pledgee, where the sale purported to be at auction, and the notice was defective, and the notes were sacrificed. *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117.

b. Implied contract.

1. Bonds.

A pledgee of bonds may sell the same on default, after demand and notice of sale. If he purchases at his sale, in the absence of express authority, he will be treated as still holding the collateral in pledge. He cannot change the original debt by renewal without consent of the pledgee, and he must conduct the sale fairly.

In the absence of a contract regulating the matter, the pledgee of bonds in default of payment may, upon giving reasonable notice, sell the pledged property at public auction, and appropriate the proceeds to the payment of the debt. *King v. Texas Bkg. & Ins. Co.* 58 Tex. 669. In this case the court said that the rule might be different in case the pledge was a bill of exchange, or promissory note which matured in a short time.

And in *Brown v. Ward*, 3 Duer, 660, it was

**Mr. Charles T. Cates, Jr.,** for appellant:

It was clearly competent for the maker of the original note, who was the holder and pledgee of the collateral, to contract that said collateral might be sold without notice.

*Union Trust Co. v. Rigdon*, 93 Ill. 458; *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854; *Carson v. Iowa City Gas-light Co.* 80 Iowa, 638, 45 N. W. 1068; *Chouteau v. Allen*, 70 Mo. 290; *Genet v. Howland*, 45 Barb. 560.

The power of sale passed with the ownership of the principal note, as a part thereof.

The accommodation maker or indorser holds himself out to the world as liable on the paper for the benefit of the party accommodated so long as that paper has life,

—that is, so long as it is not barred by the statute of limitations.

Story, *Promissory Notes*, §§ 178-194; *Sturtevant v. Ford*, 4 Mann. & Gr. 101; *Carruthers v. West*, 11 Q. B. 143; Dan. Neg. Inst. § 786; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; Randolph, Com. Paper, § 677; *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 179 Ill. 599, 46 L. R. A. 753, 54 N. E. 287; *Renwick v. Williams*, 2 Md. 356; *Davis v. Miller*, 14 Gratt. 1; *Thompson v. Shepherd*, 12 Met. 311, 46 Am. Dec. 676; *Smith v. Larson*, 18 W. Va. 212, 41 Am. Rep. 688; *First Nat. Bank v. Grant*, 71 Me. 374, 36 Am. Rep. 334; *Connerly v. Planters' & M. Ins. Co.* 66 Ala. 432; *Scyfert v. Edison*, 45 N. J. L. 303.

A purchaser of accommodation paper is entitled to recover the face value of the in-

held that railroad bonds pledged as collateral might be sold by the pledgee after the debt matured, on demand of payment and due notice of the time and place of sale, where there was no restriction by agreement. In this case the bonds are treated as stocks, and a difference is noted between this kind of collateral and that of commercial paper.

In *Morris Canal & Bkg. Co. v. Lewis*, 12 N. J. Eq. 323, it was said that when coupon bonds, having several years to run before they become due, are deposited as collateral security for the payment of promissory notes soon to mature, the fair presumption is that they were designed to be held as a pledge, and were expected to be sold, after demand and due notice, like goods, chattels, stocks, and public securities, in case the debt for which they were pledged should not be punctually paid. Such a deposit differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, and like choses in action, which, in the absence of an agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be presumed it was the intention of the parties thus to deal with them.

But a pledgee selling bonds held by him as collateral, and becoming the purchaser, will be treated as holding them after the sale as pledgee, in the absence of any contract showing right to sell or purchase. *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 180.

A bank discounting a note and taking from the payer a government bond as collateral has no right to deliver up the note to the maker on his renewal of the same, and to hold the bond as collateral, and sell the same, on the maturity of the renewal without the pledgee's consent. *Burnap v. National Bank*, 96 N. Y. 125.

## 2. Commercial paper.

The pledgee of commercial paper cannot sell the same in the absence of a contract authorizing such a sale. If he does the pledgee may treat the sale as invalid, and hold the pledgee liable as for a conversion. The exception to this rule is where the pledged paper has a long time to run after the maturity of the debt for which it was pledged. It seems that in such a case the pledgee may obtain an order for sale. The case of *Potter v. Thompson*, 10 R. I. 1, is also an exception to the general rule, as that case sustained the sale on the ground that the pledged paper had matured, and that a court of equity would have ordered a sale, and that it was not necessary to incur the expense of a suit. The distinction in this case is questionable.

It may be that a court of equity will order  
53 L. R. A.

the sale of pledged commercial paper on a proper showing, in the absence of a specific contract to that effect.

In the following cases it was held that, in the absence of authority given by contract, the pledgee of commercial paper cannot sell the same. It is his duty to collect the pledged paper on maturity, and apply the proceeds to the debt. *Wheeler v. Newbould*, 16 N. Y. 392, *Affirmed* 5 Duer, 29; *First Nat. Bank v. Hall*, 22 App. Div. 356, 47 N. Y. Supp. 1054; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806; *Boswell v. Thigpen*, 75 Miss. 308, 22 So. 823; *Hazzard v. Duke*, 64 Ind. 220; *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Fletcher v. Dickinson*, 7 Allen, 23.

The same was said to be the rule in *McLemore v. Hawkins*, 46 Miss. 715; *Brown v. Ward*, 3 Duer, 660; *Porter v. Frazer*, 6 Misc. 553, 27 N. Y. Supp. 517; *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329.

A pledgee selling commercial paper held as collateral, without a special agreement for the sale, is liable to the pledgee for the value of such notes. *Wheeler v. Newbould*, 5 Duer, 29, *Affirmed* in 16 N. Y. 392. In this case the pledgee notified the pledgee that he would sell the same, and sold the notes at private sale, but did not give notice of the time and place of sale. It was said that if he had authority to sell it was his duty to give the pledgee notice of the time and place of the sale. This is a leading case on this question, and is frequently cited. The counsel for the defendant offered to prove upon the trial the existence of a usage and custom, in the city of New York, to sell notes and drafts similarly pledged after demand of payment and notice that such sale would be made in default of such payment, at private sale, for the best price that could be obtained, and not at public sale or by auction. This evidence was objected to and rejected by the court, saying: "If I am right in the construction which I have put upon the contract, and in my estimate of the duties and obligations which the law imposed upon the pledgee in regard to the disposition of the subject of the pledge, this evidence was inadmissible. The usage to which it refers is in contradiction to the fair and legal import of the contract."

In *Fraker v. Reeve*, 38 Wla. 85, it was said: "In *Wheeler v. Newbould*, 16 N. Y. 392, the court very strongly intimates—if the point is not expressly decided—that a pledge of commercial paper as security for a loan does not, in the absence of a special power for that purpose, authorize the pledgee, upon the nonpayment of the debt, and upon notice to the pledgee, to sell



strument, although he gave a less sum therefor.

*Fowler v. Strickland*, 107 Mass. 552; *Moore v. Baird*, 30 Pa. 158; *Gaul v. Willis*, 26 Pa. 259; *Re Gomersall*, L. R. 1 Ch. Div. 137; *Hunt v. Armstrong*, 5 B. Mon. 399; *Keim v. Bank of Penn. Twp.* 1 Pa. St. 36.

*Messrs. Green & Shields*, for appellees:

The purchaser of a note at a discount of one third is perpetually enjoined from collecting more than the amount actually paid, with interest, where there was a total failure of consideration, although he bought the note before it fell due, and without any actual knowledge of the consideration of the note.

*Petty v. Hannum*, 2 Humph. 102, 36 Am. Dec. 303; *Green v. Stuart*, 7 Baxt. 418.

An indorsee can only recover, as against

an accommodation indorser, the actual amount he paid for the paper.

*Tiedeman*, Com. Paper, § 293.

Where the consideration has failed, the bona fide holder of a note can recover from the accommodation indorser only the amount the holder actually paid therefor.

*Holeman v. Hobson*, 8 Humph. 127.

A delegation of the power of sale will not be upheld. Such a power involves the exercise of discretion and judgment, and can be used by none but the trustee himself.

27 Am. & Eng. Enc. Law, pp. 143, 225; 1 Lewin, Tr. 8th ed. p. 352.

Reasonable notice of the time and place of sale must be given to the pledgee, unless such notice has been expressly waived. 18 Am. & Eng. Enc. Law, p. 670.

the securities pledged, either at public or private sale; but that he is bound to hold the same, collecting them as they become due, and applying the proceeds to the payment of the loan. Without dwelling on that case, we think the rule there laid down does not apply to a transaction like the one before us, where the intention was that the property in the notes should become absolute at law in the creditor on default of the debtor to pay his debt."

In *Porter v. Frazer*, 6 Misc. 553, 27 N. Y. Supp. 517, the case of *Wheeler v. Newbould*, 16 N. Y. 392, was distinguished, the court saying: "In many cases which appear in the books this case of *Wheeler v. Newbould* has been cited as authority for the position that the same rule is to be applied to bonds and mortgages as to commercial paper, and hence the doctrine has crept into the books as the authoritative decision of the court of appeals without due consideration. In none of the cases cited by the counsel did the pledgee attempt to foreclose his pledge by action, but they were all cases where, by the act of the party alone, the sale was accomplished or attempted."

In *Chapman v. Brooks*, 31 N. Y. 75, the court said: "The case of *Wheeler v. Newbould*, 16 N. Y. 392, does not conflict with this note. That case only holds that a creditor has no right to sell a note pledged as security at a loss, but must wait till it becomes due; but it is by no means an authority for the position that a creditor may not assign the principal debt to a third person and give him the benefit of the collateral securities to secure the payment of the principal debt. So long as nothing is done to deprive the pledgee of the right to redeem on payment of the amount due on the principal debt, the pledgee is not injured."

A sale by the pledgee, without the consent of the pledgee, of mortgage notes held as collateral, and the purchase at such sale by the pledgee, will be held to be a nullity, and the pledgee will be regarded as still holding the securities as a pledge. *First Nat. Bank v. Hall*, 22 App. Div. 356, 47 N. Y. Supp. 1054.

And the pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341. In this case it was said that "it is insisted, however, that the bonds mentioned in the plea are not shown to have been commercial paper. It is 53 L. R. A.

not perceived that this could in any way alter the case. All the reasoning in support of the doctrine laid down as to commercial paper applies with the same, if not with more, force to bonds payable upon condition. Put up to sale, no bidder can, by mere inspection of the paper, form any just judgment as to the value of such paper."

The holder of commercial paper "as collateral for the payment of a debt cannot, in the absence of a special power for that purpose, sell the security so pledged upon default of payment of the debt, at public or private sale with or without notice, as in the case of ordinary property, on timely notice, nor by order of court dispose of same." If he sells the same he will be liable for a conversion. *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806. In this case the court said that the pledgee is bound to hold and collect the security as it becomes due, and apply the proceeds to the payment of the debt. It was further said that where the pledge is long-time paper some of the courts hold that on a proper showing a sale will be ordered.

And a sale of commercial paper by the pledgee without a provision in the pledge for such sale will render the purchaser a trustee for the pledgee where such purchaser has notice of the pledge. *Boswell v. Thigpen*, 75 Miss. 308, 22 So. 823. In this case the court said that "in the case of promissory notes, and other negotiable instruments he [pledgee] is prima facie bound to collect the full face value of them, with interest, unless under special circumstances of excuse to be shown by him. . . . If the pledged notes be assigned by the pledgee to some third person with notice of the pledge, such person can take no greater right in the pledge than his assignor had, and upon the collection of the notes must pay to the pledgee the surplus after satisfying the debt for which they were originally pledged."

If a pledgee, without the consent of the pledgee, sells notes held as collateral, the pledgee will be required to account to the pledgee for the amount of such notes the same as if he had collected them. *Hazzard v. Duke*, 64 Ind. 220.

And where a pledgee sold a negotiable note held as collateral to the agent of the maker it was held that the pledgee cannot, except by special agreement, sell the collateral either at public or private sale, but must collect it when due, and, after applying the proceeds to the satisfaction of his debt and the costs and expenses incurred, pay over the surplus, if any, to the pledgee. Neither can he, except in very extreme cases, compromise with the maker of the collateral, and surrender the same for less than the amount due thereon. If he does so, he will

Beard, J., delivered the opinion of the court:

On the 11th May, 1898, Frank A. Moses executed to the Central Savings Bank of Knoxville his promissory note for \$301.10, payable ninety days after date "to the order of the payee," and pledged as collateral to secure it the note which is the subject of controversy in this case. The pledge of the collateral, as stipulated in the original paper, is in these words: "Having deposited with said bank as collateral security for the payment of this note, with authority to sell the same at public or private sale on the nonperformance of this promise, and without notice, one note for \$500, signed by F. A. Moses, and indorsed by Chas. H. Moses, Henry L. Moses, and Mary P. Moses." The \$500 note thus pledged was dated 10th December, 1892, and matured six months after date. Long after maturity of the orig-

inal note, to wit, in February, 1899, and after, by various payments made upon it by its maker, there was left due on it, in principal and interest, only \$86.50, the Central Savings Bank passed into the hands of a receiver, who sold a considerable part of its assets, including this note, to Galbraith & Maloney, of Knoxville. With this note was also delivered to them the collateral in question. Having received these assets, on the 7th of March, 1899, these transferees posted the following notice:

On Thursday, March 9, 1899, at 11 o'clock A. M., we will sell to the highest bidder, for cash, in front of the courthouse door in Knoxville, certain collaterals attached to various notes assigned to us by the Central Savings Bank, which collaterals will be produced at the sale. This March 7, 1899.  
[Signed] Galbraith & Maloney.

be compelled to account to the pledgee for its full value. *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000.

So, a creditor who holds a note secured by mortgage as collateral security for his debt has no right to sell such security privately for less than its value, knowing that the purchaser buys it with intent to cancel it. *Fletcher v. Dickinson*, 7 Allen, 23. In this case there was no specific contract authorizing a sale.

In *McLemore v. Hawkins*, 46 Miss. 715, it was said: "It is very questionable whether a valid sale of a note could be made to the maker at private sale. Such a transaction, without the consent of the pledgee, would be very suspicious,—especially if the maker were solvent. Sale implies the transfer of a thing to another, with a right of use and a power of disposition. If the pledgee makes a private arrangement with the solvent maker of a note, by which he becomes the purchaser for much less than is due upon it, the moment the paper was delivered to the maker it would be extinguished as a debt; he could make no use or disposition of it."

In *Brown v. Ward*, 8 Duer, 660, it was said that a different rule applies to commercial paper pledged as collateral from that which applies to stocks; that, in the absence of a contract to that effect, the pledgee cannot sell commercial paper pledged to secure a debt.

In *Morris Canal & Bkg. Co. v. Fisher*, 9 N. J. Eq. 687, 64 Am. Dec. 423, it was questioned whether a third party's bond, deposited by way of a collateral or as a pledge, can be sold by the pledgee, in default of payment, after notice to the pledgee, unless known usage or express agreement to do so is shown.

In *Handy v. Sibley*, 48 Ohio St. 9, 17 N. E. 329, the court said: "There is a distinction between a pledge of ordinary chattels and a pledge of commercial paper. A pledge of the latter as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the pledgee to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured. The reason assigned for this exception to the general rule in relation to the sale of property pledged is, that such securities, not being usually marketable at their fair value, would generally be sold at a sacrifice, and injustice would thus be done the debtor, and it cannot be presumed it was the intention of the parties thus to deal with the securities. *Wheeler v. Newbould*, 16 N. Y. 392; *Fletcher v. Dickinson*, 7 Allen, 23; *Nelson v. Wellington*, 53 L. R. A.

5 Bosw. 178; *Brown v. Ward*, 8 Duer, 660; *Morris Canal & Bkg. Co. v. Lewis*, 12 N. J. Eq. 323; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Zimbleman v. Veeder*, 98 Ill. 613."

In *Hunter v. Hamilton*, 52 Kan. 195, 34 Pac. 782, the court said: "In the absence of an agreement as to the remedy to be pursued, a pledgee may ordinarily, upon default, sell any chattel deposited with him as a pledge; but a different rule has been held in some courts in respect to a pledge of commercial paper as collateral security for the payment of a debt. By some of the authorities cited it is held that, without express authority, the pledgee cannot sell the paper, but that it is his duty to collect it when it falls due, apply enough of the proceeds to pay his debt, and then return what remains to the pledgee. *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimbleman v. Veeder*, 98 Ill. 613; *Fletcher v. Dickinson*, 7 Allen, 23; *Roberts v. Thompson*, 14 Ohio St. 1; *Dan. Neg. Inst.* § 833. Upon this question there is a diversity of opinion, some of the authorities holding that there are no good reasons to sustain such an exception. *Potter v. Thompson*, 10 R. I. 1; *Brightman v. Reeves*, 21 Tex. 70; *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519. We are not called upon, however, to determine whether Hamilton had a right to sell the note independent of an agreement, as the issue presented and tried was, whether Hunter authorized Hamilton to make the sale, and this issue has been resolved by the jury in favor of Hamilton. The authorities are uniform upon the question that the disposition to be made of a pledge may be regulated by the contract of the parties."

An examination of *Brightman v. Reeves*, 21 Tex. 70, and *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519, shows that they do not go to the extent claimed in the statement above set forth. In the first-named case there was authority claimed, and in the other case the court of last resort said that the question was not brought up on error.

A bank having loaned money to another bank, taking the bills of the latter as collateral on a contract authorizing that the bills might be put in circulation on the maturity of the debt, had no right to sell the bills in the market on the maturity of the debt, after the bank issuing them had failed, and the pledgee was entitled to a credit on the debt, of the dividends paid on such bills by the bank receivers. *Re Litchfield Bank*, 28 Conn. 575.

Where a mortgage note of \$800 was pledged for \$50, and the pledgee notified the pledgee that he would sell the same, and a reply was

Pursuant to this notice, and without any demand upon the maker of the original note, these parties undertook to sell the collateral in question, when S. C. Jarnigan having bid for it the sum of \$87.50, it was delivered to him, as the purchaser. Thereupon, claiming to be its owner under this purchase, he filed his petition in this cause, instituted to wind up the estate of Mary P. Moses, now deceased, one of the indorsers of this collateral, asking that he be given a decree for the face value of the note, and interest upon it. The chancellor allowed a decree for the sum of \$87.50, the amount paid by him. From this decree he prayed an appeal, and the court of chancery appeals reversed the chancellor and dismissed his petition. From the finding of this latter court, he has appealed.

For the purpose of this case, it may be conceded that the power of sale given in

this contract of pledge was not a personal trust to be exercised by the payee alone, but under the terms, "to the order of," would pass to an assignee, as in a mortgage, where the authority is given to the mortgagee or "assigns." 2 Pingrey, Chatt. Mortg. § 1320. But this concession will not avail the petitioner, Jarnigan; for there is an objection we think fatal to this claim. As has been seen, the original note was nearly four years past maturity at the time of this attempted sale. The first holder had from time to time accepted payments upon it, until there was only \$50 of the principal due upon it. No demand was made upon its maker by Galbraith & Maloney to pay it and redeem the collateral, nor was any notice of the purpose to sell given him; the only notice being the one hereinbefore set out. By the terms of the pledge the bank was vested "with authority to sell the same [the col-

sent, if not paid by next day to sell it, and the pledgee sold it to the payee for \$51, the liability of the purchaser to the pledgee was held to depend on whether the pledgee authorized the sale, and whether the purchase was made in good faith for a reasonable price. *Brightman v. Reeves*, 21 Tex. 70.

But in *Potter v. Thompson*, 10 R. I. 1, a sale of commercial paper by a pledgee after its maturity, pledged for the loan of certain bonds, was held valid where notice of the time, place, and manner of sale was given to the pledgee's agent, the pledgee being absent in Europe and having given his agent power of attorney to transact all business of whatsoever kind in his name during his absence. An offer to redeem the collateral unaccompanied by a tender did not affect the sale. In this case the distinction is made as to the implied authority to sell commercial paper before it matures, by the pledgee, and the authority to sell the same after it matures. In this case the rule is applied that the pledgee of personal property has authority to sell.

In *Potter v. Thompson*, 10 R. I. 1, the case of *Wheeler v. Newbould*, 16 N. Y. 392, is distinguished. In neither case, was there any contract authorizing a sale of commercial paper. The sale was held invalid in the *Wheeler* case, and held valid in the *Potter* case; in the latter case, on the ground that the collateral had matured, while in the *Wheeler* case it had not matured, and on the further ground that, as a court of equity would grant an order for the sale of paper after it had matured, it was unnecessary to put the pledgee to the expense of appealing to such a court, and that if proper notice was given, and no other objection was made to the sale, it would be valid.

In *Potter v. Thompson*, 10 R. I. 1, referring to *Wheeler v. Newbould*, 16 N. Y. 392, it was said: "It may be a reasonable exception to the rule that the pledgee of commercial paper soon to mature should not sell it immediately upon the pledgee's default, but should wait for it to mature and then present it for payment. It is not improbable that a court of equity, if asked to sanction the sale of such paper, before it matured, for the benefit of the pledgee, would refuse the request, but if the same request were made after the paper had matured and payment thereof had been refused, we are inclined to think the request would be deemed reasonable, and would be granted. We see no good reason for requiring that the pledgee should be at the expense of a suit in equity to authorize a sale, if a sale is to be had, except it be for the protection of the pledgee; and the pledgee, if

duly notified, can protect himself, provided the sale is made in a proper place and at public auction."

In *Richards v. Davis*, 5 Clark (Pa.) 471, the owner of a note of \$1,000, indorsed by T., dated April 7, due in August, placed the same in the hands of a broker to sell, and on failing to sell he pledged the same for \$490, to be repaid the 2d of May. The pledgee sold the same through a broker on the 20th day of May, for \$890, to the indorsee T. The pledgee tendered the debt, which was refused, and then sued for the value of the note. He was awarded the surplus arising from the sale after paying his debt, and excepted to the award. It was held that a pledge of this kind, where the time of redemption is fixed long prior to the maturity of the note, is not controlled by the law of ordinary pledges of commercial paper, and that the pledgee did not have to wait and sue on the maturity of the note as the only remedy.

In *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519, the trial court held, first, that a pledgee of a promissory note, in the absence of contract to sell on default of payment, could sell the security to pay the debt; second, that a sale made without notice to the pledgee of the time and place of sale was invalid. The pledgee recovered the difference between the sum due and the face value of the note. On appeal the court refused to discuss the first point for it was with the plaintiff in error, and affirmed the judgment on the second point, that a notice to the pledgee of an intent to sell and of the time and place was necessary.

Where the pledged note has several years to run after the debt matures the pledgee may obtain an order of court to have it sold. *Porter v. Fraser*, 6 Misc. 553, 27 N. Y. Supp. 517; *Cleghorn v. Minnesota Title Ins. & T. Co.* 57 Minn. 341, 59 N. W. 320.

In *Porter v. Fraser*, 6 Misc. 553, 27 N. Y. Supp. 517, the court said: "A distinction may well be drawn, even in the case of commercial paper, between collateral securities shortly to mature and those having a long time to run. In the first case it may be assumed that the parties intended that the holder should realize upon the collaterals themselves by their collection when due; in the other case, that the holder should realize by a sale of the collaterals; and it was expressly held in *Richards v. Davis*, 5 Clark (Pa.) 471, that a pledgee of a note which is not to mature until long after the principal debt has implied authority, on default, to sell the note, and that he need not wait to collect it. And see also, on this sub-

lateral] at public or private sale on the non-performance of this promise [that is, the promise to pay ninety days after date], without notice." But is there any law which would regard a sale made by the bank under the conditions mentioned as a proper exercise of this authority? The acceptance of payments from the maker of the original note at different times after maturity, and the indulgence given to him for near four years, necessarily lulled him into a sense of security. He had a right to suppose, under these circumstances, and after his note had been reduced to a trifling balance, that before exercising the right to sell a demand would be made upon him to redeem his collateral. The general rule is, in the absence of express authority, that the pledgee has no right to dispose of collateral securities, such as bills and notes, upon default in the payment of the original debt. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Morris Canal & Bkg. Co. v. Lewis*, 12 N. J. Eq. 323;

*Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177. It is otherwise, however, when the authority to sell is given by the contract of pledge. But "such a power, given by contract, however, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as other contracts affecting equities of redemption, be construed favorably for the interests of the pledgor, so far as is consistent with the rights of the pledgee. The power of sale must be exercised with a view to the interest of the pledgor, as well as of the pledgee, and the sale must not be forced for barely enough money to secure the payment of the debt." *Colebrooke, Collateral Securities*, § 113. We think the sale complained of was in disregard of these equitable principles, and that, if it had been made at the instance of the original holder, it would not have been tolerated by a court of conscience. No more favor will be shown to it when made by Galbraith & Maloney under a notice which gave no information to the pledgor.

*ject, Brightman v. Reeves*, 21 Tex. 70; *Potter v. Thompson*, 10 R. I. 8."

## II. Notice of time, place, and manner of sale.

The general rule is that a sale of pledged bonds or commercial paper without demand and notice of the time, place, and manner of sale will render the sale invalid. The exception to this rule is where there is no one upon whom a notice of sale can be served.

The following cases hold that a sale of such pledged security without notice of the time, place, and manner of sale will be invalid: *Richards v. Davis*, 5 Clark (Pa.) 471; *Strong v. National Mechanics' Bkg. Asso.* 45 N. Y. 718; *Washburn v. Pond*, 2 Allen, 474; *Read v. Lambert*, 10 Abb. Pr. N. S. 428; *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329; *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117; *Goldsmidt v. First M. E. Church*, 25 Minn. 202; *Cortelyou v. Lansing*, 2 Cal. Cas. 203; *Evans v. Darlington*, 5 Blackf. 320; *Zimbleman v. Veeder*, 149 Ill. 613; *Stevens v. Hurlbut Bank*, 31 Conn. 149; *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519; *Barber v. Hathaway*, 47 App. Div. 165, 62 N. Y. Supp. 329.

Bonds purchased and carried by a broker on marginal security are held by him as a pledge for the payment of advances made by him on their purchase, and a sale without authority and without notice is an unlawful conversion, and renders the broker liable for any subsequent enhancement of their market value; not strictly on a contract, but in a special action on the case to recover damages for a wrong. *Read v. Lambert*, 10 Abb. Pr. N. S. 428.

Where bonds were deposited with a bank as collateral for an advance it was held that, assuming that the bank had a lien for subsequent overdrafts, it had no right to enforce the lien by a private sale without notice to the pledgor. *Strong v. National Mechanics' Bkg. Asso.* 45 N. Y. 718.

Where a pledgee of a bond as collateral was authorized by the pledgor to repledge the bond as further collateral to secure the pledgee as indorser, it was held that such pledgee could not consent to a sale of the bond without notice to the first pledgor of the sale. Such pledgor will be entitled to a credit of the actual value of the bond at the time of the sale, to be applied on his obligations held by the pledgee or subsequent pledgee, or by a holder taking the 53 L. R. A.

same after maturity. *Washburn v. Pond*, 2 Allen, 474.

And a purchase of a collateral mortgage and note by the pledgee at his sale will not cut off the claim of a party to whom was pledged the equity of redemption by the original pledgeors, the pledgees consenting, where the second pledgee had no notice of the sale. *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329.

In *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117, it was held that a sale of \$40,000 face value, commercial paper, and purchase by pledgee for \$8,800, was void where the printed notice of sale did not state upon what authority, or by virtue of what power the sale was to be made, but was signed simply, "M. Agent," and did not state the terms of sale, and nothing indicated that the sale was to be in behalf of the bank, the pledgee. The notice also was inadequate, giving only four day's time to examine the collaterals. The sale inside the storm doors of the courthouse on account of inclement weather, only three or four bidders being present, was also improper. The fact that the attorney for the pledgor was present, and said he would make his objections to the court, was held not to constitute an estoppel. The power of sale provided: "I hereby authorize said Laclede National Bank, or any of its officers, to sell said collateral at public or private sale, or otherwise at its option, without notice. . . . Said Laclede National Bank of St. Louis shall also have the right at any such sale to bid for or purchase said pledged property, or any part thereof, in its own name, and for its own use and benefit."

The pledgor does not lose his title to a note pledged where the pledgor sold the same without notice to the pledgee of the time, place, and manner of sale. *Goldsmidt v. First M. E. Church*, 25 Minn. 202. In this case the contract of pledge provided for a sale of the pledge, but did not provide how it should be sold.

And where a pledgee sold a depreciation note of the pledgor without previous demand, and applied the proceeds of the sale to the debt, the sale was held to be illegal. *Cortelyou v. Lansing*, 2 Cal. Cas. 203.

In *Garlick v. James*, 12 Johns. 146, 7 Am. Dec. 294, in one of the briefs, it was said that the pledge in *Cortelyou v. Lansing*, 2 Cal. Cas. 200, was a note delivered as security for a debt. In the other brief it was said to be a certificate of public stock.

But it is said that at least the court of chancery appeals was in error in reversing that part of the chancellor's decree which gave the petitioner, Jarnigan, a recovery for \$87.50, as the complainant did not appeal, and petitioner only appealed from it in so far as it limited his recovery to that sum. We take it that the purpose of the petitioner was to limit his appeal so that, whatever might be the ultimate result of his contention, he would at least save the sum so decreed. But we do not think he did this. The wording of the decree on this point is as follows: "From the foregoing decree so limiting his recovery the said S. C. Jarnigan prays an appeal," etc. As we construe it, this is an appeal that brings up the whole case. But, if error in this, it cannot avail appellant. The controversy is as to his ownership of this note. He claims the whole of it, and is entitled to the whole or no part of it. His appeal necessarily involves the whole case, that is, his title to the note as an entirety. He cannot shape his conten-

tion in this court so as to eliminate this question. He cannot bring up one part of a single controversy, but in appealing he opens up the whole field. If this was not so, the court of chancery appeals would have been placed in the incongruous position of holding that the petitioner acquired nothing by the purchase of the notes, and yet affirming the decree giving a part of it. It would be otherwise if there had been several subjects of litigation settled by decree in the court below. One appeal limited to one of these subjects would leave the decree operative as to the remainder. But, even if the appeal was limited, it was the duty of the court of chancery appeals, as was said in *Williams v. Burg*, 9 Lea, 456, "to dismiss this special appeal, as improperly granted, or treat it as bringing up the entire case."

That court adopted the latter alternative, and their decree reversing the decree of the chancellor and dismissing the petition of Jarnigan is affirmed.

A sale of a note by the pledgee holding the same, without giving notice to the pledgeor, will render the pledgee liable. *Evans v. Darlington*, 5 Blackf. 320. In this case the contract of pledge did not authorize a sale without notice. The note was not indorsed by the pledgeor, who retained the general ownership in the same.

And a sale of commercial paper at public sale, by the pledgee to the maker for the amount of the debt, will not relieve the maker from liability to the pledgeor, where the latter had no notice of the sale. *Zimbleman v. Veeder*, 98 Ill. 613.

The contract of pledge in this case authorized a public or private sale without notice. The court held that, had there been no special power of sale in the contract, it would have been the duty of the pledgee to have collected the note and applied the proceeds. The court also held that the pledgee could not take less than the value of the collateral from the obligor, where that debt was well secured by mortgage. The court said that in some cases the maker of commercial paper may, where the same is being sold, purchase and acquire title to such paper as when the same is made by an administrator under the order of court, or by an assignee of a bankrupt or director of creditors.

Under a pledge as collateral security of stock and notes with a right to sell if the indebtedness is not paid within a reasonable time, but with no arrangement as to the time, place, or manner of sale, a sale without notice on condition that it is to stand if the debt is not paid that day, will be a conversion. *Stevens v. Hurlbut Bank*, 31 Conn. 149. In this case the pledgee notified the pledgeor that his indebtedness must be paid that day or the collateral would be sold. He pleaded for one day's time, and in fact by the next day had discounted with the pledgee enough to pay the greater part of the indebtedness.

Where a note, left by the owner with a broker to be sold was pledged by him for a loan to himself, and on default of payment was sold by the pledgee for much less than its face, without notice, it was held that the administrator of the owner, having tendered the advance made by the pledgee, was entitled to recover from him the difference between that sum and the face of the note. Whether proper to sell the collateral not determined, because the question was not raised. *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519.

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But a pledgeor cannot maintain an action for conversion on the claim that no notice of the sale of bonds held as collateral was given to it by the pledgee, where the pledgeor (a bank) had ceased to exist, and there was no officer upon whom notice could be served. *City Bank of Racine v. Babcock*, Holmes, 180, Fed. Cas. No. 2,741. In this case the court said: "There was coupled with the power of sale a condition for the benefit of the pledgeor, that the pledgee should give thirty days' notice before the sale. The performance of this condition became impossible by the act of the party for whose benefit it was made. For years before the sale (if the bank had any corporate existence, which is at least doubtful) it certainly had no place where, or acting officers upon whom, notice could have been served."

And a pledgeor cannot complain of the sale of bonds held as collateral where he has notice to redeem, and has knowledge of the time and place of sale. *Alexandria L. & H. R. Co. v. Burke*, 22 Gratt. 254.

And a sale of bonds by the pledgee was held valid where he at the sale, properly advertised, ordered the auctioneer to continue the sale for a week on account of the apparent scarcity of bidders, but such order was immediately countermanded on the request of the bidders, and no marked dispersion of the attendance was observed. There was nothing shown that impeached the bona fide character of the sale. *White v. Rahway*, 16 Fed. 833.

### III. Judicial and execution sales.

It seems that the pledgee may obtain an order from court for the sale of collaterals and for the payment of the debt. The right to such an order does not seem to be questioned where the pledged securities have a long time to run, or where the pledgeor is a nonresident of the state.

In the following cases an order from court was obtained by the pledgee for the sale of collaterals and for the payment of the debt: *Carter v. Wake*, 46 L. J. Ch. N. S. 841, L. R. 4 Ch. Div. 605; *Porter v. Frazer*, 6 Misc. 553, 27 N. Y. Supp. 517; *Donohoe v. Gamble*, 38 Cal. 354, 99 Am. Dec. 399; *Cleghorn v. Minnesota Title Ins. & T. Co.* 57 Minn. 341, 59 N. W. 320; *Adams v. Coons*, 37 La. Ann. 305; *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65.

Where bonds were deposited as collateral it was held that the pledgee could obtain an order

of sale, also authorizing him to bid, he not conducting the sale. *Carter v. Wake*, 46 L. J. Ch. N. S. 841, L. R. 4 Ch. Div. 605. In this case the court refused to grant a foreclosure of the equity of redemption in the bonds, but granted an order of sale.

A pledgee holding a bond and mortgage, maturing in over two years, as collateral for a note due in three months, may maintain an action to foreclose his lien by a sale of the security on the maturity of the debt, although the pledgee gave no express authority for a sale. *Porter v. Frazer*, 6 Misc. 553, 27 N. Y. Supp. 517.

And the pledgee may obtain from a court of equity an order for the sale of a note held as collateral, where the maker of such note is a nonresident of that state and has no property therein subject to seizure and sale. *Donohoe v. Gamble*, 38 Cal. 354, 99 Am. Dec. 399.

So, a pledgee of commercial paper secured by mortgage not maturing for several years may obtain an order in a court of equity for the sale of the same, especially where the pledgee has become insolvent, and the pledgee would lose his lien on the collaterals by proving his claim in insolvency, under Minn. Gen. Stat. 1878, chap. 41, § 28, providing that no debts for which the creditor holds a pledge shall be paid until the creditor shall have first exhausted his security, or shall surrender and release the security to the assignee. *Cleghorn v. Minnesota Title Ins. & T. Co.* 57 Minn. 341, 59 N. W. 320.

A pledgee of commercial paper may purchase the same at a judicial sale that recognizes the pledge and is made to enforce the lien, and he will not become a trustee for the pledgee by reason of such purchase. *Adams v. Coons*, 37 La. Ann. 306.

But an assignee of collateral railroad bonds, foreclosing the same under an order of court without making his assignor, the pledgee, a party and purchasing the bonds, is liable to account to his assignor, the pledgee, for the bonds purchased, or for the proceeds or value thereof in case they have been disposed of. *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65.

A court of equity will not grant to a pledgee an order of sale of a city warrant held as collateral, as the remedy at law is adequate. The court said that the pledgee could not sell in the absence of an agreement to that effect. *Whitaker v. Charleston Gas Co.* 16 W. Va. 717.

In *Sickels v. Richardson*, 23 Hun, 559, it was said that if the pledgee of bonds held as collateral obtained judgment for the debt, and then had the bonds sold under execution, that would be a waiver of his lien under the pledge; that the rights acquired would be under the purchase at execution sale and that the pledgee could buy the bonds and pass a good title to a subsequent purchaser, even if, as between himself and the pledgee, his acts amounted to a conversion.

A debtor in execution assigned an overdue note to the sheriff as collateral. The latter sold the note on execution, and then brought suit on the same as indorsee. It was said that he could recover thereon, there being no valid defenses thereto, but that he must account to the indorser for the proceeds. *Bowman v. Wood*, 15 Mass. 534.

A pledgee obtained a judgment on his debt that also provided for the sale of a collateral note on special execution. By mistake of the clerk a general execution was issued and the note sold thereon and bid in by the pledgee. It was held that he took the note free from equities, it having been pledged before maturity, and that the purchase on a general execution did not alter or waive his lien. *Valley Nat. Bank* 53 L. R. A.

*v. Johnson Directory Co.* 80 Iowa, 772, 45 N. W. 1076; *Valley Nat. Bank v. Jackaway*, 80 Iowa, 512, 45 N. W. 881.

#### IV. Who may purchase.

The purchase by a pledgee at his own sale, or by another person for his benefit, or the purchase of the collateral by an obligor thereon, will be held invalid in the absence of a contract authorizing such a purchase. Where a contract authorizes such a purchase the courts will scrutinize the sale very closely, and it will require very little to treat the sale as invalid and the purchase as still continuing the original contract of pledge.

In the following cases it was held that a purchase by a pledgee at his own sale will be invalid, in the absence of a contract authorizing such a purchase: *Stokes v. Frazier*, 72 Ill. 428; *Hestonville, M. & F. Pass. R. Co. v. Shields*, 3 Brewst. (Pa.) 257; *Bank of Old Dominion v. Dubuque & P. R. Co.* 8 Iowa, 277, 74 Am. Dec. 302; *Steelman v. Weiskittel*, 88 Md. 519, 42 Atl. 216; *Roach v. Duckworth*, 95 N. Y. 391; *First Nat. Bank v. Hall*, 22 App. Div. 356, 47 N. Y. Supp. 1054; *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117; *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65; *Knickerbocker Trust Co. v. Penacook Mfg. Co.* 100 Fed. 814.

So where the sale is to a surety of the pledgee. *Dana v. Buckeye Coal & Coke Co.* 38 Ill. App. 371.

And where the sale is to the obligor of the collateral. *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimbleman v. Veeder*, 98 Ill. 613; *McLemore v. Hawkins*, 46 Miss. 715.

In *Stokes v. Frazier*, 72 Ill. 428, it was held that bonds held by a pledgee, who advanced money on a contract for municipal improvements, were a trust fund, and that the pledgee purchasing at his own sale would acquire no title as against the pledgee if he desired to repudiate the sale. The pledgee would retain a lien for the debt if the pledgee elected to treat the sale as void. In this case it was said that if the purchase had been made by a disinterested party, bona fide and for value, the title would have passed; and if the sale had been without authority, or for the purpose of obtaining an undue advantage, the pledgee would have been required to account for the trust property thus sold at its fair cash value.

And a bank purchasing, through a third party acting as agent, railroad bonds held by it as collateral, at a sale on notice to the debtor, will only acquire title as a pledgee, as under the original title. *Bank of Old Dominion v. Dubuque & P. R. Co.* 8 Iowa, 277, 74 Am. Dec. 302. In this case it was said that a sale to a third person would have passed the title.

A trustee of a corporation pledged his bonds of the corporation of the value of \$6,000 for its debt of \$6,000, and the pledgee sold the bonds for \$640, and obtained judgment against some of the trustees for the balance of the debt, on account of their failure to file a corporation report. The purchaser of the bonds also obtained judgment on them against another trustee in another action, and released the judgment on the payment of \$1,300. In an action to enjoin the pledgee from pursuing the trustees on his judgment, it was held that the purchaser was the agent of the pledgee (the creditor) and that the creditor was entitled to the balance of his judgment deducting the proceeds of the sale and the \$1,300. *Roach v. Duckworth*, 95 N. Y. 391. This was on the theory that the pledge was unchanged by the sale; that the pledgee was entitled to be paid his debt in full; that the agent

released the bond judgment without the consent of the pledgee, but that the pledgee would be bound by the payment made.

A purchase of a large amount of notes by a pledgee at a grossly inadequate price, where the sale is irregular, will be invalid. *Laclede Nat. Bank v. Richardson*, 156 Mo. 270, 56 S. W. 1117. In this case the contract authorized a sale without notice but a public sale of a large amount of securities was made at a great sacrifice, and the notice of sale was indefinite and insufficient.

And a pledgee purchasing bonds at an invalid sale will be liable to account, or, if the bonds have been thereafter disposed of, he will be liable for the proceeds or value thereof. *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65.

Where a pledgee sold a mortgage and bonds secured thereby as collateral, and became the purchaser at the sale, it was held, in a proceeding by him to foreclose the mortgage, that he was not a bona fide holder in the sense of being in a position to enforce the full amount of the collateral, but could only foreclose for the amount due to him on the original claim. *Knickerbocker Trust Co. v. Penacook Mfg. Co.* 100 Fed. 814.

So in *First Nat. Bank v. Werst*, 52 Iowa, 684, 3 N. W. 711, it was held that the purchaser of an accommodation note after maturity, made and held as collateral, could only enforce the same to the extent of the unpaid amount due on the original debt.

And a sale to the surety of the pledgeor of bonds held by a bank at a heavy discount, as collateral for the debt when such bonds were worth par value and the purchaser was a director and stockholder in the bank, was held only to entitle the surety to indemnity for the amount of the debt. *Dana v. Buckeye Coal & Coke Co.* 38 Ill. App. 371.

And the purchase of a pledgeor's note by the maker will be held to be a compromise, and will not relieve the maker. *Union Trust Co. v. Rigdon*, 93 Ill. 453; *Zimbleman v. Veeder*, 98 Ill. 413.

But a purchase by a pledgee under a contract authorizing such a purchase, where the sale is fair or under a statute authorizing such a purchase, will be valid. The obligor may be estopped by subsequent conduct, as by laches or by ratification, from repudiating the sale.

So, a purchase by the pledgee of bonds held as collateral, at a sale made in pursuance of an agreement authorizing a purchase by the pledgee, will be valid. *Chouteau v. Allen*, 70 Mo. 290.

And pledgees purchasing collateral bonds at public auction, in accordance with the terms of contract of pledge, are entitled to the full face value of the bonds. *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 86 Fed. 975.

So, the purchase of railroad bonds by an accommodation indorser for whose protection they are pledged will entitle him to recover the full face value of the bonds, where the contract of pledge authorizes him to purchase the same, and there is no fraud in the sale. *Wade v. Chicago, S. & St. L. R. Co.* 149 U. S. 327, 37 L. ed. 755, 13 Sup. Ct. Rep. 892.

The delay for two years by a pledgeor in attacking a sale of bonds held as collateral, and the purchase by the pledgee, will prevent the pledgeor claiming damages on account of the subsequent rise in the price of such bonds. *Lacombe v. Forstall's Sons*, 123 U. S. 562, 31 L. ed. 265, 8 Sup. Ct. Rep. 247. This action was instituted after the pledgee had resold the bonds to innocent purchasers for value, and there was no attempt to impeach the fairness of the sale. 53 L. R. A.

So, an indorsement by the pledgeor of bonds as payable to bearer, and redelivery to the pledgee after the pledgee had made a sale of the same through a broker, and purchased the same at such sale at market price through another broker, operate as a waiver of the pledgeor's right to damages on account of such sale. *Ibid.* In this case the contract authorized a sale for cash, at public or private sale at the option of the pledgee, and the sale was made in open market in the usual way.

And under a pledge authorizing a sale of bonds held as collaterals, at either public or private sale without notice, the facts that the sale was made at public sale to a party who was an attorney of the pledgee, and that subsequently the pledgee bought the bonds of the attorney, will not render the pledgee liable to the pledgeor as trustee, in the absence of fraud or agreement between the attorney and the pledgee. *Steelman v. Weiskittel*, 88 Md. 519, 42 Atl. 216.

Third parties or strangers have no right to question the validity of a sale of bonds held as collateral, where the pledgee becomes a purchaser, as authorized by the contract of pledge. The question of inadequacy of price, or that the pledgee was incapacitated from purchasing, cannot be made by a third party. *Farmers' Loan & T. Co. v. Toledo & S. H. R. Co.* 4 C. C. A. 561, 6 U. S. App. 469, 54 Fed. 759, Reversing 43 Fed. 223.

A pledgee may purchase a mortgage note at a valid sale, under Minn. Laws 1885, chap. 171, providing that the pledgee may bid in the property pledged at the sale. *Watson v. Smith*, 60 Minn. 206, 62 N. W. 265.

And at a judicial sale of commercial paper the pledgee may become the purchaser of the same. *Adams v. Coons*, 37 La. Ann. 305.

#### V. Remedy of pledgeor.

The pledgee of a collateral bond or commercial paper, selling the same to pay the debt, is guilty of a conversion if the sale is not valid. The practice in such cases seems to differ under the Code. The general practice is to treat such sale as a conversion. In some cases the action was for an accounting. A case in the Federal Supreme Court holds that as there is a complete remedy at law the remedy should not be in equity. If the sale is to the obligor on the collateral it will be treated as an unauthorized compromise of that debt, and the obligor may also be held liable for the balance of the collateral.

The pledgee will be liable to the pledgeor, for the difference between the debt and the value of collateral securities sold by him where the sale is invalid. *Cortelyou v. Lansing*, 2 Cal. Cas. 203; *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 8; *Washburn v. Pond*, 2 Allen, 474; *Barber v. Hathaway*, 47 App. Div. 165, 62 N. Y. Supp. 329; *Richardson v. Ashby*, 182 Mo. 288, 33 S. W. 306; *Read v. Lambert*, 10 Abb. N. S. 428; *Wheeler v. Newbould*, 5 Duer, 29, Affirmed 16 N. Y. 392; *Bowman v. Wood*, 15 Mass. 534; *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65; *Hazzard v. Duke*, 64 Ind. 220; *Boswell v. Thigpen*, 75 Miss. 308, 22 So. 823; *Re Litchfield Bank*, 28 Conn. 575; *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000; *Fletcher v. Dickinson*, 7 Allen, 23; *Powell v. Ong*, 92 Ill. App. 95.

A pledgee is liable to the pledgeor for the value of a note at the time of demand by the pledgeor, where the pledgee sold the note without previous demand of the pledgeor. *Cortelyou v. Lansing*, 2 Cal. Cas. 203. This was an action of assumpsit. The court held that a tender by the debtor was unnecessary where the pledgee had tortiously rendered himself unable to per-

form his part. In regard to damages the court said: "The value of the chattel, at the time of the conversion, is not, in all cases, the rule of damages in trover, if the thing be of a determinate and fixed value, it may be the rule; but where there is an uncertainty, or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at the time he calls upon the defendant to restore it, and one of the cases even carries the value down to the time of the trial."

And a pledgee of state scrip, selling more than is necessary to pay the debt, is liable to the pledgor in damages. *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 3. The damages in such a case are the difference between the surplus paid to the pledgor and the value of such securities purchased by the pledgor to replace them. The pledgor, by accepting the surplus, does not ratify the sale as to so much of the collateral, where he does not consent in advance to the sale.

The pledgee will be entitled to a credit of the actual value of the bonds at the time of sale where the sale of a bond held as collateral is invalid. *Washburn v. Pond*, 2 Allen, 474.

And the pledgor may maintain an action for the surplus between the debt and the value of mortgage bond held as collateral, where the sale is invalid. *Barber v. Hathaway*, 47 App. Div. 185, 62 N. Y. Supp. 329. In this case it was said that "a wrongful sale by a creditor of collateral security placed in his hands by the debtor is a conversion."

A pledgee selling a note without authority is liable for a conversion. *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 306. In this case the court said: "The law holds the pledgee liable as for a full conversion and appropriation of the collateral as soon as disposed of, and the pledgor's damages is the difference between the amount due on the principal debt and the value of the collateral at the time of the conversion as declared by the trial court in its finding."

And a sale of commercial paper by the pledgee to the maker of the same will render the pledgee liable to the pledgor for conversion, where the pledgee has not express power of sale. *Powell v. Ong*, 92 Ill. App. 95. In this case it is said that under an express power of sale commercial paper could not be turned over to the maker, and this would be so held whether there was any fraud or collusion, and a sale made in that way will be held to be merely a compromise.

An action on the case may be maintained where the pledgee sells bonds without authority or notice. *Read v. Lambert*, 10 Abb. Pr. N. S. 428. In this case the court said: "But if it were necessary to give to this case the name of some old form of action, with a view to the present application of rules and principles which would have been applied on a like state of facts before the Code, we should regard this as a special action on the case, brought to recover damages for a wrong. It is not the less an action on the case because a conversion of the property is charged, although that term was most commonly found in a pleading in trover. In either form of action a tortious act would have been charged by the use of that or some equivalent term."

A pledgee is liable to the pledgor for the value of notes held as collateral and sold without authority. *Wheeler v. Newbould*, 5 Duer, 29, Affirmed 16 N. Y. 392. This was an action to recover the balance due to the plaintiffs from the proceeds of certain notes which had been pledged as collateral.

And where the pledgee sold to the agent of the maker, a note held as collateral, it was held that the pledgee was liable to the pledgor for 53 L. R. A.

the difference between the face value of the collateral note and the indebtedness to the pledgee at the time of its conversion. *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149, 54 Pac. 1000; *Fletcher v. Dickinson*, 7 Allen, 23.

An action for an accounting, or for the proceeds or value, may be maintained where the sale of bonds held as collateral is invalid. *First Nat. Bank v. Ohio Falls Car & Locomotive Works*, 20 Fed. 65. In this case the court said: "They are therefore, all alike, bound, not to give credit for the amount of their respective bids, but to account for the bonds purchased, or for the proceeds or value thereof, in case they have been disposed of."

So, a pledgee, having purchased at his own sale bonds and stocks, will be required to account to the owner of the same for any surplus after the payment of the debt secured thereby. *Hestonville, M. & F. Pass. R. Co. v. Shields*, 3 Brewst. (Pa.) 257.

And a sale of notes by the pledgor without authority will render him liable to account to the pledgee the same as though he had collected the note. *Hazard v. Duke*, 64 Ind. 220. In this case it was held: "It is clear that the appellee—it being a money transaction—was entitled to interest on all money detained from him; but it is not so clear that the appellants were entitled to deduct the expenses of collecting notes which they had wrongfully sold as their own property, and converted the proceeds to their own use."

A pledgor of bank bills is entitled to credit on the debt of dividends paid on such bills where the pledgee sells the same after the pledgor has failed in the banking business. *Re Litchfield Bank*, 28 Conn. 575. In this case the court said: "We cannot assent to the principle of law laid down by the judge of the superior court, as the very ground-work of his opinion, that because the Connecticut Bank had no right (and we think it had not) to sell as merchandise in the market the \$7,000 in bills of the Litchfield Bank, held by it as collateral security for the loan of \$5,000, it follows that the Connecticut Bank is liable to account for them at their par value. . . . They are liable only for the injury which they have thereby done to the Litchfield Bank, the amount of which is just what the bank, or the receivers of the bank, have to pay to the bona fide holders of these bills."

A pledgor taking less than the face of the note from the maker of a mortgage note held as collateral will not relieve the maker from liability to the pledgor. *Zimpleman v. Veeder*, 98 Ill. 618.

In *Lacombe v. Forstall's Sons*, 123 U. S. 562, 31 L. ed. 255, 8 Sup. Ct. Rep. 247, it was said that if the pledgee should make a fraudulent sale of bonds held as collateral, the pledgeors might tender the amount due on the bonds and bring an action of replevin or sequestration, or they might bring an action in the nature of tort for conversion, in which latter case, if they succeeded, the value of the bonds would be the measure of recovery after deducting the amount due to the pledgee.

A purchaser at an invalid sale, with notice of the pledge of commercial paper, will be held to be a trustee of the pledgor. *Boswell v. Thigpen*, 75 Miss. 308, 22 So. 823. In this case the court said: "It seems to us that the subject-matter of litigation is of equity cognizance. Kelly & Mills had no authority to discount the notes of Mrs. Roby. By so doing they committed a breach of trust and confidence, and Boswell, to whom the notes were sold at a sacrifice, participated in such wrong, and, by so purchasing at a discount, he became a trustee in invitum."



But in *Lacombe v. Forstall's Sons*, 123 U. S. 562, 31 L. ed. 255, 8 Sup. Ct. Rep. 247, it was held that the remedy of a pledgee claiming an unlawful sale of bonds and purchase by the pledgee is not in equity, but by an action at law. In this case the court said: "The first objection to this relief is, that it is simply what they could recover, if they could recover at all, in an action at law. It is the damages which, on their theory, are due for an unlawful conversion of the bonds. It is so spoken of by counsel in the argument, and the authorities referred to as furnishing the measure of damages are all in cases of actions at law for what is equivalent to a conversion of property held for another's use. We see no reason why a court of equity should be resorted to for this remedy; nor is there anything in the nature of the transaction, since no actual fraud on the part of Forstall's sons is proved, why an action at law should not have been the appropriate one to recover these damages. The case is by no means a complex or difficult one. The facts are few and easily proved. The transactions are open and patent to everybody, and an action at law would afford complete and ample remedy for the wrong complained of."

The pledgee cannot maintain an action for trover where the contract provides for a sale of bonds as collateral after default, without notice, and the bonds are sold. The remedy of the pledgee after the sale of the surplus is not trover. *Loomis v. Stave*, 72 Ill. 623. In this case the pledgee claimed that the sale was invalid because made after an agreement for an extension of time; but the court held that there was no contract of extension.

And a pledgee cannot maintain an action against the pledgee in trover where the sale of a note held in pledge is valid. *Cole v. Dalziel*, 13 Ill. App. 23.

A pledgee cannot dispute the purchaser's title to mortgage bonds pledged as collateral that are sold under a foreclosure of the pledge, although the bonds bring but little at the sale, where there is no fraud. *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.* 56 Fed. 164.

And where a pledgee rehypothecated railroad bonds, and was sued by the pledgee for a conversion, treating it as a sale of the collaterals, the judgment in that case will prevent the pledgee from afterwards maintaining an action to recover any of the securities, as he will be deemed to have made an election. *Delta v. Field*, 10 App. Div. 425, 41 N. Y. Supp. 1087.

#### VI. Summary.

Bonds or commercial paper pledged as collateral may be sold by the pledgee where the contract of pledge authorizes such a sale. There is an implied contract that bonds pledged as collateral may be sold by the pledgee, but in order to make a valid sale of the same the pledgee must give the pledgee notice of the time, place, and manner. In regard to commercial paper the general rule seems to be that, in the absence of a contract, the pledgee has no right to sell the same. It seems that he may procure an order for the sale of the same from court where the paper has a long time to run, or where the pledgee is a nonresident of the state. The contract of pledge may waive notice of the time, place, and manner of sale, and authorize a sale to be made publicly or privately, and it may authorize the pledgee to purchase at the sale. The pledgee cannot become a purchaser in the absence of a contract to that effect, unless the sale is made by an order of court. If the sale is invalid the pledgee will be chargeable as for a conversion, and will be required to account to the pledgee for the value of the securities so sold. The pledgee may be estopped from attacking the sale by laches, or by subsequent conduct. In all cases where a sale is authorized, demand of the pledgee, and notice of the time, place, and manner of sale must be given unless expressly waived. Long delay in enforcing the rights of the pledgee, especially where the debt is small and the securities are large, may result, as in *MOSES V. GRAINGER*, in rendering a sale invalid, notwithstanding a contract authorizing such sale. I. T.

### NEW YORK COURT OF APPEALS.

J. Frederick ACKERMAN, *Appt.*,

*v.*

R. Fulton RUBENS, *Respnt.*

(167 N. Y. 405)

**The purchase by the vendor, at a public auction sale, of a yacht, made after the vendee has refused to comply with his contract to purchase, will not prevent the price at which the property was struck off from being taken as the basis for assessing the damages for the breach, where the sale was duly advertised and made upon notice to the vendee.**

(*Haight, Gray, and Werner, JJ., dissent.*)

(June 11, 1901.)

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County

NOTE.—As to right of creditor to purchase property of debtor at judicial sale to satisfy debt, see, in this series, *Corinth v. Locke* (Vt.) 11 L. R. A. 207.

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in his favor for nominal damages only in an action brought to recover for breach of contract to purchase a yacht. *Reversed.*

Statement by Vann, J.:

On the 28th of July, 1897, at the city of New York, the plaintiff sold his yacht *Iola* to the defendant for the sum of \$2,250, by an executory contract which impliedly provided that the title should not pass until the purchase price should have been fully paid. The defendant refused to complete his purchase, whereupon the plaintiff gave him written notice that he should sell the yacht "either by public sale at auction, or private negotiation, whichever in my judgment will result in obtaining the most favorable price, and in the event of any deficiency in the sum so obtained and the contract price as agreed upon as per contract of July 28th, 1897, namely, \$2,250, I shall hold you for such deficiency." The defendant paid no attention to this notice, and had no further communication with the plaintiff at any time on the subject of selling the yacht. The plaintiff promptly placed the vessel in the hands of an experienced

yachtsman for sale, but after due effort no sale could be made, although she was advertised in a prominent New York daily newspaper every Sunday during the months of August and September. Thereupon the plaintiff placed her in the hands of a public auctioneer for sale at auction, and on the 29th of September gave the defendant personal notice in writing that she would be sold at auction on the 6th of October, 1897, at 1 o'clock P. M., at the store of the auctioneer, No. 29 Burling Slip, in the city of New York. In the advertisement of the auctioneer she was fully and accurately described, and notice was given that she could be "seen at Atlantic Yacht Club Basin, foot of 55th street, Brooklyn." At the time and place named she was sold at auction in the usual way to an agent of the plaintiff for \$1,100, which was the highest, but not the only, bid, as a stranger had run her up to \$1,050. The expenses of the sale were \$90, of which \$40 was for advertising, handbills, and postage, and \$50 was for the services of the auctioneer. The plaintiff credited the net proceeds of the sale upon the purchase price, and sued the defendant for the balance, amounting to \$1,240. The defendant, in his answer, pleaded a general denial, and also that he was induced to purchase the yacht by certain fraudulent representations made by the plaintiff as to her condition, but on the trial he gave no evidence in support of that allegation or any other. When the plaintiff rested, after proving the foregoing facts, the trial court, upon motion of the defendant, directed a verdict for the plaintiff for nominal damages only, and an exception was duly taken. The jury rendered a verdict for six cents, and, the judgment entered accordingly having been affirmed by the appellate division, the plaintiff came here.

**Mr. Charles D. Ridgway**, for appellant:

When the defendant refused to carry out his contract of purchase, the plaintiff did not become the agent of the defendant in making a resale. The only object and purpose of the resale, under the facts in the case, were to ascertain the amount of damages the plaintiff sustained by the defendant's breach. After the breach there was no relation of trust or agency existing between the plaintiff and the defendant, because the latter had no interest in the yacht without offering to fulfil his contract.

Even in the case where the pledgee buys the pledge in at a sale, the sale is not void, but only voidable.

*Roach v. Duckworth*, 95 N. Y. 391.

The only duty resting upon the plaintiff was to sell within a reasonable time, to exercise good faith to effect a sale at the best price he could obtain, to follow any proper instructions the defendant might give as to the time and manner in which the sale should be made, and to give credit on the contract for the amount received.

*Moore v. Potter*, 155 N. Y. 487, 50 N. E. 271.

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If the sale would have been a legal measure of the damages had the yacht been struck down to Mr. Howell, it was no less so when struck down to Mr. Tower at an advance of \$50, because the plaintiff owed no other duty, in kind, to the defendant on the sale of the yacht to himself than if it had been struck down to Mr. Howell, viz., that he should act in good faith.

*Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271.

It is not necessary that the resale should be made at the earliest possible moment after the default is known, even though the article be falling in market.

*Smith v. Pettie*, 70 N. Y. 13; *Tilt v. La Salle Silk Mfg. Co.* 5 Daly, 20; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Saladin v. Mitchell*, 45 Ill. 77.

**Mr. Henry J. McCormick**, with **Mr. Percival S. Jones**, for respondent:

A vendor cannot sell a thing to himself. It is impossible to be vendor and vendee at one and the same time.

*Benjamin, Sales*, 6th ed. pp. 1, 2; 2 Kent, Com. 13th ed. pp. 262-468; 21 Am. & Eng. Enc. Law, p. 446; *Utica Ins. Co. v. Toledo Ins. Co.* 17 Barb. 132; *Conkey v. Bond*, 34 Barb. 282; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 403, 404; *Gardner v. Ogden*, 22 N. Y. 347, 78 Am. Dec. 192; *Schermerhorn v. Talman*, 14 N. Y. 117; *Barker v. Marine Ins. Co.* 2 Mason, 369, Fed. Cas. No. 992; *Church v. Marine Ins. Co.* 1 Mason, 341, Fed. Cas. No. 2,711.

If the alleged auction was held on the theory that the plaintiff vendor was selling as the agent and for the account of the defendant vendee, the plaintiff under the law was debarred from purchasing, and the pretended sale was a fraud.

*Church v. Marine Ins. Co.* 1 Mason, 341, Fed. Cas. No. 2,711; *Van Epps v. Van Epps*, 9 Paige, 241; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Utica Ins. Co. v. Toledo Ins. Co.* 17 Barb. 132; *Conkey v. Bond*, 34 Barb. 286; *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Ritt v. Washington Marine & F. Ins. Co.* 41 Barb. 356; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Linseed & Sperm Oil Co. v. Kearney*, 14 La. Ann. 352; *Roach v. Duckworth*, 95 N. Y. 401.

The vendor of property has the choice of three remedies, when the vendee has declined to take it, to indemnify himself against loss:

(1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property and recover the difference between the contract price and the price obtained on a resale; or (3) he may keep the property as his own, and recover the difference between the market price and the contract price.

*Moore v. Potter*, 155 N. Y. 486, 50 N. E. 271; *Bryan v. Baldwin*, 52 N. Y. 232; *Hawley v. Cramer*, 4 Cow. 734.

These remedies are not concurrent. The vendor has the right to elect to which he will resort, and, once the election is made it is final. He cannot resort to either of the other remedies.

What the plaintiff sought to do was by

going through a form of sale to himself, to keep the yacht, and to recover, not the difference between the contract price and the market price, but the difference between the contract price and an arbitrary amount fixed by himself, which he insists is the measure of his damages, although he still retained the boat. If the theory is correct, then, if the yacht was bought in by the plaintiff for a dollar or other nominal sum, he would be entitled to recover the difference between the nominal sum and the contract price, and still retain the boat.

A party cannot elect one remedy and claim that his measure of damages is under another.

*Saucy v. Dean*, 114 N. Y. 469, 21 N. E. 1012; *Gray v. Central R. Co.* 82 Hun, 523, 31 N. Y. Supp. 704; *Earle v. Robinson*, 12 Misc. 536, 33 N. Y. Supp. 606.

**Vann, J.**, delivered the opinion of the court:

When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him, and sue for the entire purchase price; or he may keep the property as his own, and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and, after crediting the net amount received, sue for the balance of the purchase money. *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271; *Dustan v. McAndrew*, 44 N. Y. 72. While the courts below recognized this rule, they did not apply it; for they held that the sale at auction was no sale at all, because a man cannot sell to himself. This would be true of an attempt to make a private sale to one's self, but it is not true of a sale at public auction, fairly conducted by a licensed auctioneer, and made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public, and personal notice to the vendee, when the real purpose is to ascertain the value of the property. The law is satisfied with a fair sale, made in good faith, according to established business methods, with no attempt to take advantage of the vendee. Such, as the jury might have found, was the sale under consideration. The primary object of the sale was not to pass title from the vendor, but to lessen the loss of the vendee. The subject of the sale had no market value, and the amount for which it could be sold depended largely upon taste and fancy. A public competitive sale by outcry to the highest bidder, duly advertised and made upon notice to the vendee, is a safer method of measuring the damages than a sale by private negotiation, which has been held sufficient. *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415. A fair public sale, in the absence of other evidence, is competent evidence of value. The plaintiff did not conduct the sale himself, but placed the yacht in the hands of a public auctioneer for sale, without reservation, on account of whom it might concern. While the auc-

tioneer was his agent, he could not lawfully control him so as to prevent an honest sale. The defendant had notice and an opportunity to protect himself, yet he asked for no postponement, made no request, gave no instructions, and did not even appear at the sale. If the plaintiff's agent had refrained from bidding, the property would have gone to a stranger for a less sum than it finally brought, and yet in that event even, according to the defendant's theory, the sale would have been valid. The fact that the plaintiff outbid all competitors did not render the sale invalid; for he had a right to bid, provided he took no advantage by trying to prevent others from bidding, or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified; but the mere fact that he was the highest bidder at a public sale, the fairness of which is not questioned in any other respect, did not warrant the direction for nominal damages only. The object of the sale was to measure the damages caused by the default of the defendant, and they were diminished, instead of being increased, by the action of the plaintiff.

We forbear further discussion, because the question is no longer open in this court, as it was involved in a case recently decided by us upon careful consideration after full discussion by counsel. *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271. In that case, as in this, the property was sold at auction to a representative of the vendor, and the point was distinctly made on the argument before us that as the vendor was the real purchaser, "the sale was colorable only, and absolutely without effect upon the rights of the parties." While we did not discuss the question in our opinion, it was necessarily involved, was passed upon in consultation, and decided. Both upon principle and authority we think that the amount for which the yacht was struck off to the vendor at an auction sale fairly conducted, upon notice to the vendee, with no suspicion of fraud or undue advantage, was lawful evidence of the value of the yacht, and presented a case for the consideration of the jury.

*The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.*

**Parker, Ch. J., and Bartlett and Martin, JJ.**, concur.

**Haight, J.**, dissenting:

The rule of damages for a breach by the buyer of a contract for the sale of personal property is well settled. The seller may store the property for the buyer, and sue for the purchase price; or may sell the property as agent for the vendee, and recover any deficiency resulting; or may keep the

property as his own, and recover the difference between the contract price and the market value at the time and place of delivery. If he sells as agent, he may sell either at public or private sale; but it must be a sale made in good faith, and in such manner as to produce most nearly the full value of the property. Selling as agent, he cannot sell to himself. Selling involves contracting, and a person cannot contract with himself and bind others thereby. If he could sell to himself publicly, he could privately, and thus be able to perpetrate a fraud or an injustice which might be difficult to detect or prove. *Van Broeklen v. Smealie*, 140 N. Y. 70, 75, 35 N. E. 415; *Pollen v. Le Roy*, 30 N. Y. 549, 557; *Dustan v. McAndrew*, 44 N. Y. 78; *Hayden v. Demets*, 53 N. Y. 426; *Bain v. Brown*, 56 N. Y. 285. I fully concur in all that was said in the opinion in the case of *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, but I do not understand that the question here under consideration was raised or involved in that case. The sale then under consideration was not made to the seller, but to another person. It is true, the answer charged collusion, but the evidence upon that issue was not sufficient to carry the question to the jury. The sole ground upon which the general term reversed the judgment entered upon a verdict directed in favor of the plaintiff was that the sale was made after a receiver of the defendant had been appointed, and that such sale could not be made without the consent of the court appointing the receiver. The question considered and determined in that case was whether property contracted to be sold, which the purchaser had refused to take, passed to and vested in the receiver of the purchaser, so that it could not be sold without leave of the court. Upon this question the rule permitting the sale of personal property by the seller as the agent of the purchaser for the purpose of recovering and determining the damages of the seller was considered; and it was held that the power to sell, as agent, was limited in meaning, and did not operate to vest the title of the property in the receiver in such a sense as to prohibit his right to sell. In this case the sale was made by the seller to himself. It was made through the agency of an auctioneer, it is true; but the auctioneer was his agent, and represented him in the transaction. I think the judgment should be affirmed.

**Gray and Werner, JJ., concur.**

Edward S. STOKES, Receiver, etc., of Hoffman House, *Resp't.*,

v.

HOFFMAN HOUSE OF NEW YORK, *Appt.*

(167 N. Y. 554.)

**1. A purchaser at foreclosure sale of a**

NOTE.—For earlier cases in this series as to liability of receiver for rent of leasehold, see *Bell v. American Protective League (Mass.)* 28 L. R. A. 452; and *Tradesman Pub. Co. v. Knoxville Car-Wheel Co. (Tenn.)* 31 L. R. A. 593. 53 L. R. A.

leasehold, by the terms of which it is to obtain the property free from the lien of unpaid rent, cannot set up the amount which it has been compelled to pay on account of such rent, as a counterclaim in an action against it by the receiver to recover advancements alleged to have been made on its behalf.

**2. A common-law receiver of leasehold property is not liable for rents accruing while he is in possession of the property, since he acquires no title to the property, but mere possession as an officer of the court.**

**3. A common-law receiver of leasehold property who, after a judicial sale of the property and the placing of the purchaser in possession, pays accrued rent, thereby wrongfully applies a fund in court for the benefit of the purchaser, which the latter may be compelled to repay to him in an action at law in which the rights of all parties cannot be adjusted, although by the terms of sale the purchaser was to receive the property free from claims for such rent.**

**4. The remedy of a purchaser at a foreclosure sale of a leasehold, by the terms of which he is to receive the property free from unpaid rent, who is compelled to pay such rent, is by application in the foreclosure suit, and not by independent litigation with the receiver at law.**

**5. A common-law receiver who takes possession of a hotel operated under a lease is not required to pay the rent by a clause in the order appointing him authorizing him to take possession of and carry on the hotel, and to do any and all other things which may be necessary or proper to be done in the general and ordinary conduct of similar places of business.**

(*Haight, O'Brien, and Landon, JJ., dissent.*)

(May 14, 1901.)

**A** PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment entered in the office of the Clerk of New York County upon a report of the referee in favor of plaintiff in an action brought to recover money alleged to have been paid by plaintiff to defendant's use. *Affirmed.*

**Statement by Cullen, J.:**

An action having been commenced by the Farmers' Loan & Trust Company, as trustee, against the Hoffman House, a New Jersey corporation, to foreclose a mortgage covering leases and chattels belonging to the defendant therein, and which were in the possession of this defendant, and with and upon which it was carrying on a hotel and café business in the city of New York, on the 21st of December, 1893, an order was made appointing Edward S. Stokes receiver of the property covered by the mortgage, to foreclose which the action was brought. The said Edward S. Stokes, as receiver, entered into possession of the property mentioned in said foreclosure action, and continued to conduct the business theretofore carried on upon and with said property until the 25th of May, 1894. On the 24th of January, 1894, a judgment of foreclosure and sale was entered, appointing a referee to sell. It ap-

pears that there were outstanding 425 bonds, of \$1,000 each, which were secured by the mortgage, to foreclose which the action was brought. Three hundred of these bonds were in the possession and under the control of Edward S. Stokes. The other 125 bonds were in the possession of one William E. D. Stokes, claiming to hold them as collateral security for an indebtedness of said Edward S. Stokes; the latter, however, claiming that the said W. E. D. Stokes had converted them to his own use. On or about the 3d of February, 1894, the present corporation was formed by said Edward S. Stokes, James D. Leary, and E. V. Foote, pursuant to the statute of New York known as the "Business Corporations Law," with a capital of \$200,000. On the 2d of March, 1894, that part of the mortgaged property known as the Hoffman House" was duly sold by auction by the referee, and purchased for the defendant herein for the sum of \$120,000. The terms of sale provided that the property was to be subject to all liens of every kind and description, and that unpaid rent, if any, would be allowed to the purchaser. Said terms of sale also provided that the purchaser, upon payment of the sum bid, was to receive the property free and clear from unpaid rent then due, or taxes or counsel fees, or other expenses arising from the receivership. All such claims, if assumed by the purchaser, were to be deducted from the price the property brought. On the 12th of May, 1894, there was a meeting of the incorporators of the defendant, at which by-laws were adopted. Edward S. Stokes was elected president; Mr. Foote, treasurer; and Mr. Cornish, secretary. Thereupon a resolution was adopted confirming the purchase made on March 2, 1894, at said foreclosure sale. Of the amount of the defendant's bid, \$5,000 having been paid in cash, and said Edward S. Stokes having delivered to the defendant herein the 300 bonds controlled by him in order that they might be used in completing the purchase, and the state of the case with reference to the other 125 bonds having been reported to the court, on the 15th of May, 1894, an order was entered whereby the referee was directed to deliver to the purchaser of the mortgaged property sold by him, as above mentioned, conveyances and transfers thereof, upon receiving in cash the sum of \$5,000 in addition to the sum of \$5,000 in cash theretofore paid to him, and also 300 of the bonds of the defendant to secure which the mortgage mentioned in the complaint in the action was given, and also a bond in the penal sum of \$35,000, with sufficient surety, conditioned to pay to said referee upon demand the cash value of the remaining mortgage bonds of said defendant corporation as soon as their value could be ascertained, and any further sum or sums which might be necessary to be paid under the decree in the action. On the 18th of May, 1894, a meeting of the directors of the New Hoffman House Corporation was held, at which it was reported that arrangements had been made for the trans-

fer of the property to the corporation on filing the bond directed by the court as aforesaid; and the officers of the corporation were authorized to issue the entire stock of the company (2,000 shares) to Edward S. Stokes, save 5 shares issued to Mr. Foote, and 5 shares issued to Mr. Leary. On the 25th of May, 1894, another meeting of the directors was held, at which a resolution was passed for the execution of the \$35,000 bond, and this bond was accordingly executed. Thereafter and upon the same day a deed was delivered by the referee to the New York corporation of the Hoffman House property so purchased by it, and said corporation went into possession. After this date, however, and until the latter part of June, 1894, the receiver kept the accounts of the receipts and disbursements of the New Hoffman House Corporation in his own name, and deposited the receipts in his own bank, drawing checks and making cash disbursements therefrom on behalf of the new corporation. On the 29th of June, 1894, said receiver, finding an apparent balance of \$9,282.42 in his account, gave a check for the sum to the New Hoffman House Corporation, and closed his receivership bank account, and thereafter all transactions were had through the bank account of the Hoffman House of New York. During all the time that the said receiver was in possession of the leasehold property known as the "Hoffman House" he paid no rent to the owners of the leases, and no demand was made of him by the landlord for the possession of the property. The landlord insisted, however, that in the terms of sale under which the said leases were to be sold in the foreclosure action he should be protected so that the purchaser at said foreclosure sale might be required to pay the rent which had accrued from the 1st of December, 1893. Accordingly the terms of sale were submitted to the landlord, and he was assured by Edward S. Stokes, one of the incorporators of the new corporation, the proposed purchaser, that the purchaser, upon going into possession of the property, would pay all the back rents. As soon as the Hoffman House Corporation went into possession, the landlord made a demand for the payment of the rent, and threatened that, unless a substantial payment was made on account thereof, he would take proceedings to recover the possession of the leased property. Thereupon the said Stokes, as receiver, out of the moneys in his hands as receiver, wrongfully, as is claimed by the plaintiff, paid to the landlord the sum of \$10,000 on account of rent; and subsequently the defendant paid all the balance of the rents, amounting to many thousands of dollars. In January, 1898, after Edward S. Stokes had sold out his interest in the defendant corporation, he, as receiver, commenced this action, claiming the right to recover various items among which was the sum of \$10,000 paid by him, as above stated, to the landlord for rents. The action was referred to a referee, who has reported in favor of the plaintiff.

and the judgment entered thereon has been affirmed by the appellate division.

**Mr. David McClure, with Mr. John H. Rogan, for appellant:**

The receiver was obligated to pay the rent accruing during the term of his receivership. The payment of the rent was not an extraordinary expenditure. The mortgaged property was leasehold; its preservation depended upon the payment of the rent. If the property was to be saved and sold for the benefit of the bondholders, the rent had to be paid, and this was quite a usual and ordinary expenditure.

It should be presumed that the court has directed its officer to do what a high-minded man would do, that is, pay the rent of the premises occupied by him, during the period of his occupancy.

*Gillig v. Grant*, 23 App. Div. 600, 47 N. Y. Supp. 78.

When a chancery receiver takes possession of leased property, and continues in possession for a reasonable time, he becomes liable upon the lease.

*Woodruff v. Erie R. Co.* 93 N. Y. 609; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197, 25 N. E. 332; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 34 Fed. 259.

The receiver, by taking possession of leased premises and retaining possession, makes himself personally liable for the rent.

*People v. Universal L. Ins. Co.* 30 Hun, 142; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 299, 37 L. ed. 1088, 14 Sup. Ct. Rep. 86; *Clyde v. Richmond & D. R. Co.* 63 Fed. 21; *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. 861; *Martin v. Black*, 9 Paige, 644, 38 Am. Dec. 574.

**Messrs. Carter, Hughes, & Dwight, for respondent:**

The receiver was under no legal obligation to pay the rents. He was not a statutory receiver vested with the title, but a common-law receiver, a mere custodian of the leasehold property, with the duty of administering it, subject to the direction of the court. His possession was the possession of the court, and not otherwise. He was under no contractual liability to the lessors, and, as he was not assignee of the term, he did not become liable because of any privity of estate.

*Stewart v. Long Island R. Co.* 102 N. Y. 607, 55 Am. Rep. 844, 8 N. E. 200; *Walton v. Stafford*, 14 App. Div. 312, 43 N. Y. Supp. 1049; *Re Otis*, 101 N. Y. 580, 5 N. E. 571; *Skip v. Harwood*, 3 Atk. 564; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013; *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Gaither v. Stockbridge*, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; *Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60; *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478, 5 N. E. 316; *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447.

The distinction between the two classes of receivers is pointed out in an unvarying line of authorities in this state.  
63 L. R. A.

*Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60; *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478, 5 N. E. 316; *Decker v. Gardner*, 124 N. Y. 338, 11 L. R. A. 480, 26 N. E. 814; *Davis v. Gray*, 16 Wall. 217, 21 L. ed. 452; *Re Otis*, 101 N. Y. 580, 5 N. E. 571; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. 280.

The order appointing the plaintiff receiver did not authorize, and certainly did not bind, him to pay the rents.

*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86.

The powers of a chancery receiver are strictly limited, and he has no authority to exceed the limits prescribed by the terms of his appointment. If it should appear that other payments than those expressly authorized are necessary or equitable, it is his duty to bring the matter to the attention of the court; and in advance of its instructions and the determination of the court that such amounts should be paid, there is neither authority nor obligation on the part of the receiver to pay them.

*Atty. Gen. v. Vigor*, 11 Ves. Jr. 563; *Waters v. Taylor*, 15 Ves. Jr. 25; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438; *Wyckoff v. Scofield*, 103 N. Y. 630, 9 N. E. 498; *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814; *Hooper v. Winston*, 24 Ill. 353.

The lessors were at liberty to intervene and ask the court to require its receiver to pay rent, or to be allowed to take possession of the property.

*Noc v. Gibson*, 7 Paige, 513.

While the receiver was not liable for the rents, the leasehold property was in effect charged with their payment, and the defendant could not retain the possession and enjoyment of the property it had purchased unless the arrears were paid.

*Catlin v. Grissler*, 57 N. Y. 363.

The fact that an agreement was made, on behalf of the defendant, to pay the back rents after its purchase was completed, in consideration that the lessors would not re-enter, is not open to dispute. This agreement was adopted by, and bound, the defendant.

*Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; *Oakes v. Cattaraugus Water Co.* 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461.

It was not necessary that the assumption of the arrears of rent, or the adoption of the agreement to that effect, should be by formal resolution of the board of directors.

*Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552; *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 297, 11 Am. Dec. 170; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3 L. ed. 351; *Eureka Clothes Wringing Mach. Co. v. Bailey Washing &*

*Wringing Mach. Co.* 11 Wall. 488, 20 L. ed. 209; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Dunn v. St. Andrews Church*, 14 Johns. 118; *Fifth Nat. Bank v. Navassa Phosphate Co.* 119 N. Y. 256, 23 N. E. 737; *Martin v. Niagara Falls Paper Mfg. Co.* 122 N. Y. 165, 25 N. E. 303; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 621, 43 N. E. 72; *Perry v. Council Bluffs City Waterworks Co.* 67 Hun, 456, 22 N. Y. Supp. 151.

Nor is it important that the agreement to assume the arrears of rent was not expressed in the conveyance to the defendant.

*Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743.

Cullen, J., delivered the opinion of the court:

The foregoing statement of the case is taken from the opinion of the presiding justice of the appellate division, and adopted by us. The principal questions argued on this appeal relate to the award made by the referee to the plaintiff of the sum of \$10,000 paid by the receiver to the landlord on account of the rent after the defendant entered into possession of the leasehold premises, and to the refusal of the referee to allow the defendant its counterclaim for some \$19,000 paid by it on account of the rents accruing during the period of occupation by the receiver. The appellate division was unanimous in its approval of the disposition made by the referee of the defendant's counterclaim; but his ruling, that the plaintiff was entitled to recover the payment made by him on account of rent, was affirmed by a divided court. The judgment in the foreclosure action directed that the mortgaged property be sold "subject to all liens of every kind and description." The terms of sale under which the property was sold by the referee, after enumerating the various leases under which the property was held, stated, "Unpaid rent, if any, will be allowed to the purchaser." An addendum contained the following provisions: "The purchaser, upon payment of the sum bid, shall receive the property free and clear from unpaid rent now due, or taxes or counsel fees or other expenses arising from the receivership. All such claims, if assumed by the purchaser, shall be deducted from the price the property brings." It is claimed by the counsel for the respondent that the defendant, after the purchase at the foreclosure sale, assumed the payment of the back rents, and that this fact materially affects the rights of the parties in this litigation. We are of opinion that no agreement to assume such rents was established by the evidence, and our disposition of the case will proceed on that theory. But, though the defendant did not personally assume the back rent, it necessarily took the leasehold premises subject to the burdens of such rent, and under the hazard of being dispossessed by the landlord and losing the demised term in case the rent was not paid. It is clear that under the terms of the sale the purchaser was to receive the leaseholds free from

any back rent, or to have the amount of the back rent allowed him out of the purchase money, which, in effect, was the same thing. If the purchase had been made by a third party, paying money for the property, the questions before us would be without practical importance, for in one or another way the purchaser would be entitled to reimbursement out of the funds realized by the foreclosure suit, whether by sale or receivership, for all unpaid rent accruing before the time of sale; and we do not say that the fact that the defendant purchased in bonds in any manner affects the rights of the parties. But this consideration does not control the disposition of the case. This action is at law by the receiver to recover money paid by him for the defendant's account. The counterclaim is for money claimed to have been paid by defendant for the plaintiffs' use on the debt for which he was primarily liable. We think that the decision of the action must proceed on the same lines as if the defendant had not purchased at the foreclosure sale, and must follow the determination of the question whether the plaintiff was legally liable for the rent accruing while he was in possession of the leasehold premises. When the defendant bought at the foreclosure sale, it made no contract with the receiver, so that its right to indemnity for the accrued rent which it was compelled to pay constituted no legal claim against him. Indeed, the purchaser made no contract with the referee. "The sale is made by the court. . . . The purchaser could not sue the court, and it could not sue him upon his contract. . . . By bidding he subjects himself to the jurisdiction of the court, and, in effect, becomes a party to the proceeding; and he may be compelled to complete his purchase by an order of the court, and by its process for contempt, if necessary." *Andrews v. O'Mahoney*, 112 N. Y. 567, 20 N. E. 374. See *Miller v. Collyer*, 36 Barb. 250. A purchaser's remedy must therefore necessarily be by application in the action in which the sale was had, and, as his claim could not be the subject of an affirmative suit on his part, so he is equally precluded from setting it up as a counterclaim in a suit brought against him.

To succeed in its appeal, the defendant must, therefore, establish the proposition that the accruing rent constituted a legal liability against the receiver. We think that this is not the law. The plaintiff was a chancery, or, as it is sometimes called, a common-law, receiver, not a statutory one, who, as in case of the sequestration of an insolvent corporation, is, in effect, a mere assignee. In *Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60, it was held: "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends, while the case remains undecided. The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made."

The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties, as they may be determined by the judgment in the action.

The appointment of the plaintiff as receiver, therefore, wrought no change in the title of the property." This statement of the rights and powers of chancery receivers, and of the character of their possession and title, or rather, lack of title, and the distinction between such receivers and statutory receivers, has been repeated by this court in *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 483, 5 N. E. 316, and in *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480, 26 N. E. 814. It was applied in the case of the committee of a lunatic in *Re Otis*, 101 N. Y. 580, 5 N. E. 571. It was there held that the committee did not, by occupation of the premises, become liable as assignee of the term. Judge Andrews, writing the opinion of the court, said: "But the committee of a lunatic takes no title to the real or personal estate of a lunatic. He is a mere bailiff to take charge of the property of the lunatic, and to administer it subject to the direction of the court. His possession is the possession of the court." This statement, *mutatis mutandis*, is exactly true of a chancery receiver. Originally neither the receiver nor the committee could sue in his own name, but this power was granted to both by the same statute (chap. 112, Laws 1845). In the *Otis Case*, Judge Andrews wrote: "It is well settled that a receiver, or an assignee in bankruptcy, or an assignee for the benefit of creditors, if he elects to accept a lease belonging to the debtor or assignor, becomes, by such election, assignee of the lease, and personally liable on the covenant to pay rent, of which liability he can only discharge himself by an assignment or surrender." It is plain, however, that in this reference is made only to statutory receivers; for the distinguished judge who wrote in the *Otis Case* also wrote the opinions in the *Keeney Case* and in the *United States Trust Co. Case*, the latter being decided at the same term of court as the *Otis Case*. This view of the effect of the appointment of a chancery receiver has been adopted by the Supreme Court of the United States. *Davis v. Gray*, 16 Wall. 218, 21 L. ed. 452; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787. If it be true that a chancery receiver takes no title to a leasehold estate, but mere possession as an officer of the court, we do not see how any privity of estate can be created between him and the lessor by which he can become liable as assignee of the term upon the covenant to pay rent.

It is contended, however, that whatever be the force of the foregoing argument, and whatever the true character of his possession, it is settled by the decided cases that a chancery receiver is liable for the payment of rent accruing during his occupation. Before considering the cases cited in support of this assertion, it is necessary that we

should have in mind the clear distinction between the legal liability of the receiver, by virtue of his appointment as such and his possession under his appointment, and the equitable claim which a lessor may have for the application of the fund in court towards the satisfaction of the rent. The first, if it exists, is absolute. The second is qualified, and may be destroyed by superior equities of other parties. It is apparent that the claim of the lessor for rent, when solely an equitable one, must be established in the action in which a receiver is appointed; for in that form alone can parties having other equities be heard, and the superiority of equity among conflicting claimants be determined. Statements concerning the liability of the receiver to pay rent when made in foreclosure suits are not necessarily to be interpreted as laying down a rule of legal liability, but, rather, as asserting the equitable rights of the lessor. Three cases in this court are relied on by the counsel for the appellant. The first is that of *Woodruff v. Erie R. Co.* 93 N. Y. 609, in which it was held that a receiver must pay the rent of a leased railroad. It is to be first observed that the receiver in that case had been appointed such on a sequestration of the corporation as well as in the foreclosure suit. He was therefore a statutory receiver. But, beyond this, an examination of the record shows that in the first instance the plaintiff made his application in the foreclosure suit to compel the receiver to pay the rent. After consideration the court deemed it wiser that the plaintiff should proceed by suit, rather than by summary application, and directed him to bring an action. The action brought in pursuance of this direction was not at law, but in equity; and to it were made parties, not only the receiver, but the plaintiff and defendants in the action in which the receiver had been appointed. It was therefore entirely practicable to determine in that action the equities of all parties. The next case is that of *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197, 25 N. E. 332, in which were involved the same receivership and the same lease as in the preceding case. But the decision related to the liability of a corporation which had purchased on foreclosure and become assignee of the term. The third is that of *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. 861, in which a receiver of leasehold premises was held liable in an action at law for default during his occupation in a covenant to pay rent and taxes. The receiver in that case was a chancery receiver. There may be a question as to whether, under the terms of the order appointing him, he was directed to pay the rent. However this may be, the decision of this court seems to have proceeded on the ground that the title to the demised premises vested in the receiver. I am frank to say that very probably the point presented on this appeal was involved in the decision of that case. From an examination of the briefs of counsel, it appears that no question was made that a chancery receiver did not take title by his



appointment and possession; but it was sought to relieve the defendant on the ground that he was appointed receiver only of the rents and profits, and not of the property itself. We think that case should not control us now.

Much stress is also laid upon the case of *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86. It is there said: "If he elect to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent." This statement was made on an application in the foreclosure suit in which the receiver was appointed. It may well be, therefore, that the court intended to assert only what would constitute an equitable claim of the lessor upon the funds in court. As a matter of fact, the lessors were not allowed the rental of the whole period during which the receiver was in possession of the leased railroad, but only for rent accruing subsequent to an order made by the court, on an application of the lessors, that the receiver either pay rent or surrender the road. If the right of the lessor to rent depended upon privity of estate between the receiver and the lessor, it is not entirely clear how this result was reached. That the case was really disposed of on equitable considerations appears from the conclusion of the opinion: "As bearing upon the general equities of the case, it may be remarked that, while the proceedings in the foreclosure of the Wabash mortgage did undoubtedly result in the detention of the road from its lawful owners for about fifteen months without the payment of the agreed rent, the road during this time earned nothing beyond its operating expenses, and there is nothing to indicate that it would have done so in the hands of its owners, so that in fact they lost nothing. Indeed, it is scarcely credible that they would have delayed so long to demand possession of the road, if, in their opinion, it could have been operated at a profit."

We also agree with the learned court below that the terms of the order appointing the plaintiff receiver did not require him to pay the accrued rent. Nor can that payment be considered as having been made under the stress of necessity, in order to save the mortgaged property. At the time of the payment the sale had been effected, and the purchaser was in possession. Though it did not assume the rent in arrears, the defendant was required to pay such rent to save its lease from forfeiture. The act of the receiver was therefore an appropriation of a fund in court without the authority of the court, and must be considered to have been so appropriated for the defendant's benefit. It follows that the judgment was correct, and should be affirmed.

We do not wish our decision to be misinterpreted. We have discussed the rights of the parties from a technical point of view, 53 L. R. A.

regardless of the equitable claims of the defendant, simply because we deem that it would set a very bad precedent to attempt to adjust those equities in this action, in which all the facts determining such equities are not, and cannot be, before us. While we have held that no legal liability for the payment of rent was imposed upon the receiver, either by virtue of his appointment and possession as such, or by the terms of the order appointing him, we have not decided that the lessors had not a most equitable claim to have all the net profits of the operation of the hotel, after the payment of its running expenses, applied to the payment of the rent of the premises, the use of which by the receiver produced the fund in court. In *Re Otis*, Judge Andrews said: "If the leased premises are occupied by the committee, and such occupation is to the advantage of the estate, as where it was necessary in order to carry on or close up the business of the lunatic, the rent accruing during such occupation would justly be regarded as a reasonable expense incurred by the committee." Nor do we decide that the defendant did not, under the terms of the sale, by which it was to receive the property free and clear of unpaid rent, succeed to the equities of the lessor, as well as acquire new equities of its own. The defendant has not been without remedy. During the pendency of this action it could have applied in the foreclosure suit for an order of the court ratifying the payment made by the receiver on account of the rent. If such a motion had been granted, it would have disposed of that claim, and no recovery for the amount could have been allowed. It is not too late for the defendant now, by application in the foreclosure suit, to have all its equities established and preserved. It may move the court for a ratification for the payment of rents made by the receiver, and for a direction to its officer to reduce the judgment by that amount and interest. If the amount of the present recovery is to be ultimately restored to the defendant on account of the unpaid rent which it should have been allowed out of the purchase money, this judgment might be permitted to stand unenforced, as settling the accounts between the receiver and the defendant, and to be credited as a payment on such restoration. All these matters, however, are questions which can be determined only in the foreclosure action, and upon which we do not pass.

*The judgment appealed from should be affirmed, with costs, but without prejudice to a motion by defendant to stay its enforcement pending such application to be made in the action in which the receiver was appointed as it may be advised.*

**Parker, Ch. J., and Werner, J., concur**  
**Gray, J., concurs in result.**

**Haight, J., dissenting:**

The order appointing Edward S. Stokes as receiver of the Hoffman House authorized

and empowered him "to take possession of and carry on the several hotels and restaurants, the leases of and chattels in which are covered by the said mortgage, . . . and with authority to do any and all other things which may be necessary or proper to be done in the general and ordinary conduct of similar places of business." It is true that the payment of the rent accruing during the occupancy of the receiver upon the lease of the Hoffman House is not expressly directed by the order, but we will not assume that a court of equity, in making the order, intended to hold possession of the leasehold property, and appropriate its entire earnings, and thus deprive the landlord of the rent that legally and equitably belonged to him. The payment of such rent was proper, and was one of the things ordinarily done in the conduct of a hotel business upon leased property, and, to our minds, was clearly contemplated by the court making the order. Again, considering the case independently of the order, and upon the assumption that it contained no provision authorizing the payment of the rent, the fact nevertheless exists that the receiver did pay the sum of \$10,000 to the landlord for rent accruing during the time that the premises were occupied by him as receiver and the question now is, Can he recover this sum back from the defendant? After paying the rent referred to, the receiver had on hand upward of \$9,000. He must therefore, have saved from the operation of the property during his receivership upwards of \$19,000 over and above running expenses, not including the rent. The rent of the premises during the receivership exceeded in amount the \$10,000 paid, and, under the circumstances, a court of equity would certainly have applied this surplus upon the rent, had it been asked so to do by the landlord or the receiver. Instead of asking the court for such an order, the receiver made the payment voluntarily, without protest, under no mistake of fact or law, and no creditor of the corporation or other person has ever appeared to object to or question the propriety of such payment. Under these circumstances, no court, in the exercise of its equity powers could, when requested, properly refuse to confirm such payment. The payment was but right and proper. The rent belonged to the landlord and he was entitled to it. The defendant did not owe it, and was under no obligation, either in law or equity, to pay it. Under the notice of sale, the purchaser, upon payment of the sum bid, was to have the property free and clear from unpaid rent. He had the right to assume and pay the rent, if he so elected, and deduct the amount from the purchase price, but this was a privilege personal to the purchaser. He had the right to take the furniture and other personal property covered by the mortgage from the hotel building, and use or dispose of it elsewhere. He could either surrender the

leasehold property to the landlord, or leave it in the hands of the receiver. It does not appear to us that a payment made under such circumstances can properly be held to be the wrongful appropriation of the moneys of the receivership.

It is contended that the payment of rent was made for the benefit of the defendant. We do not so understand the facts. As we have already seen, the defendant, as purchaser, was under no obligation to pay the back rent accrued; and, if it did choose to pay such rent, it had the right to deduct the amount so paid from the purchase price. If the rent was paid by the receiver, then the purchaser could perform his part of the contract by paying over the purchase price to the officer of the court making the sale. So far as he was concerned, he had to pay the purchase price either to the referee or to the landlord, but in no event could he be called upon to pay more. The payment by the receiver merely relieved the defendant from paying that amount to the landlord, but he remained obligated to pay it to the referee. It is not, therefore, apparent how the defendant was benefited by such payment, or how it can be held to have been made for its benefit.

It is said that this is an action at law. Undoubtedly, but the plaintiff seeks to recover back money which he has voluntarily paid to the person entitled thereto, under no mistake of fact or law, which payment a court of equity would have compelled had it been requested so to do. Our attention has been called to no authority which authorizes a recovery at law under such circumstances. The defendant, doubtless, could have applied in the foreclosure suit for an order ratifying the payment made by the receiver on account of the rent during the pendency of this action. If such a motion had been granted, it would have disposed of the claim. It may not be too late for the defendant now to move for a stay of execution upon this judgment, pending an application in the foreclosure suit, to have all of its equities established and preserved. A proper result may be reached by adopting that practice, but it would doubtless result in further litigation which might extend over years. The plaintiff has brought this action to recover, among other items, the \$10,000, paid by him for rent. The issue raised thereon is now before us for determination. We have jurisdiction to now dispose of that controversy, without re-mitting it to another tribunal, and, under the circumstances, it appears to be our duty to do so.

No other errors appear in the case which require consideration here. The judgment should be modified by deducting the sum of \$10,000, with interest thereon from the 26th day of January, 1898, from the amount of the recovery herein; and, as so modified, the judgment should be affirmed, with costs to the appellant.

O'Brien and Landon, JJ., concur.

John FINN, *Respt.*,  
v.

Peter A. CASSIDY *et al.*, *Appts.*

(165 N. Y. 584.)

1. It is for the jury to determine whether or not a contractor provided a safe working place for his servants, where he was engaged in cutting a trench along the foundation of a chimney under which he had run narrow tunnels to be filled with masonry to support the chimney, leaving a layer of earth between the top of the tunnel and the foundation, in which tunnel the servants were required to work after the contractor had knowledge that the undisturbed earth had become saturated with water.
2. A contractor's employee does not assume the risk of the service, and is not guilty of contributory negligence, as matter of law, in obeying the contractor's order to go into a narrow trench which has been run under the foundation of a chimney, and level the bottom to receive masonry work to support the chimney, where he is unacquainted with the actual perils of the situation, and no perils are visible.
3. An expert may give his opinion upon a hypothetical case based upon the facts in evidence, as to the propriety of a method of supporting a chimney along which a trench was being excavated, and as to how the work should have been done for the safety of the workmen, in an action by an employee for injuries caused by earth falling upon him while carrying out the contractor's orders in constructing such support.

(Parker, Ch. J., and Gray, J., dissent.)

(February 5, 1901.)

**A**PPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Albany County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

**Mr. Lewis E. Carr**, with **Mr. E. W. Douglas**, for appellants:

Plaintiff knew the situation of affairs in the place where he was directed to work, and, having that knowledge, may not charge his employers for the injurious consequences to him arising therefrom.

Plaintiff having opportunity to know, and also actual knowledge of, the place and its surroundings, he must be held to have assumed the risks of the employment at that place, whatever they were.

*Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Shaw v. Sheldon*, 103 N. Y. 668, 9 N. E. 183; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Kaare v. Troy Steel & I. Co.* 139 N. Y. 369, 34 N. E. 901; *Appel v. Buffalo*,

*N. Y. & P. R. Co.* 111 N. Y. 550, 19 N. E. 93; *Horrigan v. New York C. & H. R. R. Co.* 7 App. Div. 377, 39 N. Y. Supp. 938; *Powers v. New York, L. E. & W. R. Co.* 98 N. Y. 274; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *DeForest v. Jewett*, 88 N. Y. 264; *Freeman v. Glens Falls Paper Mill Co.* 70 Hun, 530, 24 N. Y. Supp. 403.

If there is danger which is obvious to ordinary observation, which another person of ordinary prudence would see by looking, the employee is chargeable with contributory negligence if he in fact sees it, or ought to see it, and, notwithstanding his opportunity to know, or his actual knowledge, continues his work, and is injured.

*Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Swenson v. Mahopac Iron Ore Co.* 24 N. Y. S. R. 43, 6 N. Y. Supp. 520; *Jenkins v. Mahopac Iron Ore Co.* 32 N. Y. S. R. 866, 10 N. Y. Supp. 484; *Marsh v. Chickering*, 101 N. Y. 395, 5 N. E. 56; *Hart v. Naumburg*, 123 N. Y. 641, 25 N. E. 385.

Defendants did not furnish an unsafe place for plaintiff to work in, but, if the place was dangerous, it was so from the nature of the work of excavation; and the plaintiff was engaged in constructing a place in which to work.

*Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *O'Connell v. Clark*, 6 App. Div. 33, 39 N. Y. Supp. 454; *Smith v. Empire Transp. Co.* 89 Hun, 588, 35 N. Y. Supp. 534; *Collins v. Crimmins*, 11 Misc. 24, 31 N. Y. Supp. 860; *Kranz v. Long Island R. Co.* 123 N. Y. 1, 25 N. E. 206; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Oregan v. Marston*, 126 N. Y. 568, 27 N. E. 952; *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; *Pederson v. Rushford*, 41 Minn. 289, 42 N. W. 1063; *Griffin v. Ohio & M. R. Co.* 124 Ind. 326, 24 N. E. 888; *Anderson v. Winston*, 31 Fed. 528; *McKinzie v. Philadelphia*, 8 Pa. Co. Ct. 293.

**Mr. Eugene D. Flanagan**, for respondent:

It was the absolute duty of defendants to make the sides of this hole reasonably safe before ordering plaintiff to commence work in it, and he had the right to assume that, when he went into this hole in obedience to the personal command of defendants, they had performed their full duty towards him.

*Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Harroun v. Brush Electric Light Co.* 12 App. Div. 126, 42 N. Y. Supp. 716; *Noyes v. Smith*, 28 Vt. 59, 65 Am. Dec. 222; *Mickee v. Walter A. Wood Mowing & R. Mach. Co.* 70 Hun, 456, 24 N. Y. Supp. 501.

The injury arose from purely extrinsic causes which were not connected with his work, and consequently not within the risks of his employment, and from some-

NOTE.—As to liability of master for injury to servant by caving in of tunnel, see the earlier case in this series of *Hanley v. California Bridge & Constr. Co.* (Cal.) 47 L. R. A. 597.

As to duty to furnish safe place for miners to work, see *Consolidated Coal & Min. Co. v. Floyd* 53 L. R. A.

(Ohio) 25 L. R. A. 848, and *note*; *Petaja v. Aurora Iron Min. Co.* (Mich.) 32 L. R. A. 435; *Turner v. St. Clair Tunnel Co.* (Mich.) 36 L. R. A. 134, 47 L. R. A. 112; and *Williams v. Thacker Coal & Coke Co.* (W. Va.) 40 L. R. A. 812.

thing which he did not see and observe, and which, consequently, were not within the rule of obvious dangers.

*Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Svenson v. Mahopac Iron Ore Co.* 24 N. Y. S. R. 43, 6 N. Y. Supp. 520, Affirmed in 117 N. Y. 637, 22 N. E. 1130; *Doyle v. Baird*, 15 Daly, 287, 6 N. Y. Supp. 517; *Kain v. Smith*, 25 Hun, 146; *Hawley v. Northern C. R. Co.* 17 Hun, 115; *Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 57 N. E. 485.

Plaintiff did not assume any risks arising from the personal negligence of defendants.

*Thomas, Neg. § 744*; *Lofrano v. New York & Mt. V. Water Co.* 55 Hun, 452, 8 N. Y. Supp. 717; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Gates v. State*, 128 N. Y. 221, 28 N. E. 573.

The action of defendants in ordering this plaintiff into the hole, with the knowledge which they possessed, or which, under the peculiar opportunities for observation afforded them, they ought to have possessed, was the direct and proximate cause of the injury.

*Murphy v. Boston & A. R. Co.* 88 N. Y. 146, 42 Am. Rep. 240; *Bezel v. New York O. & H. R. R. Co.* 70 N. Y. 171; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Ardesco Oil Co. v. Gibson*, 63 Pa. 146; *Walsh v. Peet Valve Co.* 110 Mass. 23; 14 Am. & Eng. Enc. Law, p. 857.

The assumption of risks implies a knowledge of the danger. Plaintiff could not assume any risks until defendants had performed their duty to him by informing him of the dangers.

*Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373; *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986; *Wood, Mast. & S. § 434*; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97.

When defendants ordered plaintiff into this hole to work they took the responsibility connected with the omission to take the reasonable precautions for plaintiff's safety, which under all circumstances he would have the right to assume they had taken, and which, from the peculiar conditions surrounding this case, he had a right to confidently rely upon having been taken by defendants, to save him from injury. He did not assume the risks of any personal omission of defendants to perform their full duty towards him.

*Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546; *Keegan v. Western R. Corp.* 8 N. Y. 175, 59 Am. Dec. 476; *Warner v. Erie R. Co.* 39 N. Y. 468; *Connolly v. Poillon*, 41 Barb. 366, Affirmed in 41 N. Y. 619; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; 63 L. R. A.

*Span v. Ely*, 8 Hun, 255; *Capasso v. Woolfolk*, 25 App. Div. 234, 49 N. Y. Supp. 409; *Paolo v. Hunter*, 3 App. Div. 528, 38 N. Y. Supp. 356; 14 Am. & Eng. Enc. Law, p. 877.

Defendants were charged with knowledge that it was usual and proper in work of this character to employ bracing, and they are liable for the injuries resulting to plaintiff from failure to employ such methods. Plaintiff cannot be held guilty of contributory negligence for the consequences resulting from a faulty plan of construction.

*McGovern v. Central Vermont R. Co.* 123 N. Y. 280, 25 N. E. 373; *Bensing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573.

Where faulty construction is shown, contributory negligence cannot be inferred.

*Vincent v. Mausterstock*, 30 App. Div. 308, 51 N. Y. Supp. 494; *Bryer v. Foerster*, 9 App. Div. 544, 41 N. Y. Supp. 617; *Vosburgh v. Lake Shore & M. S. R. Co.* 94 N. Y. 374, 46 Am. Rep. 148; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Campbell v. New York O. & H. R. R. Co.* 35 Hun, 506; *Sheehan v. New York O. & H. R. R. Co.* 91 N. Y. 332; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315.

O'Brien, J., delivered the opinion of the court:

The jury rendered a verdict of \$3,000 for the plaintiff as compensation for the injury received on the 25th day of September, 1894, while in the defendants' service. At that time the defendants, who were general contractors, were engaged in preparing the foundation for a building to be used as a power house by the Albany city waterworks. It seems that it was necessary, in order to get a proper foundation, to excavate a trench to the depth of about 31 feet below the surface of the ground. This trench was not only of the depth stated, but very wide, and it became necessary to shore up or brace the sides in order to keep the earth in place. In carrying along this trench the contractors passed near the foundation of a chimney stack 110 feet high, and it was necessary, in order to secure the chimney, to support its foundation on the side next to the trench. This chimney was intended to be part of the structure, when completed, and rested upon a foundation which extended 20 feet below the surface of the ground, and extended along the line of the trench about 20 feet. In excavating the main trench opposite the stack the wall of the trench on that side had been carried down at an angle, so as to leave what is called a "batter" wall to support the stack. The main trench itself, as already stated, was thoroughly supported by timbers, and no accident happened for want of any care in that respect. But it became necessary to support the chimney in some way, as it was feared that, on account of the depth of the main trench, it would be undermined and fall. In working under the foundation of the chimney, narrow cuts, 3 or 4 feet wide, were

made, starting out from the bottom of the main trench, and running at right angles therefrom through the batter wall, and 3 feet under the edge of the foundation of the chimney. These narrow cuts extended upwards to within about a foot of the bottom of the foundation of the chimney, and as fast as they were made, one after another, they were filled in with masonry work, forming a pier, so as to keep the chimney foundation at all times secure. The earth between the tops of the cuts and the bottom of the foundation is described as hardpan, but water had been running down from the top and sides for some time; and thus the batter wall, near the chimney foundation, is supposed to have been weakened and disintegrated from the effects of the water which percolated through it. The plaintiff was a mason's helper, and was at work for the defendants in that capacity at the time of the accident. He was ordered to go down into a cut which had been made the night before, in which to place one of the masonry piers under the foundation, and to level off the bottom in order to prepare to start the pier. One of the defendants went with him down to or near the bottom of the main trench. It does not appear that the plaintiff was ever in this particular place before, or that he knew anything about it. He obeyed the orders of the master, and went into the cut, and commenced to level the bottom; and while doing so the earth from the top and from one side of the cut near the top fell upon and injured him, and for this injury a verdict was awarded to him by the jury.

The plaintiff's action is based upon the claim that the usual and proper precautions were not taken by the defendants to support the overhanging earth between the top of the cut and the bottom of the foundation, and that he was not provided with a reasonably safe place to work in under the circumstances. The defendants were aware of the actual situation and all of the dangers that attended the performance of work in these narrow cuts after the earth above and upon the sides had been saturated with the percolating water. It was therefore a question of fact for the jury to determine whether the defendants had performed the duty imposed upon a master, to provide the servant with a reasonably safe place in which to perform his work. The court could not have determined that question one way or another as one of law, and it was therefore properly submitted to the jury. It is said, however, that the plaintiff should not have been permitted to recover, as, under the doctrine of obvious risks, he assumed whatever danger there was in doing the work. On this point it must be borne in mind that the plaintiff was unacquainted with the actual perils of the situation. He had not been required, so far as the proof shows, to perform any service of this kind in such a place before. When directed by the master to go into the trench and level it off in order to prepare for the masonry work, he simply obeyed the order. The servant is bound by

his contract to obey all reasonable and lawful orders of his master; and the plaintiff, after receiving the order, had to determine, in an emergency, whether he should obey or refuse. It cannot, I think, be said, as matter of law, under these circumstances, that the servant was guilty of contributory negligence, or that he assumed the risk of the dangers incident to a situation with respect to which he could know nothing beyond what was visible at the time. He could not have known, for instance, that the surrounding earth had been saturated with percolating water, or that the walls of the trench or the earth of the arch above had been disturbed or weakened from any such cause. It was, therefore, a fair question for the jury whether the servant was guilty of any carelessness which would bar his right of recovery, or whether he, in obeying the master, had the same knowledge of the dangers incident to the situation that the latter had. On both these questions, therefore, the case was properly submitted to the jury.

It is strenuously argued, however, by the learned counsel for the defendants that this judgment should be reversed upon an exception taken at the trial to certain testimony offered and received in behalf of the plaintiff. The plaintiff's counsel called a civil engineer of eight years' experience in his profession, and who, it appears, had charge of work of like character, and was at the time superintending an excavation about 8½ miles in extent. The counsel propounded to this witness a hypothetical question embracing all the facts disclosed by the plaintiff's testimony, and concluded with the inquiry whether, in his opinion, that was a proper method of constructing the hole or trench for the purpose of underpinning or supporting the foundation of the chimney. One fact assumed in this question was that neither the sides nor the top of the trench were shored up or supported in any way. This question was objected to on the ground that it was not matter of expert opinion, and also on other grounds not material at this time. The objection was overruled, and the defendants' counsel excepted. The witness answered the question in the negative; that is, his opinion was adverse to the defendants. The plaintiff's counsel followed this question with another, to the effect that assuming the same state of facts as in the last question, and further assuming "that you take this excavation at a time when nothing had been done within the bank spoken of as the 'batter bank,' underneath the foundation, how, in your opinion, ought that excavation to have been made, so as to be safe for persons working in the bottom of the same?" This question was objected to on the same ground, and there was the same ruling and exception. The answer of the witness was that such excavations ought to be made the necessary width for the pier that was required, and the sides carried down vertically, the earth cleaned off from the bottom of the original foundation (that is, the chimney foundation), and the sides braced; that the bracing should be put in

as they went down with the excavation ("that is, put in the bracing in the excavation under the chimney and carry it down the full length of the excavation; put in a brace right where the new excavation joined the original foundation wall; put in a cross-piece there; another one down about 4 feet; have planks on the side up against which these braces would rest"). The witness added: "I would place these planks with reference to the face of the chimney foundation beneath it; under it; under the chimney foundation; one on either side, and then a cross-piece. The effect upon the sides of the hole of shoring and bracing would be to have rendered it safe for a man to go in there to work. Bracing and shoring is usual in like cases in other work of similar character."

I do not think that it was error on the part of the learned trial judge to permit an inquiry of this character to be made of a witness who was clearly an expert. The learned counsel for the defendants contends that it was, and his argument is based upon the proposition that the facts should have been stated, and then the jury permitted to decide for themselves. This is the usual argument urged in all such cases. There is, doubtless, some confusion in the cases with respect to the admissibility of the opinions of experts upon issues such as are involved in this case, but I think the ruling of the learned trial judge was correct, both upon principle and the great weight of authority. It is quite probable that there was not a man upon the jury, unless he happened to be an expert, who would have attempted to solve the problem of properly supporting and sustaining the chimney in question without calling to his aid some expert advice from an engineer or some person of experience on such a subject. The common mind, as we know, is not always equal to the proper solution of such a problem in such an emergency, and the counsel and advice of engineers or persons of experience in such matters is always valuable and desirable; and it is quite plain that the tendency of courts and writers on the law of evidence is in that direction. A learned author of a standard work upon the Law of Evidence has recently examined the question with much care, and has collected authorities bearing upon the question from many sources. 1 Greenl. Ev. ed. 1899, § 441. He lays down the rule on the subject of expert opinions as evidence in the following manner: "Since the so-called expert . . . will, by hypothesis, usually be better able than the jury to draw inferences on such matters, it occurs in practice that experts usually are able to be helpful with their opinions, and are therefore usually, but not necessarily, allowed to state them. Thus, in practice, opinions are receivable: First, from persons having special skill (whether the data in question have been personally observed by them or are stated to them), whenever that special skill enables them, better than the jury, to draw inferences on the subject; secondly, from persons who have no spe-

cial skill, but have personally observed the matter in issue, and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness' place, and enable them equally well to draw the inference. The absurdities which disfigure the application of the rule come chiefly from a too illiberal interpretation of the latter notion; i. e., it is frequently ruled that a personal observer can sufficiently state the observed data without adding his inference, although a just view of the situation would recognize that too much credit has been given to the witness's powers of narration, and that in truth it is impossible for the data to be fully recited. For instance, rulings that a witness may not state whether a person's answer was made in a jocular or a serious manner, whether the conduct of the parties evinced a mutual attachment, and the like, err in this manner. A more liberal tendency in this respect seems to be making its way in recent times, but the Reports are overloaded with decisions of that sort that ought never even to have been called for. A prominent feature in the application of the rule is the petty and unprofitable quibbling to which it gives rise. . . . It ought first, however, to be noticed that certain reasons or tests sometimes put forward for this rule are unfounded: (1) It is said that the witness is not to 'usurp the functions of the jury.' The answer is simply that he is not attempting to usurp them,—not attempting to decide the issue and thus usurp their place, but merely to give evidence, which they may or may not accept, as they please. Even though his opinion is admitted, it is not decisive, especially when it is considered that opinions might be given by witnesses on both sides. (2) It is sometimes said that an opinion is not to be offered on 'the very issue before the jury.' But this, as once remarked, would rather 'seem to be a very good reason for its admission.' If the witness can add instruction over and above what the jury are able to obtain from the data before them, it is no objection that he refers to the precise matter in issue." These propositions of the learned author are well sustained by the authorities cited,—for instance, the case of *Cornell v. Green*, 10 Serg. & R. 16, where it was said: "Wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence." In *Prendible v. Connecticut River Mfg. Co.* 160 Mass. 131, 35 N. E. 675, it is stated as follows: "We are of opinion that a person who has made a special study of the strength of materials, and the proper mode of building structures to sustain weight, may be allowed to give his opinion as to whether a staging erected in a specified way can safely be trusted to carry a particular load. That was the substance of the [hypothetical] question put in this case. Although by reason of its form it did not direct the attention of the witness to the ele-

ments of fact involved so particularly as it might have done, it was not so objectionable as to be incompetent." In *1 Smith, Lead. Cas. 286*, the admissibility of expert evidence is stated as follows: "The opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance." [*Carter v. Boehm*, 5th Am. ed.] In *Turner v. Haar*, 114 Mo. 345, 21 S. W. 737, it was held that the question as to what effect the running of machinery on the third floor of a building would have towards weakening the building and rendering it insecure and dangerous was a subject beyond general knowledge, and one about which an expert might give an opinion. In *Continental Ins. Co. v. Pruitt*, 65 Tex. 125, it was held that a builder might give his opinion as to whether the walls of a building were sufficient to sustain it. In *Buffum v. Harvis*, 5 R. I. 243, it is stated in the opinion that the business of a civil engineer "in superintending the construction of milldams and other guards against the flow of water . . . makes them practically acquainted with the relative capacity of our different common soils to resist the percolation of water," and the opinion of such a witness might be given on the subject. In *Clark v. Willett*, 35 Cal. 534, it was held that the proper method of proving the effect of tunneling near other property, with respect to causing the earth to settle and slide, was by taking the opinions of witnesses acquainted with the character of the soil and the surrounding circumstances.

It seems to me that the decisions in the courts of this state, and especially in this court, amply justify the rules and principles contained in the authorities cited. In some of them it will be seen that the opinions of experts have been received in issues much more likely to be comprehended by the jury from a simple statement of the facts than in the case at bar. Thus it has been held that it is no objection to this class of evidence that the question propounded to the witness is the precise question the jury is to determine. *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179. The opinion of an expert may be competent by stating to him a hypothetical case, taking in some or all of the facts stated by witnesses and claimed by counsel, putting the question to be established by their evidence; and when the question is thus stated the witness has in his mind a definite state of facts and the province of the triors, whether referees or jurors, is not interfered with. They will determine whether the facts exist which are thus assumed, and thus give the opinion such weight as they think it is entitled to, with a full knowledge of the facts upon which it is based. *Reynolds v. Robinson*, 64 N. Y. 589. Whether in any case a witness is qualified to speak as an expert is a fact to be determined by the court upon the trial preliminary to his testifying, and ordinarily the decision of the trial court on

this point, when there are any facts to support it, is not open to review in this court. *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 454. In *Curtis v. Gano*, 26 N. Y. 426, the issue was whether three threshing machines manufactured by the defendants were constructed in a good and workmanlike manner. The only question which seems to have been put to the witnesses in that case was the following: "Were the three machines built in a good and workmanlike manner?" And, although there was no proof of the particular facts which rendered the machines defective, the court held that the answer was competent, on the ground that the question was one which came within the exceptions to the ordinary and general rule forbidding the reception of evidence of a witness's opinion. It was a matter of skill, requiring peculiar knowledge of the article, and judgment respecting it. It seems to me that if it was competent to prove that the farmers' threshing machines of forty years ago were not built in a good and workmanlike manner by the opinion of an expert without stating any facts whatever, the question in the case at bar was clearly admissible. In *Pullman v. Corning*, 9 N. Y. 93, the witness was permitted to express an opinion as to whether a cobblestone wall was properly built. It is needless to say that it would be much easier for the jury to determine whether the wall was or was not suitably built, after learning all the facts, than for the jury in this case to determine whether this piece of tunneling under the foundation of a chimney more than 30 feet below the surface of the ground was properly guarded and protected with reference to the safety of the workmen. So an engineer, having experience in the erection of bridges, was permitted to testify, under objection and exception, that it was not customary to have guards of any kind on drawbridges, and this court held that the question was proper. *Hart v. Hudson River Bridge Co.* 84 N. Y. 56. So it has been held competent to ask a cabinet maker, who had performed part of the work in controversy, whether the work was a good job and well done. *Ward v. Kilpatrick*, 85 N. Y. 414, 39 Am. Rep. 674. So this court has held, upon an issue concerning the value of a growing crop damaged by the overflow of water, that it is competent to ask a witness conversant with such crops how much, in his opinion, a given field would yield to the acre. *Phillips v. Terry*, 3 Abb. App. Dec. 607. So it has been held that the opinion of an expert is admissible upon an issue as to whether a scow was seaworthy or not. *Baird v. Daly*, 68 N. Y. 547. So it has been held that a hypothetical question need not include all the facts in evidence, and is good, as against the objection that it does not correctly state the facts, if the proof justifies the assumption of the facts covered by the question. *Cole v. Fall Brook Coal Co.* 159 N. Y. 59, 53 N. E. 670. So an expert witness was permitted to state, against objection and exception, that a particular test applied by par-

ties to fire hose was not a fair one. *Chicago v. Greer*, 6 Wall. 726, 19 L. ed. 769. So it has been held that it is competent for an expert to express an opinion as to whether it would be safe or prudent for a tugboat to tow three boats abreast in a high wind upon a bay or arm of the sea. *Eastern Transp. Line v. Hope*, 95 U. S. 297, 24 L. ed. 477.

This review of the cases and authorities seems to me to amply justify the assertion that the question propounded in the case at bar to a civil engineer embraces a proper inquiry. The contention that the jury could have drawn the conclusion as well as the engineer is not, I think, correct. It is very difficult for a witness to picture to a jury in words the real situation that confronted the plaintiff at the moment that he stepped into the trench by the direction of the master. It would be still more difficult for them to determine what should have been done in order to make the place where the plaintiff was injured reasonably safe and suitable for the workmen. To say that an engineer of experience in such matters could not assist the jury by an expression of opinion would be to ignore well-known facts, and to disregard the principle upon which the opinions of experts are received in evidence. It does not follow that because the rule permitting experts to give opinions has been often abused, especially by medical experts and those claiming to be skilled in handwriting, the opinion of an honest and intelligent engineer upon an issue of the character involved in this action was not competent.

The authority which is cited by the counsel for the defendants to support his argument that the ruling of the court in this case admitting the testimony of the engineer in answer to the question as propounded to him was legal error, requiring a reversal of the judgment, is the recent case of *Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757. The decision in that case has no bearing on the question now before us, and for these reasons: (1) There was not a single fact in that case, as the learned judge stated, upon which the charge of negligence could rest, and that circumstance alone would have justified the decision. P. 532, 163 N. Y., and p. 758, 57 N. E. (2) There were no facts shown upon which an expert could properly base an opinion. It was admitted that if it had been shown what amount and the kind of strain the eyebolt which gave away had been subjected to and its size, inherent tensile strength, and the character of the fastenings to the base, that there would then be a case for the opinion of an expert. P. 534, 163 N. Y., and p. 759, 57 N. E. (3) It was held that the questions were insufficient and improper in form to lay the foundation for even such opinions as were given. Neither the size, capacity, nor material of the eyebolt was described, and hence there was no basis for an opinion. The opinion of an expert, in order to be admissible, must be based upon facts either within his own knowledge, or presented to his mind through the form of a hypotheti-

cal question. All the elements for an opinion that were absent from that case are notably present in this. Here the facts and the whole situation are disclosed, and an experienced engineer is asked to state how the danger incident to such a place could have been reasonably obviated, to insure the safety of the workman. That was the theory upon which the question was asked and answered, and it seems to me that no reasonable mind can fail to see that the opinion of an engineer under such circumstances would be helpful to either court or jury. It is probably true, as already observed, that no member of this court, or of the jury that tried the cause, if confronted with such a problem in their own affairs as that presented to the defendants when they undertook to support this chimney, would have disdained the advice of a competent engineer. Indeed, it may be safely asserted that none of them would have proceeded without it; and, if his advice and opinion would have been valuable, then how can it be said that it was not admissible upon the issue in this case, which was whether the contractors had really met the situation with reasonable prudence and care? When there is a question with respect to the safety of what may be called a tunnel through the earth 30 feet below the surface, where men are sent to work, I think it is open to either party to call engineers familiar with such work, and the methods of insuring the safety of the place, and take their opinions with respect to such methods. The cases in which opinions are excluded are well illustrated by the discussion in *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544. There the negligent act charged was setting fire to fallow land at a dry season of the year, when the wind was blowing a strong gale. The defendant proved the condition of the land, the state of the weather, and the velocity of the wind, with all the circumstances. Not content with all that, he called several witnesses, and inquired of them whether, in their opinion, it was a proper time to burn the fallow. He succeeded before the jury, but the judgment in his favor was reversed upon exceptions taken to this class of testimony. Now, that was a case where the jury could not, after hearing all the facts, be enlightened by the opinions of farmers to the effect that the fire was or was not properly set. But there is a wide difference between the nature of the issue in that case and the one at bar. The circumstances under which a fallow may be burned are known of all men, but the conditions that are necessary to insure the safety of a workman in a narrow tunnel 30 feet under the surface of the ground are not. There is doubtless a growing tendency in the profession to press what is called "expert evidence" into cases and questions where it has no proper place. The practice is not to be commended since it frequently happens that such professional zeal endangers a case on appeal that may be otherwise meritorious. It may be that in this case the plaintiff's proof would have been



as strong without the testimony in question as it is with it, but, now that the testimony has been introduced, I think this court cannot say, as matter of law, that it was inadmissible.

I think that the ruling of the learned trial judge was correct, and that *the judgment should be affirmed*, with costs.

**Haight, Cullen, and Werner, JJ., concur.**

**Gray, J., dissenting:**

I must dissent from the opinion in this case. While I have my doubts upon the proposition that it was a question of fact for the jury to determine whether the defendants had performed their duty to provide a reasonably safe place for the plaintiff to work in, and am inclined to think that the latter assumed the risk of the situation, I nevertheless shall not dissent upon that ground. I think that it was error to admit the opinion evidence which was given by the civil engineer. The opinion of Judge O'Brien is misleading in its discussion of that question, in so far as the situation is concerned which the facts revealed. It is evident from that opinion that the learned judge is impressed with the idea that the danger of the place in which the plaintiff was at work was connected with the work of underpinning the chimney stack, whereas in fact it was not. The facts are briefly these: That, while preparing for the foundation of a building to be erected by them for the Albany waterworks, the defendants excavated a deep trench, within some 12 feet of a chimney stack about 112 feet in height, and at a depth greater than that of the foundation of the chimney, by 11 feet. In order that that foundation might be strengthened and supported by an underpinning or piers of masonry they made a number of tunnels or cuts through the earth from the trench to points under the chimney foundation, and as each tunnel was made the pier was constructed therein. These tunnels were irregularly arched, and not shored up or braced by timbers. The soil was of the nature of hardpan, which is dissolved or disintegrated by the action of water. For some time previous to the occurrence in question water had been observed trickling upon and spreading over the ground between the chimney and trench, and to its loosening effect upon the soil was attributed the falling in of the earth of the tunnel in which the plaintiff was working. The plaintiff had been ordered to go into one of the tunnels and to level off the bottom preparatory to the building of the pier. While working there, according to his evidence, he observed water dripping upon him from overhead. Shortly after he had commenced to work, the earth from the top and from the north side of the tunnel fell upon him and produced the injuries complained of. There is nothing in the evidence to show, and it is not claimed, that the fall of the earth was due to any other cause than the loosening or disintegrating of the soil

through the action or the percolation of the water from above. Indeed the cause of the falling of the earth is stated in the respondent's brief to have been "by reason of this running water eating its way through the ledge just north of the irregular arch on the north side of the hole, causing it to become loosened from the adjoining mass and fall by its own weight." Questions concerning the construction of an underpinning for the chimney foundation and the manner of proceeding therewith had nothing to do with the issue. The jurors had the evidence very fully before them of the facts which had been observed by witnesses relating to the nature of the soil, to the continuous trickling of water upon, and its percolation through, and its effect upon the soil, and to the manner in which the cut or tunnel through the ledge or bank of earth from the trench was made. The evidence showed, for instance, that, while the trench or main excavation itself was braced with timbers, the tunnel had not been treated in the same manner, and that what had been deemed sufficient for its temporary protection was to arch it over. The situation was a very simple one, and was clearly exposed by the evidence and I am quite unable to see what question of science, or of a nature beyond the apprehension of the lay mind, was involved in the determination of the issue, which justified or made necessary the admission of opinion evidence. The hypothetical question upon the facts which was put by the plaintiff's counsel to the witness, a civil engineer, concluded with the inquiry concerning the place where the plaintiff had been working,—whether, in his opinion, he would say "that was a proper method of constructing that hole for the purpose of underpinning that foundation." The witness was permitted to answer that question, over the objection of the defendants' counsel, and then, on the same assumed state of facts, the following question was asked: "How, in your opinion, ought that excavation to have been made, so as to be safe for persons working in the bottom of the same?" This question was also objected to, but the objection was overruled, and the exceptions to these rulings raised the serious question in the case.

The prevailing opinion is misleading in conveying the impression that this opinion evidence was proper and necessary by reason of the problem presented, of underpinning this chimney stack; and authorities are cited to support the view that the opinions of persons who have made especial study of the strength of materials, or of the proper mode of building structures to sustain weight, or of questions concerning structural or architectural strength, are proper. The authorities, however, are not applicable to such a commonplace and everyday state of facts as that which this case presented. There was nothing in question here but the making of a temporary hole or tunnel through a ledge of earth. Under the circumstances detailed, there was nothing which necessitated the opinion of a civil en-

gineer, or of any expert in difficult construction work, in order that the jurors might comprehend the question, and without which they would be incompetent to draw their conclusions. It cannot reasonably be said that the description of this hole or tunnel dug in the earth would have conveyed an imperfect idea of its safety. Extensions of the rule which permits of opinion evidence are not to be favored. The general rule as to the admissibility of such evidence is that persons having technical or peculiar knowledge upon certain subjects are allowed to give their opinions when the question involved is such that the jurors are incompetent to draw their own conclusions from the facts without the aid of such evidence. 12 Am. & Eng. Enc. Law, 2d ed. p. 432. In the language of Judge Earl in the case of *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544: "Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eyewitnesses, or to be as capable to draw conclusions from them as some witnesses might be; but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them, and comprehend them sufficiently for the ordinary administration of justice." To hold that the opinion evidence in this case was properly admitted, in my judgment, is to make a wide departure from the rule, and may create a troublesome precedent in the future. I think that the jurors were quite competent to understand the facts about this everyday occurrence of tunneling through the ground, and to decide the issue between the parties upon their own judgments. It is impossible to say that the admission of this opinion evidence may not have prejudiced the defendants, and, for the error committed in that respect, I think that the judgment should be reversed, and that a new trial should be ordered with costs to abide the event.

**Parker, Ch. J.**, concurs with **Gray, J.**  
**Landon, J.**, not sitting.

Motion for reargument denied March 26, 1901.

Adelbert KULLMANN, *Respt.*,  
v.

Henry D. COX, *Appt.*

(167 N. Y. 411.)

#### A purchase for full value from the

NOTE.—The above case seems to be a novel one. It denies the contention that the father had failed in any duty to the children so as to make his purchase inure to their benefit by making him in effect a trustee.  
63 L. R. A.

mortgagee, who purchased at foreclosure sale under a purchase-money mortgage, made without collusion with the mortgagee, will give a man a good title, to the exclusion of his minor children, to property, the equity of redemption of which his wife died seized of, leaving surviving her the husband and children, where none of the survivors were able to pay the accrued interest on the mortgage to avoid the sale, and the value of the property did not exceed the amount of the judgment.

(*Cullen, Martin, and Landon, JJ., dissent.*)

(June 11, 1901.)

**A** PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiff in an action to compel specific performance of a contract to purchase real estate. *Affirmed.*

The facts are stated in the opinion.

**Mr. Francis B. Chedsey**, for appellant:

As guardian in socage there devolved upon the plaintiff the custody of the infants' interests in the real estate, with its consequent responsibilities.

*Boyer v. East*, 161 N. Y. 580, 56 N. E. 114.

The plaintiff as the tenant for life of the property, having the possession and use thereof, was bound to pay from his own means the interest on the mortgage as it became due.

*Moseley v. Marshall*, 22 N. Y. 201.

The plaintiff cannot hold as his own the estates of his infant children, the legal title to which he has acquired, if at all, only by reason of a default wholly his own.

Plaintiff in recovering the property from Hupfel performed only a plain duty which he owed to his infant children, to regain, if he could, for their benefit that which they had lost by his default.

*Perry*, Tr. 5th ed. § 222; *Kullman v. Cox*, 26 App. Div. 160, 49 N. Y. Supp. 908; *Bennett v. Austin*, 81 N. Y. 306; *Ten Eyck v. Craig*, 62 N. Y. 419.

The title tendered need not, in fact, be bad in order to relieve one from his purchase; but it must be either defective in fact, or so clouded by apparent defects, either in the records or by proof outside the records, that prudent men, knowing the facts, would hesitate to take it.

*Greenblatt v. Hermann*, 144 N. Y. 20, 38 N. E. 966.

A title open to a reasonable doubt is not a marketable one.

*Fleming v. Burnham*, 100 N. Y. 10, 2 N. E. 905; *Abbott v. James*, 111 N. Y. 676, 19 N. E. 434; *Vought v. Williams*, 120 N. Y. 257, 8 L. R. A. 591, 24 N. E. 195; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527.

The defendant in this action, having notice that the plaintiff purchased the property for his own account, and that he denies that his children have any right or interest in it, could not, if he completed his purchase, hold the property free from the rights and interests of those children.

*O'Donoghue v. Boies*, 159 N. Y. 102, 53 N

**E. 537; *People v. Open Board of Stockholders' Bldg. Co.* 92 N. Y. 98.**

**Messrs. Samuel Untermyer and Moses Weinman, for respondent:**

Unless the defendant's charge of fraud is clearly and affirmatively established, the title tendered by the plaintiff is a good marketable title. Hupfel, the mortgagee, acquired a good title upon the foreclosure and the plaintiff was not disqualified by his guardianship in socage to purchase the property from Hupfel.

***Boyer v. East*, 101 N. Y. 580, 56 N. E. 114; *Corbin v. Baker*, 56 App. Div. 35, 67 N. Y. Supp. 249.**

The defendant has wholly failed to establish his allegations of fraud, and the plaintiff has affirmatively shown good faith.

**Parker, Ch. J., delivered the opinion of the court:**

This record, as it comes to us, entitles the plaintiff to an affirmance of the judgment, for the facts, which we must accept, are contained in the findings of the trial court. Every fact therein found has some evidence to support it; indeed, every material fact but one is established by uncontradicted evidence, and that one relates to the value of the property at the time of the foreclosure sale. The affirmance by the appellate division, therefore, makes those facts conclusive upon this court. The question of law presented is whether the facts established title in the plaintiff personally or in him as trustee for his children. The premises were conveyed to plaintiff's wife by one Hupfel in February, 1886, to whom she gave a purchase-money mortgage for \$3,800. In April, 1895, plaintiff's wife died intestate, leaving, her surviving, her husband and four minor children. The amount then due and unpaid on the purchase-money mortgage was \$3,600. The plaintiff was not able to pay the semi-annual interest due on July 1, 1895, nor were any of his children able to pay the same, and the mortgagee, Hupfel, having failed to receive his interest after demand made, brought an action to foreclose the mortgage, which resulted in a judgment of foreclosure and sale, in which it was provided that any party to the action might purchase at the sale, and under it Hupfel purchased the property on the 16th day of January, 1896, for \$4,000. "The price realized on the foreclosure sale at least equaled what the property was worth at that time." Shortly thereafter the referee duly conveyed the premises to Hupfel. "There was no collusion between Hupfel and the plaintiff herein in instituting and prosecuting said foreclosure suit. The foreclosure action was instituted and prosecuted by said Hupfel in entire good faith for his own benefit, because neither Adelbert Kullmann (the plaintiff) nor any of the owners of the property paid, or were able to pay, the interest due on July 1, 1895." Shortly thereafter Hupfel conveyed the premises to this plaintiff, and accepted in part payment therefor a purchase-money mortgage for \$3,800. Each one of these facts was established by uncontra-

dicted evidence with the exception of the one which, in effect, asserts that the property was not, at the time of the sale, worth more than the amount paid by Hupfel. There was a conflict of testimony as to value, but there was evidence fully justifying the finding made. It is not pretended that there was any defect whatever in the foreclosure proceedings, and it is apparent, therefore, from the facts found, that Hupfel acquired a perfect title to the premises, which he could vest in anyone to whom he saw fit to convey them, and which he did vest in this plaintiff by his conveyance to him. Indeed, no one pretends that Hupfel did not acquire a good title, free and clear from all claims that the former owners had in the property prior to the sale under the judgment of foreclosure; nor is it pretended that Hupfel could not convey as good a title as he had to anyone else; but, instead, it is suggested that the plaintiff's former relation to the property and its owners disabled him from acquiring the title which Hupfel concededly had. No authority is, or can be, cited in support of that position, and one difficulty with the reasoning by which it is sought to be established is that it proceeds upon an erroneous assumption of fact, namely, that the plaintiff, prior to the foreclosure, failed to discharge a duty he owed to the owners of the property,—that of paying the interest on the mortgage. In the first place, it may well be doubted whether it was his duty to pay the interest, had he the money with which to pay it, in view of the finding that the value of the property did not exceed the amount of the judgment, for it necessarily follows that the interest of the children had no value whatever, and even a tenant by the curtesy is not called upon to pay money for the protection of a thing that is without substance, and is valueless. But, aside from the fact that the interest of the children in the property was without value at that time, the plaintiff could not pay the interest, because he did not have the money with which to pay it, and so the trial court found upon evidence to support it; and, indeed, it should be said that there is not a suggestion in the record to the contrary. It follows, therefore, that the foreclosure, which was neither suggested nor instigated by the plaintiff, was not due to any fault on his part. That being so, the plaintiff had the same right as any other person to purchase the property of Hupfel when he found himself in such improved financial condition as warranted him in attempting its acquisition. The plaintiff's testimony to the effect that the property was, in the first instance, in reality his, and that he furnished the \$200 that was paid on account of the purchase price at the time the deed was taken in the name of his wife, does not call for reversal of the judgment, inasmuch as the case has been disposed of in all the courts upon the assumption that the plaintiff's wife was the owner of the property at the time of her death.

*The judgment should be affirmed, with costs.*

**Gray, O'Brien, and Werner, JJ., concur.**

**Cullen, J., dissenting:**

This action was brought, vendor against vendee, to compel the specific performance of a contract for the purchase of real property in the city of New York. The appellant defended on the ground that the plaintiff's title was unmarketable. The objection to the title is based on the following facts: Anna Maria Kullmann, the wife of the plaintiff, at the time of her death, which occurred April 22, 1885, was seised in fee of the premises subject to a mortgage executed by herself and her husband to one Adolph G. Hupfel to secure the payment of \$3,600 on January 1, 1889, with interest payable semiannually on the 29th days of June and December, which mortgage contained a provision that, in case of thirty days' default in the payment of the interest, the mortgagee might elect that the whole principal sum should become due. Mrs. Kullmann died intestate, leaving, her surviving, the plaintiff and four children, her only heirs at law. At the time of their mother's death these children were infants; the oldest having been born in 1866, and the youngest in 1875. The plaintiff has remained in continuous occupation of the premises from his wife's death to the trial of the action. The semiannual interest falling due on June 29, 1885, was not paid. On September 17, 1885, the mortgagee instituted an action to foreclose the mortgage, alleging the default in the June interest, and electing that the whole principal sum should become due. Judgment was entered in the action on December 19, 1885. Under that judgment the property was sold for the sum of \$4,000 on January 22, 1886, to the mortgagee, who subsequently received a deed therefor from the referee. The property was then conveyed by the mortgagee to the plaintiff by deed dated February 1, 1886. These two deeds were recorded on the same day in the registrar's office. On his purchase the plaintiff executed a new mortgage to Mr. Hupfel for \$3,800. The appellant claims that on these facts the plaintiff's children have an equitable claim to the premises, subject to the life estate of their father. On the trial both the plaintiff and the mortgagee testified as witnesses. The trial court found that the plaintiff was unable to pay the interest which accrued on June 29, 1885, and that the foreclosure was prosecuted and the sale had in good faith, without any collusion between the plaintiff and the mortgagee. Judgment was entered that the defendant specifically perform his contract. This judgment has been affirmed on appeal by a divided court.

The defendant was entitled, under the contract, to a marketable title, free from doubtful questions of fact or law. *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196. In that case it was held that testimony taken on an inquisition, tending to show that a grantor through whom the vendor traced title was at the time of his grant of unsound mind, 53 L. R. A.

was sufficient to render the title unmarketable, though no proof of the insanity of that grantor was produced on the trial of the action, and the proceedings on the inquisition had been set aside. The learned trial court has found that there was no collusion between the plaintiff and the mortgagee, and that finding is conclusive upon us. This is not sufficient, however, under the case cited; for, if the circumstances were such that the defendant's title might hereafter be impeached or defeated by a contrary determination of the question of fact presented by those circumstances, then the title offered was not marketable. The trial court committed a fatal error in the admission of evidence on which its finding of facts was based. The plaintiff was allowed to testify over the defendant's objection and exception, that the property was in reality his; that he paid the consideration on its original purchase, and had the conveyance made to his wife. The statute is explicit that in such cases there is no title, legal or equitable, in the person who pays the consideration. 1 Rev. Stat. p. 728, § 51. The fact did not in any way diminish or vary the plaintiff's duty to his infant children, who inherited the remainder subject to his life estate. There is this further to be said: In any action that might hereafter be brought by the children against the appellant, if he should take title, the plaintiff would not be a competent witness to testify as to personal transactions with his deceased wife.

The record presents a still more serious objection to the title offered,—a question of law, to say the least, of very doubtful determination, and one which should not be decided except in an action to which the remaindermen are parties. "A tenant for life . . . is a quasi or implied trustee for the remainderman, and is accountable for the highest good faith." *Perry, Tr.* §§ 540, 549. As tenant for life, the plaintiff was bound to keep down and pay the interest. *Story, Eq. Jur.* § 488; *Moseley v. Marshall*, 22 N. Y. 201. The interest for which the mortgage was foreclosed became due over two months subsequent to the wife's death, and there is therefore no question of accumulated arrears of interest, the liability for which, as between life tenant and remainderman, has been the subject of conflicting decisions in England. The plaintiff having accepted the inheritance, and having enjoyed the possession of the premises, was bound to pay this interest. The trial court found that he was unable to pay it. This may relieve him from the imputation of moral fault, but it in no way affects the fact that the mortgage was foreclosed and the mortgaged property sold solely by default of the plaintiff in the performance of his legal obligation. If the foreclosure and sale were without collusion, doubtless the mortgagee acquired a perfect title by the deed given to him on the sale. But the question is whether, when the plaintiff purchased from the mortgagee, and repossessed himself of the title, such title did not instantly inure to the benefit of the remaindermen. Of course,

the general rule is that, where a trustee has properly sold property to a third person in good faith, and without collusion, he is not precluded from subsequently buying the property from the purchaser. To make that rule applicable, the original sale of the property must have been without fault on the part of the trustee. "Wherever a trustee is guilty of a breach of trust by the sale of the trust property to a bona fide purchaser, for a valuable consideration, without notice, the trust in the property is extinguished. But if afterwards he should repurchase, or otherwise become entitled to, the same property, the trust would revive, and reattach to it in his hands; for it will not be tolerated in equity that a party shall, by his own wrongful act, acquire an absolute title to that which he is in conscience bound to preserve for another. In equity, even more strongly than at law, the maxim prevails that no man shall take advantage of his own wrong." Story, Eq. Jur. § 1264; *Bovey v. Smith*, 1 Vern. 84. In acquiring the property from the mortgagee, the plaintiff put a new encumbrance upon it greater in amount by \$200 than that to which it had been previously subject. There therefore arose no claim upon his part for contribution from the remainderman. It is also to be observed that the plaintiff was guardian in socage of his infant children, and thus he occupied a double relation of trust and confidence to them. It is unnecessary, however, to pursue the discussion further. It is sufficient to say that the plaintiff's title presents a question of law, the resolution of which in favor of the plaintiff is by no means certain. The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

**Landon, J.**, concurs with **Cullen, J.**

**Martin, J.**, dissenting:

The plaintiff, as owner of a life estate in the property in question, of which his children were remaindermen, of whom he was guardian in socage, plainly occupied towards them the relation of trustee. *Warren v. Union Bank*, 157 N. Y. 259, 43 L. R. A. 256, 51 N. E. 1036. It was his duty to pay the interest upon the mortgage thereon. *House v. House*, 10 Paige, 158, 164; *Bell v. New York*, 10 Paige, 49; *Moseley v. Marshall*, 22 N. Y. 201. He failed, and the premises were sold by reason of his default. Almost immediately he repurchased them of the mortgagee, by whom they were bid off upon the sale. Whether this transaction was in good faith, or resulted from a collusive violation of his duties as trustee, was a question of fact. In this case it has been decided in his favor, so that, if there were no other parties interested, the judgment herein would be conclusive upon the question, and the title would be clearly marketable. But when that transaction occurred, his children, the remaindermen, were infants, and the infancy of some of them continued until about the time of the commencement of this

action. None of them were parties to this, or shown to have been parties to any other, action where the question of the validity or good faith of that transaction was involved. Nor was there any proof that the plaintiff has in any way acquired or become possessed of their interest in the premises, unless under such foreclosure, sale, and repurchase, which may ultimately be declared void as to them. The defendant was entitled to a marketable title, and cannot properly be required to accept any other. "A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding." *Fleming v. Burnham*, 100 N. Y. 1, 10, 2 N. E. 905, 907; *Brokaw v. Duffy*, 165 N. Y. 399, 59 N. E. 196. "A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused." *McPherson v. Schade*, 149 N. Y. 16, 21, 43 N. E. 527, 528; *Jordan v. Poillon*, 77 N. Y. 521; *Vought v. Williams*, 120 N. Y. 253, 8 L. R. A. 591, 24 N. E. 195; *Shriver v. Shriver*, 86 N. Y. 575; *Heller v. Cohen*, 154 N. Y. 299, 306, 48 N. E. 527; *Dyker Meadow Land & Improv. Co. v. Cook*, 159 N. Y. 7, 15, 53 N. E. 690. The plaintiff was bound to show that the title tendered was good, or at least marketable, as against all the world. *Simis v. McElroy*, 160 N. Y. 156, 162, 54 N. E. 674. This, it seems to me, he has failed to do. If the defendant is required to accept the title tendered, possessing, as he does, knowledge of the transaction of the plaintiff in obtaining the title to property held in trust for his children, what assurance has the former that an action may not be commenced against him by the remaindermen to establish their title to the property, and the plaintiff be required to defend it? Again, what assurance has the defendant that even the plaintiff, if called as a witness in such an action, would not give testimony to secure to his children the title to the property for which he had already been paid? Certainly, the judgment in this action would be no estoppel to his giving such testimony; and, if willing to deprive them of their rights under their mother's will in the manner stated, might it not well be that, after obtaining from the defendant the consideration for the premises, he might be equally willing to deprive him of the property, and secure it for his children? Under these circumstances, and under the principles established by the decisions of this court, it seems to me plain that the defend-

ant ought not to be compelled to accept the title offered, and that the judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

*Re* Petition of George W. PECK for Order Revoking Liquor Tax Certificate Issued to Norman B. Cargill.

(167 N. Y. 391.)

1. Allegations upon information and belief are not sufficient as a basis for a forfeiture of a liquor tax certificate, under a statute requiring the petition to state the "facts upon which the application is based."
2. Forfeiture of a liquor tax certificate for criminal acts cannot be authorized, by legislation, upon failure of the holder to deny under oath the allegations of the petition, without any proof of the commission of the acts constituting the offense.

(Landon, J., dissents.)

(June 11, 1901.)

**A**PPPEAL by respondent from an order of the Appellate Division of the Supreme Court, Fourth Department, affirming an order of a Special Term for Monroe County revoking his liquor tax certificate. *Reversed.*

The facts are stated in the opinions.

*Messrs. Forsyth Brothers*, for appellant:

The petition, being wholly upon information and belief, presented no legal evidence which justified the court in making the show-cause order.

Statements upon information and belief, without any reasons for them, are not proof or evidence in any legal sense.

*Roderigas v. East River Sav. Inst.* 76 N. Y. 323, 32 Am. Rep. 309; *Mowry v. Sanborn*, 65 N. Y. 581; *Martin v. Gross*, 24 Jones & S. 512, 4 N. Y. Supp. 337; *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 Paige, 305.

In criminal cases an information upon information and belief is wholly insufficient to give the court jurisdiction of the person.

*People ex rel. Aingsley v. Pratt*, 22 Hun, 302; *Blodgett v. Race*, 18 Hun, 132; *Re Rothaker*, 11 Abb. N. C. 122; *Voight v. Newark Excise Comrs.* 59 N. J. L. 358, 37 L. R. A. 294, 36 Atl. 686; *State v. Lamos*, 26 Me. 261; *Plummer v. Com.* 1 Bush, 26.

The certificate cannot be revoked except in the manner and for the causes prescribed in the statute.

*Re Lyman*, 160 N. Y. 96, 54 N. E. 577.

The court has no jurisdiction in a special proceeding to take away the property right of Mr. Cargill, i. e., his right to apply for and obtain a liquor tax certificate for a period of one year for a violation of the statute, without a trial by jury.

Chancellor Walworth's opinion in *New*

*York Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. 571.

The statute did not give the right to sell liquor, nor does the certificate give the right to sell liquor.

*Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657.

The statute, not prohibiting the right to sell intoxicating liquors, leaves those engaged in its sale in a lawful business, exercising one of the inherent rights of a citizen of the government.

*Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

*Mr. Nelson E. Spencer*, for respondent Peck:

The petition complied with the statute, and the justice not only had jurisdiction, but was required, to make the order to show cause, as of course.

It is not necessary for the petition to be made by one having personal knowledge of the facts.

*People ex rel. Smau v. McGowan*, 44 App. Div. 30, 60 N. Y. Supp. 407.

This is a civil proceeding to protect the public from violations of the law. It is not a criminal proceeding to punish offenders.

*People ex rel. Presmeyer v. Police & Excise Comrs.* 59 N. Y. 92; 17 Am. & Eng. Enc. Law, 2d ed. p. 267.

The method of enforcing criminal liability is expressly and constitutionally provided for by the act. The legislature has the right, as one of its police powers, to say who shall carry on the traffic and how, and to restrict the issuance of the certificates, and prescribe the manner of their revocation.

*Re Lyman*, 46 App. Div. 387, 61 N. Y. Supp. 384; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657.

The proceeding is constitutional.

*Re Lyman*, 163 N. Y. 552, 57 N. E. 1115, Affirming 46 App. Div. 387, 61 N. Y. Supp. 384; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657; *People ex rel. Beller v. Wright*, 3 Hun, 306; *Kresser v. Lyman*, 74 Fed. 765; *Re Lyman*, 28 App. Div. 127, 50 N. Y. Supp. 977.

The appellant cannot claim the right to trial by jury in this case.

*Re Lyman*, 163 N. Y. 552, 57 N. E. 1115.

*Mr. William E. Schenck*, for special deputy commissioner of excise:

The property rights conferred upon a certificate holder are measured by the statute which created the certificate.

*People ex rel. Miller v. Lyman*, 156 N. Y. 407, 50 N. E. 1112; *McNeeley v. Welz*, 166 N. Y. 124, 59 N. E. 697; *Re Lyman*, 163 N. Y. 552, 57 N. E. 1115, Affirming 46 App. Div. 387, 61 N. Y. Supp. 384; *Re Campbell*, 162 N. Y. 612, 57 N. E. 1106, Affirming 46 App. Div. 634, 61 N. Y. Supp. 1133; *Re Lyman*, 53 App. Div. 330, 65 N. Y. Supp. 673; *Re Livingston*, 24 App. Div. 51, 48 N. Y. Supp. 989; *Lyman v. Tewster*, 2 App. Div. MSS. March, 1901.

The right to transfer or surrender a liquor tax certificate, under §§ 27 and 25, respectively, is restricted to those certificate holders who have not violated the liquor tax law.

NOTE.—As to right to revoke license for sales of liquor without jury trial, see, in this series, *Voight v. Newark Excise Comrs.* (N. J. L.) 37 L. R. A. 292.

*People ex rel. Miller v. Lyman*, 156 N. Y. 407, 50 N. E. 1112; *Re Mitchell*, 41 App. Div. 271, 58 N. Y. Supp. 632; *Re Seitz*, 32 Misc. 108, 65 N. Y. Supp. 462, Affirmed in 2 App. Div. MSS. March, 1901; *People ex rel. Lawton v. Lyman*, 33 Misc. 243, 68 N. Y. Supp. 331.

The civil liability of certificate holders for violations committed by servants and bartenders has been applied as the basis of these proceedings, rather than the criminal liability.

*Re Kinzel*, 23 Misc. 622, 59 N. Y. Supp. 682; *Re Lyman*, 29 Misc. 524, 61 N. Y. Supp. 946; *Re Schuyler*, 32 Misc. 221, 66 N. Y. Supp. 251; *Re Coman*, 50 App. Div. 622, 63 N. Y. Supp. 1106.

The petitioner has only been required to establish his case by a "preponderance of evidence," instead of "beyond a reasonable doubt."

*Re Fall*, 26 Misc. 611, 57 N. Y. Supp. 858, Affirmed in 39 App. Div. 671, 57 N. Y. Supp. 1137; *Re Henry*, 56 App. Div. 268, 67 N. Y. Supp. 733; *Lyman v. Murphy*, 33 Misc. 349, 68 N. Y. Supp. 490.

Violation of the liquor tax law by a certificate holder forfeits his bond, but the action brought by the state commissioner of excise to enforce it is a civil action.

*Lyman v. Shenandoah Social Club*, 39 App. Div. 459, 57 N. Y. Supp. 372.

If the petition fairly informs the certificate holder against whom it is directed, of the nature of the offense and the place where and the time when it was committed, it answers the purpose of the statute, and restricts the petitioner to the grounds for relief set forth therein.

*Re Lyman*, 163 N. Y. 536, 57 N. E. 745; *Re Purdy*, 40 App. Div. 133, 57 N. Y. Supp. 629; *Re Halbran*, 30 Misc. 515, 63 N. Y. Supp. 1024.

The petition is a pleading; and it is well settled that facts may be alleged in a pleading upon information and belief.

*Bennett v. Leeds Mfg. Co.* 110 N. Y. 150, 17 N. E. 669; 2 Wait, Pr. p. 321.

The language of the statute hardly seems to warrant any construction which will complicate or hamper the simple proceeding which the courts declare was intended by the legislature "to be summary, and was designed to furnish a ready and quick remedy for failure to comply with the provisions of the law."

*Re Lyman*, 46 App. Div. 387, 61 N. Y. Supp. 884, Affirmed in 163 N. Y. 552, 57 N. E. 1115.

O'Brien, J., delivered the opinion of the court:

This is an appeal from an order which revoked and canceled a liquor tax certificate held by the appellant. These certificates are recognized by the statute under which they are issued as a species of property transferable from one to another. They are the evidence of a right or privilege to carry on a certain kind of business, issued by the state to the individual, and hence a thing of pecuniary value. In this case the 53 L. R. A.

holder of the certificate has been deprived of it by the order appealed from, which revoked and canceled it. This has been done on the ground that he was guilty of a violation of the law by selling liquor on Sunday. The order so adjudges. No one has testified or even alleged that he committed that offense. The petitioner does allege that he is informed and believes that the holder of the certificate has been selling beer, whisky, and wine "during the last three months" on Sunday, and that is absolutely the only allegation or proof in the record to uphold the order complained of. It is said that this is all that the statute requires, and that the certificate has been revoked by a proceeding authorized by law, which has been literally complied with in this case. A statute which would permit the rights of a party to be summarily disposed of in that way would be of very doubtful validity. We think that the statute in question requires, upon any fair construction, something more. It does authorize any citizen to commence such a proceeding by petition to a judge or the court, but it expressly provides that the "petition shall state the facts upon which said application is based." Liquor Tax Law, § 28. When the law requires that the facts shall be stated, as the basis of a summary proceeding to forfeit the right to carry on business by reason of acts which constitute a crime, it is not complied with by the presentation of a petition, every allegation of which is upon information and belief, without even a statement of the sources of the information or the grounds of the belief. The liberty and property or personal rights of the citizen have practically no protection if they can be taken away or destroyed by such a proceeding on the part of anyone who is willing to become a party to such a controversy, and without producing any proof whatever of the acts constituting the offense charged. The least that should be required in such a case is that the petition should state the facts positively upon oath, unless the statute expressly permits a statement upon information and belief, and this statute does not. A special statutory requirement that a party must state certain facts as a basis for an order revoking a certificate of the right to carry on a certain business is not satisfied or complied with by a mere statement that the moving party suspects or is informed and believes that the particular facts exist, or that the party charged has committed the forbidden acts in violation of law. This principle would seem to be specially applicable to a case like this, where the acts charged, and which are at the foundation of the proceeding, not only subject a party to a penalty or a forfeiture, but are also crimes, and punishable criminally. The statute now under consideration authorizes the judge, upon presentation of a petition stating the facts, to grant an injunction against a transfer of the certificate, and an order to show cause. The petition does not confer jurisdiction unless it is in compliance with the statute, and a petition in which all the

material facts are stated upon information and belief, without disclosing the sources of the information or the grounds of the belief, is no sufficient basis for any judicial action. *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882; *Buell v. Van Camp*, 119 N. Y. 160, 23 N. E. 538; *Campbell v. Morrison*, 7 Paige, 157; *Cushing v. Ruslander*, 49 Hun, 19, 1 N. Y. Supp. 505.

But it is said that the statute expressly authorized the court, upon the proceedings in this case, to revoke the certificate. The contention is that the statute provides that, after service of the petition and an order to show cause on the holder of the certificate five days before returnable, the judge before whom it is returnable shall revoke or cancel the certificate unless the holder shall present and file a verified answer raising an issue as to some material fact in the petition, in which event the judge is required to take proof of the disputed facts, but otherwise the order of revocation is granted by default. It is true that the statute so provides, but this does not dispense with a petition containing proper averments of the necessary jurisdictional facts. Moreover, it is plain that what the statute practically provides for is that in such cases the accused shall be presumed to be guilty unless he denies his guilt under oath. If he omits to deny the statements of the petition on oath, the facts charged are to be taken as confessed, and a forfeiture follows. If the party against whom the proceeding is instituted is really guilty of the offense charged, he is thus compelled to confess his guilt, either by his oath or by silence, and then the forfeiture of his property rights follows. He has no other alternative, unless he is tempted to tamper with his conscience and deny the truth on oath. It is not competent for the legislature to place a citizen in such a disadvantageous position in order to protect his liberty or his property. In any proceeding by the state to deprive him of the one or the other, the facts which in law justify it must be alleged and established. The legislature has no power to enact that they may be inferred or presumed from the silence of the party accused, or from his failure to answer under oath. This is especially true when the acts charged are not only the basis of a penalty or a forfeiture, but constitute a crime. It is the constitutional right of the party charged with the commission of acts which, if true, constitute a crime or create a penalty or impose a forfeiture, to answer without verification. No law can be valid which directly or indirectly compels a party to accuse or incriminate himself, or to testify by affidavit or otherwise with respect to his guilt or innocence. In every case when he elects to remain silent with respect to any charge involving unlawful acts which are criminal or subject him to a penalty or forfeiture, that is a constitutional privilege which the legislature may not invade. The courts have insisted upon giving to the constitutional provision a construction broad and liberal enough to permit a citizen to remain entire-

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ly silent with respect to the truth or falsity of any criminal charge against him, if he so elects, and his right to refuse to verify a pleading is as clearly within the privilege as his right to refuse to testify. The constitutional immunity from every species of incrimination may be as effectually violated by a law which compels a person to plead or deny upon oath any charge involving a criminal offense, without regard to the form of the investigation, as by a law compelling him to testify as a witness. The privilege of silence secured by the Constitution applies to the one case as well as the other. *Thomas v. Harrop*, 7 How. Pr. 57; *Hill v. Muller*, 2 Sandf. 684; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *People v. Courtney*, 94 N. Y. 490; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319; *Gadsden v. Woodward*, 103 N. Y. 242, 8 N. E. 653. The principles decided in these cases establish the proposition that it was not within the power of the legislature to dispense with the necessary allegations and proof of the facts constituting the offense by enacting virtually that no proof need be given by the state unless the party charged with the violation of the law denies the charges under oath. The statute virtually authorizes a presumption of guilt from an omission of the accused to testify, and therefore it is a law adjudging guilt without evidence, and reverses the presumption of innocence. An enactment of this character violates fundamental principles binding alike upon the legislature and the courts. *People v. Courtney*, 94 N. Y. 490.

The order appealed from should be reversed and the proceeding dismissed, with costs.

**Parker, Ch. J., and Bartlett and Vann, JJ., concur.**

**Martin, J., concurring:**

I concur upon the sole ground that the petition in this case does not state all the facts upon which the application is based, otherwise than upon information and belief, without stating the source of the petitioner's information or the grounds of his belief. Although the allegations as to the sale of liquor on Sunday are sufficient and not upon information and belief, other of the essential facts are not so stated, and hence the petition was insufficient to authorize the action of the judge in making the order appealed from. I do not concur in this decision upon any other ground. While it has been said that a tax certificate possesses some of the elements of property, and to an extent may be so regarded, still it is, at most, a qualified property, subject to all the provisions of the statute, and may be canceled or destroyed in the manner specified. In other words, the right of property is a conditional one, which is subject to all the contingencies provided for by the statute, among which is the liability of being can-



ceded and annulled for any of the reasons and in the manner specified in the statute.

Cullen, J., concurs with Martin, J.

Landon, J., dissenting:

I dissent. The tenure of a liquor license is conditioned upon the holder's observance of the provisions of the liquor tax law,—a tenure very different from that of the absolute ownership of property. The reason is plain: When he violates the law under which he receives his license, the holder perverts his license into an aid and cover for his violation, and makes it a weapon against the law, and himself a traitor to it. If the state which grants this kind of property for permissible uses protects it as it does other property, it may aid the abuses it should suppress. This license holder practically invites the state to take that position. But the real position of the state is not that the license holder shall defend his innocence whenever challenged, but that the institut-

ing of an inquiry into his guilt shall be open to every citizen, and its methods shall be adapted to ascertaining the truth instead of suppressing it. The license holder accepts this condition in accepting his license. Section 28, subd. 2, permits any citizen to present a verified petition for the revocation of a liquor tax certificate. "Such petition shall state the facts upon which said application is based." The act does not in terms require the facts to be stated positively, or otherwise than upon information and belief. To require more would often result in encouraging the offender to continue his violations, and this the legislature sought to prevent. If the license holder by a verified answer denies the charge, its truth must be judicially determined upon competent evidence. In this case he did not deny it, but took the same objections as if an attachment of his property was in question. For the reasons stated, the rules as to attachment are as inappropriate as they are inadequate.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary LEAHAN  
v.  
Caroline R. COCHRANE.

(178 Mass. 566.)

1. The rule requiring notice to a purchaser of property containing a nuisance, requesting its removal, before he is liable to an action for injuries caused by it, does not apply in favor of the purchaser of a house so constructed as to cast water from its conductor pipes upon the sidewalk in such a way as to freeze and render the sidewalk unsafe for pedestrians.
2. The right to conduct water from a roof across a sidewalk in such a way that it freezes and renders the walk dangerous to public travel, thereby creating a public nuisance, cannot be acquired by prescription.

(May 21, 1901.)

**NORM.—Prescriptive right to maintain a public nuisance.**

- I. General doctrine.
- II. Matters relating to health.
  - a. Offensive trades.
  - b. Burial of the dead.
  - c. Pollution of streams, etc.
- III. Highways and places held for public use.
  - a. Obstructions and encroachments in general.
  - b. Railroads.
  - c. Fences, buildings, and other structures.
  - d. Sidewalks.
  - e. Nuisances relating to waterways.

#### I. General doctrine.

In answer to proceedings on the part of the public to abate or prevent a nuisance, it has often been contended that prescription has given the right to maintain it, but the authorities generally declare that no length of time will legalize or enable a person to acquire a title by

**EXCEPTIONS** by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Mr. G. O. Abbott for defendant.

Mr. Charles Wood Bond, for plaintiff:

The owner occupying premises bounding upon a highway is liable for an injury to travelers on such way, caused by a faulty or defective construction of the premises, or by their ruinous condition, or by a nuisance upon the premises.

*Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Daluy v. Savage*, 145 Mass. 38, 12 N. E. 841;

prescription to a public nuisance, or bar the right of the public to abate it.

The following cases recognize the above doctrine: *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Reed v. Birmingham*, 92 Ala. 339, 9 So. 161; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; *Ex parte Taylor*, 87 Cal. 91, 25 Pac. 258; *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Sims v. Frankfort*, 79 Ind. 446; *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114; *Sherlock v. Louisville, N. A. & C. R. Co.* 115 Ind. 22, 17 N. E. 171; *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600; *Ashbrook v. Com.* 1 Rush, 139, 89 Am. Dec. 616; *Knox v. Chaloner*, 42 Me. 150; *Veazie v. Dwinel*, 50 Me. 479; *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902; *Northern C. R. Co. v. Baltimore*, 21 Md. 93; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Baltimore v. Fairfield Improv. Co.* 37 Md. 352, 40 L. R. A. 494, 39 Atl. 1081; *Com. v. Upton*, 6 Gray, 473; *New Salem v. Eagle Mill Co.* 138 Mass. 8; *Martin*

*Clifford v. Atlantic Cotton Mills*, 146 Mass. 50, 15 N. E. 84; *Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 2 L. R. A. 695, 19 N. E. 387; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475.

Where a person purchased premises upon which there was a defect in a public sidewalk by reason of the stone surrounding the cover of a coal-hole, he was held liable for an injury to a traveler on the walk, notwithstanding the premises were at the time of the injury in the occupancy of a tenant.

*Delay v. Savage*, 145 Mass. 38, 12 N. E. 841.

The rule in *Penruddock's Case*, 5 Coke, 100, is not applied in cases where the nuisance causes an injury to persons traveling on the highway.

**Hammond, J.**, delivered the opinion of the court:

The evidence tended to show that affixed to the house of the defendant was a conduct-

or, constructed and used for the purpose of carrying water from the roof to the public sidewalk adjoining; that there was a groove in the sidewalk, extending from the end of the conductor to the outer edge of the sidewalk; that the water from the conductor had frozen in and about the groove upon the sidewalk; and that the plaintiff, while traveling, in the exercise of due care, over the ice, was injured. The evidence warranted a finding that in the winter the natural and probable result of the situation would be the formation of ice upon the sidewalk, which would be dangerous to public travel, and therefore a public nuisance. At the time of the accident the defendant had been the owner of the house for several years, and there was no evidence that the defendant constructed the building, the conductor, the groove, or the sidewalk; and it appeared that the condition of the conductor at the time of the purchase was, and ever since had been, the same as at the time of the ac-

v. Gleason, 139 Mass. 183, 29 N. E. 664; *LEAHAN v. COCHRANE*: Atty Gen. *ex rel. Mann v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605; *Folkes v. Chad*, 3 Dougl. 340; *Matthews v. Stillwater Gas & Electric Light Co.* 63 Minn. 493, 65 N. W. 947; *Smith v. Sedalla*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907; *Temperance Hall Assn. v. Gilles*, 33 N. J. L. 260; *Cross v. Morristown*, 18 N. J. Eq. 305; *State ex rel. North Brunswick Twp. Bd. of Health v. Lederer*, 32 N. J. Eq. 675, 29 Atl. 444; *Stamm v. Albuquerque (N. M.)* 62 Pac. 973; *Patten v. New York Elev. R. Co.* 3 Abb. N. C. 324; *Peckham v. Henderson*, 27 Barb. 207; *Rochester v. Erickson*, 46 Barb. 92; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Renwick v. Morris*, 7 Hill, 575; *Crill v. Rome*, 47 How. Pr. 406; *Ogdensburg v. Lovejoy*, 2 Thomp. & C. 83, Affirmed in 58 N. Y. 662; *Campbell v. Seaman*, 2 Thomp. & C. 231, Affirmed in 63 N. Y. 568, 20 Am. Rep. 567; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Dyggert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Kelley v. New York*, 6 Misc. 516, 27 N. Y. Supp. 164; *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562, 38 N. Y. Supp. 510; *People v. Pelton*, 36 App. Div. 460, 55 N. Y. Supp. 815, Affirmed in 159 N. Y. 537, 53 N. E. 1129; *State v. Holman*, 104 N. C. 861, 10 S. E. 758; *Little Miami R. Co. v. Greene County Comrs.* 31 Ohio St. 338; *Heddlston v. Hendricks*, 52 Ohio St. 460, 40 N. E. 408; *Com. v. Van Sickle, Brightly (Pa.)* 69; *Com. v. McDonald*, 16 Serg. & R. 395; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Com. v. Alburger*, 1 Whart. 469; *City v. Daub*, 1 Lanc. L. Rev. 306; *Com. v. Yost*, 11 Pa. Super. Ct. 323; *McNerney v. Reading City*, 150 Pa. 611, 25 Atl. 57; *Simmons v. Cornell*, 1 R. I. 519; *State v. Rankin*, 3 S. C. N. S. 438, 16 Am. Rep. 737; *Elkins v. State*, 2 Humph. 543; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 16 Utah, 246, 40 L. R. A. 851, 52 Pac. 168; *Meiners v. Frederick Miller Brewing Co.* 78 Wis. 364, 10 L. R. A. 586, 47 N. W. 430; *CHARNLEY v. SHAWANO WATER-POWER & RIVER IMPROV. CO.*; *Dougllass v. State*, 4 Wis. 387; *Mining Débris Case*, 9 Sawy. 441, 18 Fed. 753; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Rex v. Cross*, 3 Campb. 226; *James v. Hayward*, Cro. Car. 184; *Weld v. Hornby*, 7 East, 195, 3 Smith, 244; *Queen v. Brewster*, 8 U. C. C. P. 208.

In *Smith v. Phillips*, 8 Phila. 10, it is stated that, although a continuous user for twenty years by giving rise to a presumption of a grant

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may preclude individuals from recovering for injuries from a nuisance which was wrongful in its origin, nothing is more firmly settled, both in England and America, than that statutes of limitation do not run against the public, and that lapse of time will not change the nature of a public nuisance, as it is against the law to prescribe for a public nuisance.

And in *State v. Holman*, 104 N. C. 861, 10 S. E. 758, the court said that an acquiescence for seventy years has been held no bar to criminal proceedings against a nuisance.

An adverse user which is known to have originated without right within the memory of persons now living will not, alone and of itself, legitimate a public nuisance, or bar the public of their rights. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

If the property of a private individual is of itself a public nuisance, no period of use and occupation, however extended and uninterrupted and under whatever claim of right, will protect it from abatement by the public authorities, or the preventive remedy by injunction to restrain its perpetuation by additions and repairs. *Rochester v. Erickson*, 46 Barb. 93.

Nor can a municipality acquire a prescriptive right to maintain a continuing nuisance of a public nature. *Bloomington v. Costello*, 65 Ill. App. 407; *Litchfield v. Whitenack*, 78 Ill. App. 364; *Noian v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 48 L. R. A. 691, 45 Atl. 154. See also *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858; *Smith v. Sedalla*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907, *infra*, II. c.

And even if long continuance of a public nuisance affords evidence from which the jury may presume to find as a fact the existence of the right to maintain it, the evidence must be submitted to the jury, as the question is not one of law, but of fact, and the court cannot determine it. *House v. Metcalf*, 27 Conn. 631.

This general rule has been enacted by statute in some states. Thus, in California, by the express provisions of Cal. Civil Code, § 3490, "no lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right." *Mining Débris Case*, 9 Sawy. 441, 18 Fed. 753.

So, under Idaho Rev. Stat. § 3630, no lapse of time can give a prescriptive right to maintain a nuisance. *Lewiston v. Booth (Idaho)* 34 Pac. 809.

No length of time will justify the continuance

cident. There was no evidence that the defendant ever had been requested by the plaintiff, or by any other person, to reform the nuisance, or that the plaintiff ever complained of it to the defendant. The action is at common law, and the question whether the notice requisite to the maintenance of an action, under Pub. Stat. chap. 52, § 19, was given, is immaterial. It is not argued that the evidence did not warrant a finding that this conductor in its natural operation did create a nuisance in the highway. The only question presented is whether the court erred in declining to give the second and third rulings requested by the defendant. These requests raise the question whether, the situation being the same as at the time of the purchase by the defendant, she can be held answerable to the plaintiff, in the absence of any request made to her to reform the nuisance. There can be no doubt that in the case of a private nuisance the general doctrine in this country, following *Penruddock's*

of a public nuisance, where the legislature has expressly prohibited the doing of the act constituting the nuisance. *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177. This for the reason that if such a nuisance can be justified by the length of time it has continued it must be on the theory that a grant is presumed to have been obtained for the erection of a nuisance, or a license or authority from the public to do the act constituting the offense, which presumption cannot be indulged where it would be clearly in opposition to the legislative will.

Even when the action is brought by a private party who has suffered a special injury from a public nuisance, a prescriptive right to do the acts complained of cannot be maintained against him. *Mining Débris Case*, 9 Sawy. 441, 18 Fed. 753; *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703; *Kiesel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Matthews v. Stillwater Gas & Electric Light Co.* 63 Minn. 493, 65 N. W. 847; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *De Laney v. Blizzard*, 7 Hun. 7; *Raht v. Southern R. Co.* (Tenn. Ch. App.) 50 S. W. 72; *Melners v. Frederick Miller Brewing Co.* 78 Wis. 364, 10 L. R. A. 586, 47 N. W. 430; *Fowler v. Sanders*, Cro. Jac. 446.

It does not seem probable that the court in *CHARNLEY V. SHAWANO WATER-POWER & RIVER IMPROV. Co.* intended to adopt a contrary doctrine which would involve the tacit overruling of *Melners v. Frederick Miller Brewing Co.* 78 Wis. 364, 10 L. R. A. 586, 47 N. W. 430, *supra*, although the statement in the later case, that the proposition that there can be no prescriptive right to maintain a public nuisance "must be understood as applying to the rights of the public, and not to those of individuals," might be so construed. This case is perhaps best distinguishable on the theory that here the public nuisance was the obstruction to navigation, while the private injury complained of was not that which made the obstruction a public offense, but was the invasion of the petitioner's property interests by the overflowing of his lands. Had the petitioner been deprived of his use of the stream as a public highway, and brought his action for the special injuries which he suffered because of the obstruction to navigation, it would seem that the defense of prescription could not have been maintained. And this has been directly decided where the overflowing of lands caused a nuisance to public health from which the owner of the overflowed lands sustained special damage. *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160.

*Oase*, 5 Coke, 100, is that the grantee of land upon which, at the time of the grant, there exists a nuisance created by his predecessors in title, is not responsible merely because he has become the owner of the land. His liability arises from his knowingly continuing the nuisance; and, generally, it may be stated that he is not answerable for continuing the nuisance in its original state unless he has had notice to abate, or, at least, until he has had knowledge that it is a nuisance, and injurious to the rights of others; and, while there is some dissent from this doctrine (see opinion of Denio, J., in *Brown v. Cayuga & S. R. Co.* 12 N. Y. 486; of Strong, P. J., in *Hubbard v. Russell*, 24 Barb. 404; and of Manning, J., in *Caldwell v. Gale*, 11 Mich. 77), still it must be regarded as the law of this commonwealth (*McDonough v. Gilman*, 3 Allen, 264, 80 Am. Dec. 72, and cases cited). The cases are numerous in which this doctrine has been applied to private nuisances, but with the

315, 24 Am. Dec. 160. Here the continuance of a nuisance to the public health created by the overflowing of lands by means of a mill dam for more than twenty years, although it may confer a right so to use the land, was held to be no defense to an action by an owner of the overflowed lands to recover damages for the resulting sickness of himself and family.

And in *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631, the court, although it recognized that one can acquire a prescriptive right to overflow the lands of another, said that, as the right to a nuisance cannot be acquired by prescription, if the damming of a stream, though in accordance with a prescriptive right, works hurt, or inconvenience, or damage to the owner of the land overflowed by creating or causing such annoyance as seriously to interfere with the comfortable enjoyment of his property or that has a direct or decided tendency to cause sickness in his family or immediate neighborhood, it is a nuisance of which he may complain.

## II. Matters relating to health.

### a. Offensive trades.

The right to pursue an offensive occupation cannot be acquired by prescription. *Campbell v. Seaman*, 2 Thomp. & C. 231, Affirmed in 63 N. Y. 568, 20 Am. Rep. 567.

And the fact that the business of tanning hides and rendering fat has been carried on for twenty-eight years will not defeat a proceeding by the board of health of the township in which the business is located to abate it as a nuisance hazardous to public health. *State ex rel. North Brunswick Twp. Bd. of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444.

And it is no defense to an indictment for maintaining a nuisance within the limits of a populous city, consisting of a large distillery and a large frame building with extensive out-works attached thereto in which large numbers of hogs were fattened for the city market, fed chiefly from the refuse from the distillery, that the business has been conducted in the same place for more than thirty years. *Com. v. Van Sickle*, Brightly (Pa.) 69.

So, lapse of time, whatever its length, was said in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, not to justify a nuisance to health arising from the manufacture of animal matter into a fertilizer, as every day's continuance is a new offense.

And the principle that no length of time can

exception of *Woram v. Noble*, 41 Hun, 398, we have seen no case where the doctrine has been directly applied to the case of a public nuisance, although in *Wenslick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358, and *Dodge v. Stacy*, 39 Vt. 558, the court seems to have failed to notice any difference in this respect between private and public nuisances.

We think the rule should not be extended to a public nuisance like that in this case. The reason generally given for the rule is that, in the absence of any notice to the contrary, the grantee has the right to assume that the structures upon the land are rightfully there, and that, even where they may seem to interfere with the usual rights appurtenant to other estates, he may properly assume that the right thus to interfere has been lawfully obtained, and it is said that it would be inequitable to subject him to damages until he has had notice that in maintaining the structure or work complained of he is infringing upon the rights

of others. The reason of the rule is not applicable to a case like this. The conductor, in its natural and intended use, caused ice to form upon the sidewalk, which, being dangerous to public travel, was a public nuisance. No matter how often the ice was formed, the right thus to encumber the street could not be lawful. The right to create such a nuisance was not a matter of grant, nor could it have been acquired by prescription. *Holyoke v. Hadley Water-Power Co.* 174 Mass. 424, 426, 54 N. E. 889; *New Salem v. Eagle Mill Co.* 138 Mass. 8. In so far as the conductor, by its natural operation, caused the formation of such ice, it created a nuisance. The defendant, as owner, must have known this, or must be presumed to have known it. In such a case, the reason for the requirement of a notice does not exist, and we see no reason why the rule should be applied. See *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75.

#### *Exceptions occurred.*

legalize a public nuisance was recognized in *Com. v. Rush*, 11 Lanc. L. Rev. 97, which was a prosecution by indictment, under Pa. act March 31, 1880, for maintaining a public nuisance, the nuisance complained of being a chemical factory for the manufacture of phosphates, fertilizers, etc.

And that a rock-crushing machine was in operation before the passage of an ordinance prohibiting the operation of such machines in a block containing three or more occupied dwellings, which was therein declared to be a nuisance, is no defense to a proceeding under such ordinance. *Kansas City v. McAleer*, 31 Mo. App. 433.

The subject of municipal control over particular trades or business as nuisances will be found discussed in note to *Ex parte Lacey* (Cal.) 38 L. R. A. 640.

The owner of a brewery, who so operates it as to endanger the health of persons residing in the neighborhood, can acquire no prescriptive right to continue the nuisance as against an individual who suffers special damage therefrom. *Melners v. Frederick Miller Brewing Co.* 78 Wis. 364, 10 L. R. A. 586, 47 N. W. 430.

Nor can a prescriptive right so to conduct a beer garden as to constitute it a public nuisance be urged against the right of an owner of property in the vicinity to bring a private action for the special injury which he sustains therefrom. *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478.

And this may be regarded as the ground for the decision in *Saville v. Kilner*, 26 L. T. N. S. 277, a proceeding in equity brought by a private person to restrain the proprietors of a glass factory from causing dense black smoke and vapors to issue from their new works, in which an injunction was granted as to the whole of the new works, notwithstanding one of the chimneys had been erected for more than twenty years before the filing of the bill. The court does not characterize this as a public nuisance, though it was of the opinion that it was such a nuisance as was indictable at common law, and doubtless had that fact in mind in denying the defendant's claim of a prescriptive right to that chimney which had been erected for twenty years.

Carrying on an offensive trade in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads

laid out in the neighborhood, to the occupants of and travelers upon which it is a nuisance. *Com. v. Upton*, 6 Gray, 478; *Wier's Appeal*, 74 Pa. 230. In the former case the court said that, even if the prosecution and continuance of the offense under such circumstances could be regarded as the assertion and maintenance of a claim adverse to the law and public right, it could be so considered only upon the ground that it was, during all that time, a nuisance subject to be suppressed and abated.

So, the right of the public to abate a common nuisance resulting from the maintenance of cattle pens in a city is not barred because the locality has been so used by the defendant and those under whom he claims for thirty years, and when so first used was entirely outside of the city limits and some distance in the country. *Ashbrook v. Com.* 1 Bush, 189, 89 Am. Dec. 616. The court said that the pursuit of a noxious trade is lawful so long as it does not interfere with the rights of the public, but when it does so interfere with the superior rights it becomes illegal, and no length of time can sanctify it, as its exercise is a daily renewal of the offense.

And the fact that an offensive trade was established upon an open common remote from habitation will not entitle the owner to continue it after the land in its vicinity has been built up and occupied, as against persons living in the neighborhood to whom it constitutes a nuisance. *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

And by lapse of time and undisturbed possession no one gains a right to maintain an offensive trade, even as against subsequent incomers. *Com. v. Van Sickle*, *Brightly* (Pa.) 69. See also *Douglas v. State*, 4 Wis. 387; *Queen v. Brewer*, 8 U. C. P. 208, *infra*, II. c.

To the contrary is *Rex v. Cross*, 2 Car. & P. 463, in which it was held that if a person establishes a noxious trade, such as a slaughterhouse, in a place remote from habitations and public roads, he may continue his trade, though it afterwards becomes a nuisance to persons inhabiting houses subsequently built, or traveling along a highway thereafter constructed.

To the same effect is a dictum in *Rex v. Neville, Peake*, N. P. pt. 1, p. 91, where, in holding that a person whose business renders that which was a little unpleasant before very disagreeable and uncomfortable is answerable therefor though it would not amount to a nuisance by itself, Lord Campbell said that where manu-

## WISCONSIN SUPREME COURT.

William H. CHARNLEY, *Resp't.*,

v.

SHAWANO WATER-POWER & RIVER  
IMPROVEMENT COMPANY, *App't.*

(109 Wis. 563.)

1. A finding by the trial court that certain land is overflowed with back water from a dam, which is supported by a fair preponderance of the evidence, will not be disturbed by the appellate court.
2. One called upon to pay damages for overflowing land under authority of the legislature to erect a dam for purposes of manufacturing and improving navigation cannot defeat liability by insisting that more land has been overflowed than absolutely necessary to carry out such purposes.
3. Lapse of time may bar a suit by a private individual for private injuries in-

factories have been borne with in a neighborhood for many years it will operate as a consent of their inhabitants to their being carried on, though the law might have considered them as nuisances had they been objected to at the time.

*Rex. v. Cross*, 2 Car. & P. 483, *supra*, was followed in *Ellis v. State*, 7 Blackf. 534, in which a conviction for maintaining a nuisance, consisting in establishing a noxious trade near a public highway and dwellings thereon, was reversed for the refusal of the trial court to permit evidence that the dwelling house proved to be in the immediate vicinity of the nuisance had been built since the erection of the nuisance, to go to the jury as a full defense against the charge in the indictment. But this case was regarded in *Sims v. Frankfort*, 79 Ind. 446, *infra*, III. a. c, as not only in conflict with the great weight of the decisions of other states, but also in irreconcilable conflict with *State v. Phipps*, 4 Ind. 515, *infra*, III. a, and was therefore held to have been overruled by the latter case.

While it is no defense to an indictment for a common nuisance that the business complained of has been in operation many years, yet, where the existence of the nuisance is controverted, this fact may be considered by the jury in determining that question. *Com. v. Miller*, 139 Pa. 77, 21 Atl. 138.

In *Com. v. Rush*, 11 Lanc. L. Rev. 97, the court instructed the jury that, in determining the question whether a chemical factory for the manufacture of phosphates, fertilizer, etc., was a public nuisance, the length of time the business had been conducted at its present location was proper for their consideration.

And in *Wier's Appeal*, 74 Pa. 230, the court was of the opinion that a much clearer case was required to justify a court of equity in compelling by injunction a person to remove an offensive trade in which he has invested his capital, and which he has carried on for a long period of time, than in a case where a person comes into the neighborhood proposing to establish such a business for the first time, and is met with a remonstrance and notice that if he persists in his purpose application will be made to a court of equity to prevent it. See also *New Castle v. Raney*, 180 Pa. 546, 6 L. R. A. 737, 18 Atl. 1086, *infra*, II. c.

## b. Burial of the dead.

Lapse of time is no defense to an indictment  
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dicted upon him by the maintenance of a public nuisance; such as a dam across a navigable stream.

4. The burden of showing the nature and extent of the claimed right is upon the one setting up a prescriptive right to flow lands.

(March 19, 1601.)

APPEAL by defendant from an order appointing commissioners to assess damages to plaintiff's land by reason of back flow from defendant's dam. *Affirmed.*

Statement by Bardeen, J.:

Proceedings to obtain damages to property claimed to have been overflowed by defendant's dam. By chapter 235, Laws 1889, the privilege of erecting a dam across the Wolf river, near the city of Shawano, was

for a nuisance consisting in the appropriation of a part of the public square in the city of Philadelphia for the purposes of a burial ground under a void grant. *Com. v. Alburger*, 1 Whart. 469.

In *Coates v. New York*, 7 Cow. 585, it was held that the length of time—one hundred years—during which a part of the premises had been used as a burial ground under a grant from the corporation for that purpose was not conclusive as against the power of the legislature or corporation to pass by-laws and ordinances prohibiting under a penalty the interment of the dead within certain parts of the city.

As to nuisances relating to the burial of the dead and the question of municipal power thereover, see note to *Harrington v. Providence* (R. I.) 38 L. R. A. 805, 327.

## c. Pollution of streams, etc.

The fact that a milldam has been maintained across a creek for more than fifty years is no defense to an indictment to abate it as a nuisance to public health consisting in the obstruction to the regular and continuous flow of the water and the consequent accumulation of noxious matter in the pond created by the dam. *People v. Pelton*, 36 App. Div. 450, 55 N. Y. Supp. 815, *Affirmed* in 159 N. Y. 537, 53 N. E. 1129.

And it is no defense to an indictment for a public nuisance, consisting in the erection and maintenance of a dam causing thousands of acres of land to be overflowed with nearly stagnant water so as to render the lands surrounding and adjoining uninhabitable except at the imminent risk to health, that such dam has been erected for more than twenty years. *Queen v. Brewster*, 8 U. C. C. P. 208.

The maintenance of a milldam which spreads disease and death through the neighborhood cannot be legalized by any lapse of time. *Douglas v. State*, 4 Wis. 387.

In *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731, it was said that no length of enjoyment could legalize the continuance of a millpond destructive to the health of the surrounding country.

While long possession of a milldam and pond may confer a right to the land flowed and all the proprietary incidents which follow the title of property, it cannot be set up as a bar to the abatement, on behalf of the public, of a nuisance to health, created thereby. *State v. Rankin*, 3 S. C. N. S. 438, 16 Am. Rep. 737; *State*

granted to C. M. Upham and others for "manufacturing and other purposes." Said parties or their assigns were given power to secure flowage rights, under § 1777, Rev. Stat. 1878, as amended by chapter 318, Laws 1882. Defendant is a corporation organized for the purpose of building said dam for hydraulic and manufacturing purposes, and to improve the river and facilitate the running of logs therein, and is the assignee and owner of the rights and privileges granted to Upham and others under the act mentioned. The dam was erected in 1892, and by it the defendant maintains a head of water averaging about 10 feet. Shawano creek, the outlet to Shawano lake, empties into the Wolf river about a mile and one half above the dam. This creek is navigable for logs and timber, and is 30 or 40 feet wide. Some forty years or more ago a dam

was built across this creek a little way above its mouth, in which a head of water from 6 to 8 feet was claimed to have been maintained continuously and adversely until 1892, at which time defendant purchased the dam from one Kast, together with all flowage rights. Shawano creek is about 4 miles long, and is the only outlet of Shawano lake, which is a body of water of considerable size. W. H. Charnley is the owner of lots 1 and 2, section 14, township 27, range 16 E., on the banks of this lake. In 1897, Charnley filed a petition for the appointment of commissioners, under § 1777 and acts amendatory thereof, to appraise the damages to his lands by reason of the overflow of the same by defendant's dam. The petition sets out the facts required by the statute, and claims injury to about 25 acres of land, specifically described. An order for hearing was duly

v. Holman, 104 N. C. 861, 10 S. E. 758. See also Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631, *supra*, I.

It is no defense to an indictment for a nuisance occasioned by the erection and maintenance of a dam by which the surrounding lands were overflowed and the health of the community impaired that the dam was built long before there were any inhabitants who could be injured by it. Douglass v. State, 4 Wis. 387; Queen v. Brewster, 6 U. C. C. P. 208. See also cases *supra*, II. a.

In New Castle v. Raney, 130 Pa. 546, 6 L. R. A. 737, 18 Atl. 1066, it was held that a milldam which had been in existence over fifty years was not a nuisance *per se*, and if a nuisance at all,—as to which the evidence was conflicting.—it had only become so by the gradual growth of the city around it and by the emptying of cess pools into it; the purpose for which the dam was used being for a flour mill which at times of low water was operated by steam. The court refused relief in equity at the instance of public authorities without prejudice to their right to proceed against the defendants by indictment or suit at common law, intimating that, having thus established their right, equity would relieve them. The court quoted with approval the statement in Wier's Appeal, 74 Pa. 230, *supra*, II. a., that a much clearer case was required to justify a court of equity in compelling, by injunction, the removal of a business which has been carried on for a long time than in the case of one who comes into a neighborhood proposing to establish such a business for the first time, and said that this principle applied with especial force to a case where the property alleged to be a nuisance cannot be removed, and the decree to abate it means its destruction.

No length of time can exempt a person from a penalty imposed by the legislature upon the creation of a nuisance in allowing sawdust to fall from a mill into a creek, thereby impairing the quality of the water. Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177.

The fouling of the waters of a canal from which a number of persons (more than three) obtain water for irrigation and domestic purposes, rendering it unfit for such use, creates a public nuisance under Utah Comp. Laws 1888, § 4566, defining such a nuisance as an unlawful act or omission to perform a duty which either annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons, or in any way renders three or more persons insecure in life or the use of property; and the right to maintain it cannot be acquired by prescription. North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co. 16 Utah, 246, 40 L. R. A. 851, 52 Pac. 168.

The right of a municipality to fill up a creek which had been kept open by it for navigation on the ground that from the discharge of drains and sewers it had become a nuisance and an injury to the health of the inhabitants cannot be challenged by an abutting owner on the theory that he had acquired a prescriptive right by using the creek while so kept open for drainage purposes; this for the reason that while the creek was kept open there was an implied license to use it, and no use during that period was adverse. Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421.

No prescriptive right to use a stream as a place of deposit for the offal from a slaughterhouse can be acquired so as to bar an action brought by a person who is specially injured thereby, to abate the same as a public nuisance. Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149.

The pollution of a stream by the refuse from a slaughterhouse, so as to injure the health of the employees in a mill below, lessening the value of the mill property and depriving the owner of its comfort and reasonable enjoyment, is a public nuisance for which there can be no prescription. Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419.

The pollution of a watercourse by a city with its sewers, unless authorized by law, constitutes a public nuisance which no length of time will legalize as against one who suffers special injury thereby. Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703.

A municipality cannot acquire by any prescription the right to discharge its accumulated filth and sewage into a river in such quantities that it is necessarily carried to the premises of a lower riparian proprietor where it produces a nuisance dangerous to his health and destructive of the value of his property. Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 48 L. R. A. 691, 45 Atl. 154.

The pollution of a watercourse by sewage and the obstruction of the stream causing the water at certain seasons to back up and overflow property of a riparian owner, leaving a filthy and noxious deposit thereon, is a nuisance of a public nature, which the municipality can acquire no right to continue. Bloomington v. Costello, 65 Ill. App. 407.

A city can acquire no prescription or right to empty its sewage into a ravine in such a manner as to deprive a property owner of the wholesome and comfortable use of his home by the stench and offensive odors from the ravine, as such a nuisance is a continuing one and of

made. Upon the return day the defendant denied that the lands described in the petition were necessary for the maintaining of said dam; denied that any portion of said lands were overflowed. It then alleged the construction and adverse maintenance of the Kast dam, a purchase of Kast's rights, and a prescriptive right to overflow all of the lands described in the petition. It also alleged that it does not now and has not for several years past improved the river for the purpose of driving logs, and that its dam is now wholly maintained for the purpose of furnishing power and operating mills and manufacturing plants located at or near said dam. The testimony was taken, by stipulation, before a referee. Thereafter the court made findings, which are recited in the order appointing commissioners, among other things, to the effect that by the construction

of its dam the defendant has overflowed said lands since about April 1, 1892, and that they were necessary for that purpose and the purposes of its incorporation; that it has no prescriptive right to overflow the same; and that the petitioner had suffered damages by reason thereof. This appeal is taken from said order.

**Messrs. M. J. Wallrich and C. F. Dillett** for appellant.

**Messrs. Eugene M. Wescott and George C. Dickinson** for respondent.

**Bardeen, J.**, delivered the opinion of the court:

The points made by the defendant are (1) that the evidence does not show that the lands described in the petition are overflowed by defendant's dam; (2) that the evi-

a public character. *Litchfield v. Whitenack*, 78 Ill. App. 364.

A city which has used a stream as an open sewer for a long time, and has the right so to use it, acquires no prescriptive right to neglect its duty to keep the channel open so as to prevent the accumulation of filth upon the lands of adjoining owners and no right to inflict injury upon such landowners by allowing offensive and injurious odors and smells from polluting substances discharged into the stream from the city sewer. *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858.

But the pollution of a stream by the sewage of a municipality was held not to amount to a public nuisance in *Smith v. Sedalla*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907, and therefore a prescriptive right could be acquired by the city so to pollute the stream as against a landowner through whose property the stream runs. The court said that, "though there be several landowners through whose possessions the polluted stream may flow, and all suffer damage of the same character but each of different degree, that does not convert the injurious act into a public nuisance, for it is only those individuals, and not the public in general, who suffer; and therefore each may recover the damage he suffers, though it differs only in degree from that that others in the same class have suffered."

A riparian owner on a stream, whose waters are used as the water supply of a municipality, acquires no prescriptive right to pollute the water by the sewage from her house and the wash from her barnyard, stables, and other out buildings, as such acts constitute a public nuisance. *Kelley v. New York*, 6 Misc. 516, 27 N. Y. Supp. 164.

No prescriptive right to pollute a stream can be acquired after the waters of such stream have been appropriated as a source of municipal water supply, since the fouling of the water after the right to foul it has ceased would be a public nuisance. *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664.

Since the passage of Mass. Stat. 1878, chap. 183, to prevent the pollution of rivers, streams, and ponds used as sources of water supply by cities or towns, no one can acquire a prescriptive right to pollute a stream as against a town which obtains its water supply from that stream by the intervention of a filtering gallery into which the water passes by percolation through the walls, as no rights can be acquired by prescription by acts done in violation of the absolute prohibition of a public statute. The court said: "Such acts, when expressly prohibited, are in their inception and continuance unlawful 53 L. R. A.

as against the public authority, and they cannot become lawful as against the individual members of the public, however long they may have been exercised. When the statute forbids anything to be done the right to do it is not to be granted or acquired. However long the nuisance may have been continued, those affected thereby are entitled to a remedy to the extent at least to which the acts by which it was continued were forbidden by law." *Brookline v. Mackintosh*, 133 Mass. 216.

No prescription or usage can justify the maintenance of a privy so located as to contaminate the sources of a municipal water supply. *Com. v. Yost*, 11 Pa. Super. Ct. 323; *Reversed in Com. v. Yost*, 197 Pa. 171, 46 Atl. 845, on the ground that, as there was no evidence showing the use by anyone of the water of the stream except by a water company which, without any apparent rights other than those of an ordinary riparian owner, has established a pumping station for the purpose of supplying water to customers in the municipality, the injury was a private one for which the remedy was by a civil action, and not by indictment.

In *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354, plaintiff claimed a prescriptive right to use the waters of a reservoir for boating, sailing, and fishing. The court held that, as he had relied upon a written agreement by the municipal authorities permitting such use of the water, and had never repudiated it in any way, he could not, by his use, convert the license of a personal privilege limited to his life into an absolute title to last forever.

The subject of municipal control over nuisances relating to public health and safety will be found treated in *note* to *Harrington v. Providence* (R. I.) 38 L. R. A. 305. And the right of municipalities to enjoin the pollution of water and watercourses is discussed in *note* to *Waverly v. Page* (Iowa) 40 L. R. A. 465.

### III. Highways and places held for public use.

#### a. Obstructions and encroachments in general.

There is a class of cases which holds that a prescriptive title to land held for a public use can be acquired by occupation under a claim of right. Inasmuch as it is doubtless true that every encroachment upon, or occupation of, a highway or other public place is a public nuisance, these cases even though decided without reference to any question of nuisance, seem to be in conflict with the general rule that a prescriptive right cannot be acquired to maintain a public nuisance, unless this rule be regarded as limited in its application, so far as nuisances

dence does not show that the overflow of said lands is necessary in accomplishing the purposes of its creation; (3) that the defendant has a prescriptive right to overflow said lands.

1. Concerning the contention that the evidence fails to show that the petitioner's lands are overflowed by backwater from the defendant's dam, there is considerable evidence in the record to support the trial court's conclusion. We may say that it is supported by a fair preponderance thereof. To discuss it would serve no useful purpose. We must therefore overrule the defendant's contention on this point.

2. The petition made a prima facie case for the appointment of commissioners, and it was for the company to show why they should not be appointed. *Gill v. Milwaukee & L. W. R. Co.* 76 Wis. 293, 45 N. W. 23.

on highways and other public places are concerned, to cases where no claim of title is set up.

For a discussion of these cases, as well as those maintaining a contrary doctrine, see note to *Meyer v. Graham* (Neb.) 18 L. R. A. 146, on the question, What rights can be acquired against the public by adverse possession of a highway or city street? For the purposes of this note it is deemed sufficient to include only those cases of this character in which the occupation has been clearly regarded by the court as a nuisance.

The obstruction of a public street is a public nuisance which no one can acquire a prescriptive right to maintain. *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Reed v. Birmingham*, 92 Ala. 339, 9 So. 161; *Sims v. Frankfort*, 79 Ind. 446; *Morton v. Moore*, 15 Gray, 573; *Com. v. Albarger*, 1 Whart. 469; *Raht v. Southern R. Co.* (Tenn. Ch. App.) 50 S. W. 72.

So, encroachments on a public highway have been declared nuisances which were not helped or aided by lapse of time. *Yates v. Warrenton*, 84 Va. 337, 4 S. E. 818; *Cross v. Morristown*, 18 N. J. Eq. 305.

No lapse of time will enable an individual to acquire a prescriptive right to occupy a portion of a highway where such occupation amounts to an obstruction and nuisance. *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514.

No length of time will legalize an unauthorized obstruction of a highway to the annoyance of the King's subjects, as such an act is an indictable offense. *Rex v. Cross*, 3 Campb. 226.

An occupation and obstruction of a public street is a nuisance, and against an action to abate it, brought on behalf of the public or by a private person specially injured, no one can acquire a defense by adverse possession, as every continuance of that which was originally a nuisance the law considers a new nuisance. *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 308, 4 Pac. 433.

In *Taylor v. Com.* 29 Gratt. 780, the court approved an instruction given by the trial court that any substantial encroachment upon or obstruction of a public highway or street is a public nuisance which no length of time will legalize or render lawful, and the fact that such encroachments or obstructions have been maintained and continued for a long time does not operate as a bar to the right of the public to have the nuisance abated, nor to give the accused the right to continue or keep such obstructions and encroachments in the highway or street.

*Newark & N. Y. R. Co. v. Newark*, 23 N. 53 L. R. A.

The defendant admits the purpose of its incorporation to be to build, maintain, and operate a dam across Wolf river under the franchise granted by chapter 235, Laws 1889, for hydraulic and manufacturing purposes, for the improvement of said river, and the building and maintaining of piers to facilitate the running of logs therein. It accepted the franchise so granted, and erected its dam pursuant to the power thereby conferred. It must be presumed that it built its dam to such a head and of such dimensions as to properly carry out its corporate purposes, in absence of evidence to the contrary. Whatever may be the fact, when the company is called upon to pay compensation for the land it takes by overflow, it cannot be heard to say that it has taken more than is absolutely necessary to carry out its purposes. So long as it maintains its dam un-

J. Eq. 515, the court was of the opinion that the maxim, *Nullum tempus occurrit reipublicis* should, if necessary, be applied so to protect the inhabitants of the city that the negligent inaction of its officers would not legalize the placing of a nuisance in a public street.

The length of time during which the proprietors of a distillery have maintained a systematic and continued encroachment upon a street through the accumulation of teams, carts, and wagons of their customers awaiting opportunity to load is no defense to an indictment against them for maintaining a nuisance. *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

So, the mere fact that a portion of a public highway has for twenty years been used by an innkeeper for the purpose of standing thereon the empty vehicles of his customers or guests was held to be no defense to an information preferred under 5 & 6 Wm. IV. chap. 60, § 72, for obstructing a highway. *Gerring v. Barfield*, 16 C. B. N. S. 597, 11 L. T. N. S. 270. In this case *Willes, J.*, said: "The evidence offered on the part of the appellant only amounted to this, that the public had for a certain time been content to tolerate a nuisance. That could avail nothing against the clear proof that the public had a right to the way without obstruction."

And the length of time during which a practice of a stagecoach proprietor to permit his coaches to stand in a public highway during the interval between the end of one journey and the commencement of another, to the annoyance of the King's subjects has prevailed, has likewise been held to be no defense to an indictment against him for maintaining a public nuisance. *Rex v. Cross*, 3 Campb. 226.

No prescriptive right can be acquired to lay logs of wood for fuel in the highway before the doors of ancient houses, although sufficient room is left for travelers to pass, which will bar an action on the case for damages sustained by a traveler upon the highway by reason of the existence of this public nuisance. *Fowler v. Sanders*, Cro. Jac. 446.

So, in *Morton v. Moore*, 15 Gray, 573, the court based its holding that a right to deposit sawlogs within the limits of a highway cannot be maintained by evidence that the owner of the sawmill has been accustomed to deposit them there for more than twenty years, upon the principle that an obstruction to a public highway is a public nuisance which, however long it may be continued, is still unlawful.

But in *King v. Smith*, 4 Esp. 109, it was held that no indictment could be maintained as for a nuisance in obstructing a highway by exposing



der authority rightfully granted by the state, it will not be permitted to say that its dam is built somewhat higher than is absolutely necessary to carry out some of its corporate purposes. See *Babcock v. Chicago & N. W. R. Co.* 107 Wis. 280, 83 N. W. 316. By a fair construction of the act granting the franchise, the person whose lands are overflowed may, as was done in this case, institute proceedings to secure his damages, when the company fails to proceed. When this is done, as said in the case cited, "it would be incongruous to permit the latter to deny necessity of its taking, or to insist on allegation or proof by the other party, when the whole proceeding rests on its own acts, affirming such necessity in the most unambiguous manner."

3. The trial court found that the defendant had no prescriptive right to overflow

articles for sale in a place which had been used for a public fair or market for more than twenty years.

No right so to maintain a ditch or canal through the streets of a city as to constitute a nuisance can be acquired by adverse user continued over a series of years. *Fresno v. Fresno Canal & Irrig. Co.* 98 Cal. 179, 39 Pac. 943.

So, in *Waterloo v. Union Mill Co.* 72 Iowa, 437, 34 N. W. 197, the right of a municipality to maintain an action to abate a nuisance caused by the construction of a mill race in one of its streets was upheld, although the race had been constructed for about twenty years.

And in *Kellogg v. Thompson*, 66 N. Y. 88, the court, although deeming it unnecessary to decide whether a person could, by the lapse of twenty years, acquire a prescriptive right as against the public to turn a stream from its original channel on his land into an artificial channel in the highway, thereby creating a public nuisance, expressly disclaimed any intention to affirm such a doctrine.

After a highway has been laid out no prescriptive right can be acquired by an abutting owner to discharge water from a spout on his building into the highway so as to create a public nuisance. *Holyoke v. Hadley Water Power Co.* 174 Mass. 424, 54 N. E. 889.

The maintenance of a ditch across a public highway or street without a bridge or other safe and convenient way of crossing is a nuisance which no lapse of time can, under Idaho Rev. Stat. § 8630, give a prescriptive right to maintain. *Lewiston v. Booth* (Idaho) 34 Pac. 809.

Twenty years' continuance of a milldam across a river is no defense to an indictment for maintaining a public nuisance consisting in the obstruction of a highway by the consequent setting back of the water. *State v. Phipps*, 4 Ind. 515.

Nor will the lapse of twenty years bar an action by the town, charged with the duty of maintaining the highway in a safe condition, to recover from the party maintaining such a nuisance the damages it has suffered. *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902.

And no prescriptive right to continue a public nuisance of this character can be acquired by the lapse of twenty years as against a town which suffers a peculiar and special damage thereby, although a recovery for the harm done by the original action of the dam may be barred. *New Salem v. Eagle Mill Co.* 138 Mass. 8.

In *Atty. Gen. ex rel. Mann v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 53 L. R. A.

these lands. Such finding is but a mere conclusion of law, and it is difficult to say whether it was based upon a consideration and determination of the fact from the testimony, or on an adoption of the rule of law contended for by the petitioner's counsel. Their argument is that Kast and his grantors maintained a dam across a navigable stream without authority from the state; that such dam was a public nuisance, and could never be legitimated by lapse of time, and therefore Kast had no rights he could assign. It must be conceded that Shawano creek is a navigable stream, within the rule established in this state. *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 273, and cases cited. The dam was built on lands owned by the parties who maintained it. It had been built more than forty years prior to the time the defendant pur-

605, *infra*, III. e, it was said that, although the maintenance by an individual of such an exclusive occupation of land held by the commonwealth for a public use as constitutes a disseisin in some way other than by the erection of a fence or building would be a public nuisance and subject him to an indictment, yet, under Mass. Rev. Stat. chap. 119, § 12, at the end of twenty years he would have a title by disseisin, and the commonwealth could not dislodge him. It would seem that the obstruction of a highway by the setting back of water upon it due to the maintenance of a dam is not regarded as such an exclusive occupation of land held by the commonwealth for a public use as constitutes a disseisin within the meaning of this statute, as the authority of *New Salem v. Eagle Mill Co.* 138 Mass. 8, *supra*, was said in *Holyoke v. Hadley Water-Power Co.* 174 Mass. 424, 54 N. E. 889, *supra*, not to be impaired by this decision.

The same point was involved in *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902, and it was there held that the provisions of Me. Rev. Stat. chap. 18, § 95, relative to adverse rights in public ways or streets or lands appropriated to public use, have no application to an action by a town to recover damages for erecting and maintaining a dam whereby a highway is overflowed and injured, as such acts constitute a public nuisance which no length of time will give a prescriptive right to maintain.

In *Webber v. Chapman*, 42 N. H. 326, 80 Am. Dec. 111, the court, in holding that where a highway had been inclosed, occupied, and used adversely, uninterruptedly and under a claim of right for twenty years a prescriptive right had been acquired against the public, said: "We are not called upon to decide, as seems to be contended in defendant's argument, that a trespass can ripen into a right by long continuance, or that a twenty years' continuance of a public nuisance, admitted to be such, would give the individual any rights as against the public."

It is difficult to determine whether the court in *Wheeling v. Campbell*, 12 W. Va. 36, in holding good as against the corporate authorities defendant's title to certain portions of the street of which he had been in uninterrupted, open, notorious, and continuous possession for over forty years under a claim of title thereto, regarded the obstruction as a public nuisance, and intended to affirm that a prescriptive right could be acquired to maintain it, or simply to decide that defendant had acquired a good title by adverse possession. The obstruction sought to be enjoined was characterized in the bill as a public nuisance, but the court nowhere declares it to be such, and, although among the cases which

chased Kast's interests, in 1892. The only evidence in the case regarding the right to maintain it was given by Mr. Kast when he said that he "maintained the dam publicly, claiming a right to do so without permission from anyone." Generally speaking, all hindrances or obstructions to the use of a navigable stream by the public, without authority from the state, are public nuisances. *Barnes v. Racine*, 4 Wis. 454; *State v. Carpenter*, 68 Wis. 165, 60 Am. Rep. 848, 31 N. W. 730; *Know v. Chaloner*, 42 Me. 150. See *Re Eldred*, 46 Wis. 530, 1 N. W. 175. "There is no such thing as a prescriptive right, or any other right, to maintain a public nuisance." *Douglass v. State*, 4 Wis. 387, and cases cited.

This proposition, however, must be understood as applying to the rights of the public, and not to those of individuals, and it

is the failure to appreciate this distinction that has led the counsel for petitioner into some confusion. A public nuisance cannot be abated by the act or at the suit of a private party unless it is shown that he has suffered some private and special injury. *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423; *Greene v. Nunnemacher*, 36 Wis. 50; *State ex rel. Hartung v. Milwaukee*, 102 Wis. 509, 78 N. W. 756. This is based upon the principle that the rights of the state are to be vindicated only by public officers, but when the nuisance becomes a private one, so as to affect individual rights, the injured party may pursue his remedy. The fact, however, that a public nuisance cannot be legitimated as against the public, by the mere lapse of time, does not justify the conclusion argued for, that no prescriptive right can be obtained as against individuals.

It cites and refuses to follow are several in which the doctrine that no length of time will legalize an obstruction of the highway which amounts to a public nuisance was laid down, it seems to have deemed the real question to be whether the maxim *Nullum tempus occurrit reipublice* is applicable to municipal corporations, or is restricted in its application to sovereignty alone, and to have regarded the cases which it cites only as authorities pro and con upon that question.

For a discussion of municipal power over nuisances affecting highways and waterways, see note to *Hagerstown v. Witmer* (Md.) 89 L. R. A. 649. And as to injunctions by municipalities against nuisances upon highways and streets, see note to *Drew v. Geneva* (Ind.) 42 L. R. A. 814.

#### b. Railroads.

No lapse of time, however great, can destroy the right of city officials to remove or abate a railroad bridge over a city street, the piers and embankments of which impair its usefulness as a public thoroughfare, as this obviously constitutes a public nuisance. *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562, 38 N. Y. Supp. 510.

The rule that there can be no such thing as a prescriptive right to maintain a public nuisance was recognized in *Philadelphia, W. & B. R. Co. v. State*, 20 Md. 157, in which the nuisance complained of consisted of the erection and maintenance by a railroad company of a bridge over its tracks at a highway crossing in such a manner as to impede travel on the highway.

In *Blakely v. Delaware & H. Canal Co.* 2 Lack. L. News, 59, the court, in holding that the silence and acquiescence of a plank-road company authorized to open a road of any width not exceeding 40 nor less than 8 feet, while a railroad company constructed an overhead crossing, amounted to a designation by the plank-road company that its road was no wider at that point than the distance between the abutments erected to support such crossing, said that if such abutments had been wrongfully placed in the line of the highway no length of time would ripen such wrong into a right, or legalize the nuisance thus created.

The length of time which a railroad company has blocked a street crossing with its tracks and cars allowed to stand thereon, and has obstructed a portion of the street by using it as a dumping ground for cross ties, lumber, and debris of various kinds, is no defense to a suit by an abutting owner to compel the street to be opened, and to have the obstructions declared 63 L. R. A.

to be nuisances and to be abated and removed. *Raht v. Southern R. Co.* (Tenn. Ch. App.) 50 S. W. 72.

So it was said in *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114, that the obstruction of a highway by the tracks, switches, and buildings of a railroad would, if unauthorized and illegal, be a public nuisance which the railroad company could not acquire the right by prescription to maintain.

And in *Hamden v. New Haven & N. Co.* 27 Conn. 158, the court, in holding that the statute of limitations will not protect a railroad company against its liability for an encroachment or obstruction created by it upon the public streets which constitutes a nuisance, said that every continuance of such a nuisance will amount to a new nuisance.

But in *Atlanta v. Georgia R. & Bkg. Co.* 40 Ga. 471, municipal authorities were enjoined until final hearing from summarily removing a railroad embankment as an obstruction to a public highway and a nuisance, on the ground that, as it was doubtful whether the embankment encroached on the highway, and as it had existed for more than twenty years, the city should be compelled to await a trial on the merits. See also *Cross v. Morristown*, 18 N. J. Eq. 305, and cases immediately following, *infra*, III. c.

As to injunctions, by municipalities against nuisances by railroads and electrical companies, see note to *Marshfield v. Wisconsin Telephone Co.* (Wis.) 44 L. R. A. 565.

The duty of restoring a highway to its former state of usefulness, which is imposed upon a railroad company by its charter in case it shall intersect or cross any road or highway, is continuous, and therefore, irrespective of the general doctrine that length of time cannot legalize a public nuisance, no lapse of time will bar an action to compel the removal as a nuisance of an abutment and embankments constructed by the railroad company upon a highway which constitute an obstruction to travel. *Little Miami R. Co. v. Greene County Comrs.* 31 Ohio St. 338.

To the same effect is *Hatch v. Syracuse, B. & N. Y. R. Co.* 50 Hun, 64, 4 N. Y. Supp. 509, in which the duty of restoring a highway to its former state of usefulness, imposed by N. Y. Laws 1850, chap. 140, upon a railroad company whose railroad intersects a highway, was held to be a continuous one, and the fact that an overhead crossing, whose abutments impair the highway's usefulness, has existed for more than thirty years, was held to be no defense to an action by a highway commissioner to compel its

Important rights, as against individuals, may be acquired and lost by adverse enjoyment for a period of twenty years or more. As against the public, the Kast dam was wrongful, if it obstructed the navigation of the stream. As against the petitioner, it was wrongful because it overflowed (if it did overflow) his lands, and thus invaded his property interests. The private right of action arises, not from the fact that the dam was unauthorized, but because land was taken by the overflow without compensation. The right to damages would have been the same had the dam been authorized by state authority. That one may obtain a prescriptive right of flowage under proper conditions cannot be disputed. It is a right which must have been claimed and maintained in hostility to the right of the person against whom it is set up. *Vliet v. Sher-*

*wood*, 35 Wis. 229. It must have been continuous, exclusive, known to, and acquiesced in by, the owner of the rights affected thereby. 1 Wood, Nuisances, §§ 418, 419, and cases cited. When these conditions concur, and the use has been extended for a period of twenty years or more, the prescriptive right becomes absolute. See Gould, Waters, 3d ed. chap. 11. Such questions are not to be determined by ascertaining how long the dam has been in existence, or by the claim the party makes during the period of prescription. The question is not how high the dam is, but whether the water has been held the requisite period so high as to affect the land flowed as injuriously as it does at the time the landowner seeks damages for such overflow. Gould, Waters, § 343. While it has been the policy of this state to hold all streams capable of floating logs and timber

removal as an encroachment and obstruction to public travel.

So, in *Windsor v. Delaware & H. Canal Co.* 92 Hun. 127, 36 N. Y. Supp. 863, Affirmed in 155 N. Y. 645, 49 N. E. 1105, the existence for upwards of twenty years of the abutments to an overhead railroad crossing, which so narrowed the highway as unnecessarily to impair its usefulness, was held no bar to an action by the town to enforce the public rights in such highway.

#### c. Fences, buildings, and other structures.

No length of time furnishes a defense to an indictment for a nuisance in maintaining a fence across a highway and thereby obstructing the public in the use of it. *Elkins v. State*, 2 Humph. 548.

Nor can the doctrine of prescription defeat the right of a municipality to maintain a suit in equity to remove as a public nuisance a fence erected across one of its streets. *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 18 So. 289.

So, the erection of a fence within the limits of a highway is a public offense which no one can acquire a prescriptive right to maintain. *Sims v. Frankfort*, 79 Ind. 446.

And the length of time which a fence has been intentionally and wilfully maintained within the limits of a street with full notice of the public right thereto will not prevent its summary removal by the public authorities empowered by statute to remove in a summary manner any nuisance. *Childs v. Nelson*, 69 Wis. 125, 33 N. W. 587.

A wall and hedge which incloses, in the lands of an abutting owner, a substantial portion of the highway, is a public nuisance which cannot ripen into a right, however long continued. *Heddlleston v. Hendricks*, 52 Ohio St. 460, 40 N. E. 408.

And the inclosure by a wall of a portion of a public street, although maintained for more than twenty years, cannot destroy the public right, or take away the authority of the public officers to remove and abate the encroachment. *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286.

So, in *Simmons v. Cornell*, 1 R. I. 519, it was held that the possession and inclosure of a portion of a public highway by an adjoining land owner for more than twenty years did not bar the right of the surveyor of highways to remove his fences as an encroachment upon the highway, as this inclosure began as a common and public nuisance for which no one can prescribe.

And in *Reed v. Birmingham*, 92 Ala. 339, 9 So. 161, the court seems to have rested its hold-

ing that the statute of limitations relative to adverse possession is no bar to a suit by a municipal corporation to enjoin and abate as a public nuisance the maintenance of a fence and out-house in one of the city streets upon the principle that there can be no prescription for a public nuisance.

But in *Peckham v. Henderson*, 27 Barb. 207, where the plaintiff's fence, which had been maintained for thirty years, had been removed by the highway commissioners, who justified under N. Y. act 1852, authorizing a resurvey of a public highway, the court held that, as the fence was not an obstruction to travel, and it did not cause any real or substantial annoyance to the public, it was not a public nuisance, and that the commissioners could not so abate it. The court distinctly based its opinion, however, upon the ground that the encroachment upon the highway did not constitute a public nuisance, and its decision would clearly have been otherwise if it had been proved to be such a nuisance.

If the erection of a building in a public square is a common nuisance, the owner can acquire no right by long-continued possession. *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95.

On the trial of an indictment for maintaining a common nuisance consisting of the erection of a large wooden building on and upon a public street, the length of time which it has been occupied is no defense. *Com. v. Moorehead*, 118 Pa. 344, 12 Atl. 424.

No lapse of time can legalize the obstruction of a municipal street by a brick ferry house, a stable, and a stone wall, or bar a prosecution by indictment to abate the nuisance,—especially where the structures complained of were built or repaired since the passage of the act incorporating the municipality, which provides for the abatement as a public nuisance of buildings encroaching upon the streets which shall be erected thereafter, or be rebuilt. *Com. v. McDonald*, 16 Serg. & R. 895.

In *State v. Brown*, 18 Conn. 54, the court, in holding that the act of the purchaser of a building in permitting it to remain within the limits of the highway where it was originally built some thirty years before his purchase was not an erection of the building within the meaning of the statute providing for the punishment of common nuisances, said that the public was not without remedy because the occupant of the building might be compelled to remove it under another section of that statute.

No silence or length of time can deprive a municipal corporation of its power to remove wooden buildings constructed upon land reserved by law for a public road. *Thibodeaux v. Maggioni*, 4 La. Ann. 74.

to be navigable, yet in streams like this, that are not meandered, the landowner and the public have certain reciprocal rights, which may be enjoyed without the destruction of the other. This is fully set forth in the opinion of this court in the case of *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.* 74 Wis. 652, 43 N. W. 660, which holds distinctly that a dam built and maintained by a riparian owner, without legislative permission, in a stream navigable only for the floating of logs and timber, is not unlawful if it does not materially affect or abridge the beneficial use of the stream. See *Carlson v. St. Louis River, Dam & Improv. Co.* (Minn.) 41 L. R. A. 371, note, 73 Minn. 128, 75 N. W. 1044. We fail to find anything in the evidence in the case at bar that brings it outside the line of the discussion and decision in the case last mentioned, nor are we able to perceive why a prescriptive right of overflow could not have been secured, if the facts exist that would bring the case within the principles of law stated. Upon the question of fact of whether the

Kast dam actually backed water upon the petitioner's land to the extent claimed, we have been obliged to refer to the record, and read over 350 pages of typewritten matter, in order to reach a conclusion. The failure to print any considerable portion of the testimony has greatly added to our labors. The burden of showing the nature and extent of the claimed overflow was upon the defendant. Gould, Waters, § 341. A careful review of the evidence convinces us that this obligation has not been met. On the contrary, we believe that a fair preponderance of the testimony shows that such overflow never reached the lands in question at a normal stage of water, as kept back by said dam. An attempt to justify this conclusion by reference to, and a discussion of, the testimony of the numerous witnesses would require much more time and space than the importance of the fact demands. We shall therefore content ourselves with the conclusion stated.

*The order appealed from is affirmed.*

The occupancy by a private person of a portion of a street by temporary and inexpensive wooden structures is not so inconsistent with the right of the public to the use of the street as a highway that the continuance of such possession for twenty years will estop the municipality from demanding their removal. *Cheek v. Aurora*, 92 Ind. 107.

By Pa. act April 16, 1872, it is expressly declared that no length of possession of any part of a public street in the city of Philadelphia shall be available to bar the removal of any nuisance by buildings which had been or might thereafter be erected upon any street, lane, or alley in that city. *Philadelphia v. Friday*, 6 Phila. 275.

A porch extending several feet into the public street is a public nuisance, and, although originally built with the consent of the city, the municipality cannot legalize the structure so as to bar public right; and user, however long continued, is no obstacle to proceedings for its removal. *People ex rel. Wooster v. Maher*, 141 N. Y. 330, 36 N. E. 396.

So, an insufficiently guarded areaway 4 feet 9 inches in width and extending from the building line into the street 5½ feet is, if located in a much-frequented street, a public nuisance which neither lapse of time nor the existence of like nuisances elsewhere with the consent of a municipality will legalize. *McNerney v. Reading City*, 150 Pa. 611, 25 Atl. 57.

To the same effect is *Coupland v. Hardingham*, 3 Campb. 398, which was an action on the case for negligence in not railing in or guarding an areaway in front of defendant's house, whereby plaintiff fell down into the area and was injured. The defense set up was that the premises had been exactly in the same situation as far back as could be remembered and many years before the defendant was in possession. But Lord Ellenborough held that, however long the premises might have been in this situation, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had been before exposed, and was liable for the consequence of having neglected so to do in the same manner as if he himself had originated the nuisance.

By statute in Massachusetts it is provided that no length of time less than forty years will justify the continuance of a building or fence on a highway or other public place. And, although 53 L. R. A.

a person who erects such a structure may be indicted for maintaining a public nuisance, yet under the statute an indictment can only be found where the structure has not existed for forty years. *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Cutter v. Cambridge*, 6 Allen, 20; *Com. v. Blaisdell*, 107 Mass. 234; *Atty. Gen. ex rel. Adams v. Tarr*, 148 Mass. 309, 2 L. R. A. 87, 19 N. E. 358; *Atty. Gen. ex rel. Mann v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605.

Front steps leading to a dwellinghouse and projecting into the street but 3½ feet make the building one within the highway within the meaning of Mass. Rev. Stat. chap. 24, §§ 61, 62. *Gen. Stat. chap. 46, §§ 1, 2*, declaring that the continuance of a building in the highway, cannot be justified by any length of time less than forty years, but may be indicted as a nuisance. *Com. v. Blaisdell*, 107 Mass. 234.

Under a statute authorizing selectmen, after giving notice, to pull down and remove encroachments upon the highway within fifteen years from the date of such encroachments, fifteen years uninterrupted possession of a highway will bar the right of the town to maintain ejectment to recover possession of the land for the use of the highway. *Litchfield v. Wilmot*, 2 Root, 288.

The length of time during which a structure has been maintained in a public street may be ground for restraining its summary removal by municipal or public authorities.

Thus where the true boundaries of a street were open to serious controversy, and a fence claimed to be an encroachment had existed for more than twenty years, the court, in *Cross v. Morristown*, 18 N. J. Eq. 305, was of the opinion that the officers of the town, unauthorized to pursue such a course by any ordinance, would not be justified in entering upon the premises and removing a fence as a public nuisance, notwithstanding the fact that encroachments upon a public street, no matter how ancient and long continued, are clearly public nuisances, and as such are abatable. See also *Atlanta v. Georgia R. & Ykg. Co.* 40 Ga. 471, *supra*, III. b.

And a tollgate erected across a turnpike road within the city limits under legislative authority, which has existed for over thirty years without objection, has been held not to be such a public nuisance as can be summarily removed by the municipal authorities. *Conestoga & B.*

S. Valley Turnp. Road Co. v. Lancaster City, 151 Pa. 543, 24 Atl. 1092.

So, in Varick v. New York, 4 Johns. Ch. 53, the court enjoined the public authorities from removing buildings and fences, under their right to regulate highways, which had been erected under a claim of right and were in constant possession for upwards of twenty-five years, until the corporation should establish by due process of law its right to the ground in dispute.

And, although the continuance of a veranda overhanging a public street cannot be justified by lapse of time so as to give the owner the right to restrain the municipal authorities from enforcing an ordinance passed for the purpose of compelling its removal, yet where it had existed for more than sixty years, and no special necessity for its removal was made out, the court in Caldwell v. Galt, 27 Ont. App. Rep. 162, refused to grant a mandatory injunction without prejudice to the right of the municipal authorities to enforce obedience to their ordinance by ordinary methods.

In Philadelphia v. Presbyterian Bd. of Publication, 9 Phila. 499, Affirmed in Philadelphia's Appeal, 78 Pa. 33, an injunction restraining as a nuisance the erection of a building, the ornamental parts of which encroached upon and overhung the public street, was dissolved because a custom had existed in the city for many years for builders to come out over the line with ornamental works, and the city council had never legislated against this practice. The court said: "While such a course of action on the part of builders does not make such a custom as would prevent councils from prohibiting it, nevertheless the silence of councils in regard to it when the practice was well known, and the acquiescence in it by the city authorities for so long a time, would seem to furnish a solid reason why this court should not interfere by special injunction in a case where the building has already been commenced."

In Com. v. Miltenberger, 7 Watts, 450, the nuisance charged was the encroachment upon the highway by building over what the public authorities claimed to be the building line. It was shown that the municipal corporation had located and fixed the boundary line to which the owners had built, and enjoyed their rights for over twenty years, the public having used the street for the same period. The court held the boundary line as thus maintained must be taken as the true location, which could not be disturbed by the municipal authorities so as to prejudice vested rights of the owners.

#### d. Sidewalks.

The right to maintain a public nuisance consisting of the permanent obstruction of a portion of a city sidewalk 2 feet wide and 40 feet in length cannot be acquired by prescription. *Ex parte Taylor*, 87 Cal. 91, 25 Pac. 258.

Where a fruit and vegetable stand extended into the sidewalk, and was used by a storekeeper in connection with his business for a considerable number of years, it was held that the same was abatable by the public authorities as a public nuisance, and that no length of time would legalize the nuisance or give the defendant the right to maintain it as against the public. *City v. Danb*, 1 Lanc. L. Rev. 306.

An adverse possession for the time prescribed by the statute of limitations would not be available as a defense against a proceeding by a municipality to abate a nuisance consisting of an entrance to the basement of a building which encroaches upon the sidewalk. *Memphis v. Le-nore*, 6 Coldw. 412.

The fact that a wooden awning extending over a city sidewalk, which would be dangerous in case of fire and might prove dangerous to

persons using the street, has been there for more than twenty years, does not give a prescriptive right to its continuance. The liability of the city for damages resulting therefrom remains on the theory of the continuing nuisance, and no statute runs against the right of the municipality to protect itself therefrom. *Simis v. Brookfield*, 13 Misc. 569, 34 N. Y. Supp. 695.

In *Augusta v. Burum*, 93 Ga. 68, 26 L. R. A. 340, 19 S. E. 820, it is said that the continuance of wooden awnings over sidewalks in a city having no power to grant a perpetual right for their maintenance must be referred to a license, express or implied, from the city government, or to a renewal or repetition thereof. The court in this case expressly refrained from deciding whether such awnings were nuisances or not.

In *Patten v. New York Elev. R. Co.* 3 Abb. N. C. 324, the court was of the opinion that vaults constructed by an owner of land abutting on a public street under the sidewalk in front of the premises which occasioned any interference with the public use of the street, such as the construction of an elevated railroad therein under authority of the legislature, would amount to a public nuisance which no indulgence on the part of the corporation, and no length of time in the enjoyment of such privilege, would justify.

#### e. Nuisances relating to waterways.

In *Southern R. Co. v. Ferguson*, 106 Tenn. 552, 59 S. W. 343, it was said that the rule seems to be universally accepted that a right to obstruct a public highway, such as a navigable stream, cannot rest on prescription, as such an obstruction is a common nuisance.

An obstruction of a navigable stream for twenty years was said in *Voight v. Winch*, 2 Barn. & Ald. 662, to be no bar to the public right to use it as such.

The length of time during which a dam has been maintained across a navigable stream to the impairment of navigation is no bar to the right to abate it as a public nuisance, for every continuance of the obstruction is of itself an offense. *Renwick v. Morris*, 7 Hill, 575.

So, in *Olive v. State*, 86 Ala. 88, 4 L. R. A. 38, 5 So. 653, it was said that there could be no prescriptive right to maintain or continue a dam which constitutes an obstruction to the navigation of a public stream.

And in *Crill v. Rome*, 47 How. Pr. 406, where plaintiff claimed the right by prescription to divert the waters of the Mohawk river, a navigable stream, for the purposes of his mill privilege, by means of a dam, the court held that the erection of a dam was a public nuisance, and that the continuance thereof could not, as against the state, give the plaintiff or his grantors a valid claim to maintain the interference with the public waters.

And in *Dyer v. Curtis*, 72 Me. 181, the court, in holding that a milldam erected without legal authority across the mouth of a creek which empties into an arm of the sea, so as to exclude the salt water from the millpond for the purpose of creating a pond of fresh water for the formation of ice for the market was a public nuisance, said that no erection injurious to the right of navigation or the passage of fish into bays, creeks, or up the course of navigable rivers without legislative sanction ever acquires the right to exist by lapse of time.

The obstruction by a dam of the passage of migratory fish from the sea to a large inland lake is a public nuisance the continuance of which, even under a claim of right, cannot, as against the public, give a title by prescription, where such obstruction in fact originated without right. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

And, although twenty years' acquiescence may bind parties whose private rights only are affected, the public has an interest in the suppression of public nuisances, such as the erection of a weir across a river whereby the fish are stopped in their passage up the river, though of longer standing. *Weld v. Hornby*, 7 East, 195, 3 Smith, 244.

So, in *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199, it was said that no one can acquire a prescriptive right to maintain a dam or other artificial obstruction whereby the passage of fish up and down a stream is prevented.

A riparian owner cannot acquire by prescription the right so to maintain a dam and mill as to defeat the right of the public in an easement to float logs down a stream capable of such use. *Collins v. Howard*, 65 N. H. 190, 18 Atl. 794.

And no lapse of time will bar an action on the case for maintaining a dam across a stream capable in its natural state of floating logs, rafts, and timber, and thereby obstructing the passage of the plaintiff's logs, as a dam so constructed is a public nuisance which no length of time will legalize. *Knox v. Chaloner*, 42 Me. 150. The court said: "Important rights as against individuals may be acquired and lost by adverse enjoyment for a period of more than twenty years. But this principle does not apply as to obstructions in a public navigable river."

No right can be acquired by prescription so to maintain a bridge across a navigable stream as to prevent a person who has occasion to use the stream from removing it if necessary to the safe and convenient passage of his vessel. *Arundel v. McCulloch*, 10 Mass. 70.

No length of time will legalize the maintenance in a navigable stream of such a public nuisance as an unauthorized large permanent float especially injurious to the plaintiff in that it obstructed free access from his land to a public navigable highway and return therefrom. *De Laney v. Blizzard*, 7 Hun. 7.

Length of time will not legalize a public nuisance consisting of a bank erected in a harbor. *Folkes v. Chad*, 3 Dougl. 340.

But where riparian owners have maintained wharves without complaint and interruptions from any source for twenty-five years, they will not be declared to be nuisances at the instance of the municipal authorities whose acts in the erection of a bridge and the dredging of the stream caused the wharves to be the obstruc-

tions to navigation of which they complain. *Chicago v. Ladin*, 49 Ill. 172.

On the right of municipalities to enjoin nuisances in waters and watercourses, see *note to Waverly v. Page* (Iowa) 40 L. R. A. 465.

The deposit into a navigable stream by a hydraulic mining company of debris consisting of gravel, sand, and other refuse, to the endangerment of habitation and cultivation of large tracts of land and to the impairment of navigation, constitutes a public nuisance, the right to continue which cannot be acquired by prescription so as to bar a proceeding in equity instituted by the attorney general in the name of the people to compel the discontinuance of the acts which constitute the nuisance. *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

And the obstruction of a harbor by depositing sawdust, shavings, chips, bark, and other refuse matter from a mill into a raceway leading therefrom in violation of a municipal ordinance is a public nuisance which no length of time will legalize. *Ogdensburg v. Lovejoy*, 2 Thomp. & C. 88, Affirmed in 56 N. Y. 662.

So, a millowner can acquire no right by prescription to cast slabs, edgings, and waste into a stream capable in its natural state of floating logs, rafts, and lumber, if the stream or channel is thereby obstructed. *Veasie v. Dwinel*, 50 Me. 497.

And the filling and narrowing of the channel of a navigable river with the debris resulting from hydraulic mining to the injury of navigation and the danger of riparian owners is a public nuisance which can never become lawful by any length of exercise, so as to bar a suit to abate it brought by a private person who has sustained special damage. *Mining Debris Case*, 9 Sawy. 441, 18 Fed. 753.

But if the acts of a millowner in reducing, for a short time in each year, the area and depth of the water in a great pond, thereby diminishing the enjoyment of boating by the public, create a technical public nuisance, neither principle nor authority require the application to such case of the rule that no length of time will legalize a nuisance, there being a statute permitting the acquisition by disseisin of a complete title against the state. *Atty. Gen. ex rel. Mann v. Revere Copper Co.* 152 Mass. 444, 9 L. R. A. 510, 25 N. E. 605. W. W. N.

## OREGON SUPREME COURT.

William R. WILLIS, *Resp't.*,  
v.  
A. M. CRAWFORD, *Appt.*

(.....Or.....)

1. An undertaking, by two lawyers not general partners in the practice of the law, to conduct litigation for a client, followed for a time by equal division of the compensation paid for the services, does not render them special partners so as to give equity jurisdiction of a suit for an accounting in case one of them subsequently receives and retains the greater share of such compensation.

NOTE.—For some other cases in this series as to agreement to share profits as test of partnership, see *Seabury v. Crowell* (N. J. L.) 11 L. R. A. 136, and *Drovers' & M. Nat. Bank v. Bolter* (Md.) 36 L. R. A. 767, 53 L. R. A.

2. One of two lawyers who have undertaken to conduct litigation for a client has a plain, adequate, and complete remedy at law in an action for money had and received to his use, which will preclude a resort to equity in case the other receives and retains an undue proportion of the compensation paid for the services.

On rehearing.

3. As between the alleged partners themselves, the fact of partnership cannot be established by proof of independent facts from which the principal fact is inferable, in the absence of direct evidence of a purpose to form a partnership.

(March 4, 1901.)

APPEAL by defendant from a decree of the Circuit Court for Douglas County in favor of plaintiff in a suit to dissolve an

alleged partnership and for an accounting. *Reversed.*

**Statement by Moore, J.:**

This is a suit to dissolve an alleged partnership, and for an accounting. The transcript shows that one J. T. C. Nash was the owner of a mine in Douglas county, Oregon, which he sold to the Victory Placer-Mining Company, a corporation, receiving therefor its bonds in the sum of \$90,000, and an assignment of a cause of action instituted by one W. H. Harris against the International Nickel-Mining Company to recover the sum of \$10,000. A cross bill having been filed in said action, making Nash a party, he retained the plaintiff and defendant as his attorneys, who secured for him the amount involved, receiving as fees for their services the sum of \$350 each. They also commenced a suit for Nash against the Victory Placer-Mining Company, and secured a decree making their client's bonds a first lien upon the property so sold by him. The corporation having made default in the payment of the interest due on its bonds, and the mine having been operated at a loss, actions were commenced against said corporation by its creditors, whereupon the plaintiff and the defendant, as Nash's attorneys, intervened and secured the appointment of a receiver. A sale of said bonds having been negotiated for \$30,000 of which sum \$500 was paid in cash, and promissory notes of the purchasers thereof were executed for \$5,500, payable April 5th of that year, and \$2,000 on the 5th of each month thereafter until and including April, 1898, Nash, on February 27, 1897, without plaintiff's knowledge, executed to Crawford a writing promising to pay him one third of the purchase price, when paid, in consideration of the latter's service for several years as an attorney and in securing the sale of said bonds; and it was stipulated that from the sum so received Crawford would pay Willis all sums due him for service rendered Nash. Willis, on March 29, 1897, received from Nash a check for \$600, and thereafter the defendant paid him the sum of \$150 on account of his attorney fees, the latter having received \$750 for the same service. The promissory notes evidencing the purchase of said bonds having been paid as they severally matured, the defendant, in pursuance of Nash's agreement, received and retained the sum of \$8,500. In July, 1898, the plaintiff, having found in the defendant's office, joining his in the same building at Roseburg, Oregon, the memorandum executed by Nash, took possession thereof without the defendant's knowledge, and thereupon commenced this suit, alleging that Crawford was his partner in the trial of said causes for Nash; that the defendant collected all sums paid on account of attorney fees, and falsely represented that he had received only \$1,800 therefor; that no settlement had ever been made respecting said attorney fees, and the defendant refuses to render a statement of the terms of the agreement entered into with Nash, or to give a correct account of

the sums he has received as fees in pursuance thereof; and praying a decree for one half the sum which it may be found the defendant has received. A demurrer to the complaint on the ground that the plaintiff had a plain, speedy, and adequate remedy at law having been overruled, an answer was filed, denying the material allegations of the complaint, and averring that about April 5, 1898, Nash settled with the plaintiff, and paid him the sum of \$750 in full satisfaction of his demand, since which time he rendered no service for Nash; and also alleging that the plaintiff has a full, complete, speedy, and adequate remedy at law for the redress of his alleged wrongs. The reply having put in issue the allegations of new matter in the answer, the cause was referred to Ira B. Riddle, who took the testimony, from which the court found that the plaintiff and defendant were partners in the business transacted for Nash; that the defendant entered into an agreement with Nash whereby he received and retained the sum of \$8,500, which agreement inured to the benefit of said partnership, and that the plaintiff was entitled to recover from the defendant the sum of \$4,250; and, having rendered a decree in accordance therewith, the defendant appeals.

*Messrs. J. C. Fullerton and E. B. Watson* for appellant.

*Messrs. Dexter Rice and W. R. Willis* for respondent.

Moore, J., delivered the opinion of the court:

It is contended by defendant's counsel that no partnership existed between the plaintiff and the defendant; that, if the latter received any money from Nash to which the plaintiff was entitled, he had an adequate remedy at law for the recovery thereof; and that the court erred in holding that equity had jurisdiction of the cause. It is not alleged in the complaint, and the evidence fails to show, that the plaintiff and defendant were general partners, though each paid one half the cost of the fuel used and of the rent of the separate rooms occupied by them, and a city license was issued to them as partners to practise their profession as attorneys at law in Roseburg, Oregon, from January 1, 1896, to July 1, 1897; but Crawford testifies, and he is not contradicted in this respect, that the license was issued in the form indicated so as to save the cost of one license. The parties not being general partners in the practice of law, did the joint service rendered by them for Nash establish *inter se* such a special partnership as would authorize a court of equity to assume jurisdiction of the cause by reason of their relation of trust and confidence? A partnership is an agreement entered into between two or more persons to unite their labor, skill, money, and property, or either or all of them, in a lawful enterprise for their mutual account. Story, Partn. § 2; 17 Am. & Eng. Enc. Law, p. 828; *Cogswell v. Wilson*, 11 Or. 371, 4 Pac.

1130; *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 40; *Dawson v. Pogue*, 18 Or. 94, 6 L. R. A. 176, 22 Pac. 637; *Flower v. Barnekoff*, 20 Or. 132, 11 L. R. A. 149, 25 Pac. 370. Whether the parties are partners *inter se* must be determined in a suit instituted for that purpose, from their intention to enter into that relation, as legally ascertained from their agreement to that effect. 17 Am. & Eng. Enc. Law, p. 832; *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 40; *Klosterman v. Hayes*, 17 Or. 325, 20 Pac. 426; *Nelms v. McGraw*, 93 Ala. 245, 9 So. 719; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; *McDonald v. Matney*, 82 Mo. 358. It is not asserted by Willis that they intended to form a partnership, and, in the absence of any testimony in this respect, their intention must be ascertained, if possible, from the evidence of their conduct. The defendant testifies that no agreement had been entered into whereby the plaintiff was to be paid one half the money received from Nash as attorney fees, but that he had divided the sums so received equally with Willis until the latter settled with Nash respecting the amount so due him, and was thereupon discharged as his attorney. An agreement between two or more persons to divide the profits resulting from the prosecution of a business venture in which they have a common interest was once regarded as affording an accurate test of partnership; but such standard is not now deemed conclusive evidence of the existence of such relation. *Cox v. Hickman*, 8 H. L. Cas. 268; *McDonnell v. Battle House Co.* 67 Ala. 90, 42 Am. Rep. 99; *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Clark v. Barnes*, 72 Iowa, 563, 34 N. W. 419; *Colwell v. Britton*, 59 Mich. 350, 26 N. W. 538; *Clifton v. Howard*, 89 Mo. 192, 58 Am. Rep. 97, 1 S. W. 26; *Eastman v. Clark*, 53 N. H. 276, 16 Am. Rep. 192; *Day v. Stevens*, 88 N. C. 83, 43 Am. Rep. 732; *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343; *Harvey v. Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; *Boston & C. Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3. In *Bloomfield v. Buchanan*, 13 Or. 108, 8 Pac. 912, it was held that it was not necessary that there should be an express stipulation to share the profit and loss of a business enterprise in order to form a partnership; Mr. Justice Thayer saying: "If it were understood between the parties that there was to be a communion of profit, it would be a partnership." The language thus quoted, when considered by itself, would seem to imply that an agreement to divide the profits of an enterprise in which the parties had an interest necessarily created a partnership; but, when the utterance is read in connection with the context, it clearly shows that such was not the intention of the learned justice, and that the agreement referred to did not defeat the theory of a partnership, when so intended by the parties, because it did not provide for sharing the losses. In *Webster v. Bray*, 7 Hare, 159, decided in 1849, two railway companies, having contemplated the construc-

tion of a line of railroad, each retained a solicitor to represent its interests; but, the companies having consolidated, the solicitors continued to render services for the new company without any agreement as to the division of the business to be performed by each, or in respect to their compensation therefor. The defendant performed much more service for their client than the plaintiff, and, having received a large sum in payment thereof, the latter instituted a suit for an accounting, alleging that they were special partners, and entitled to share equally the profits incident to their joint employment. At the trial it was proved that the plaintiff remarked to the defendant, soon after their employment by the consolidated company, that in cases of a special partnership it was the custom, so far as he had observed, for the solicitor performing the service to retain from 10 to 25 per cent of the sum charged, in addition to the office charges and expenses, as his compensation, and the defendant replied that there could be no misunderstanding between honorable men respecting the matter, whereupon it was decreed that the sum so received by the defendant should be divided in the manner indicated thus apparently holding that the existence of a partnership was to be determined from an agreement of the parties to share the profits. To the same effect, see *M'Gregor v. Bainbrigge*, 7 Hare, 164, decided in 1848, and *Robinson v. Anderson*, 7 De G. M. & G. 239, decided in 1855. Plaintiff's counsel rely upon the two cases last adverted to, and the remarks of Mr. Lindley in his work on Partnership, 2d Am. ed. p. 118, in support thereof, wherein it is said that, "if two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further." But the decision in *Cox v. Hickman*, 8 H. L. Cas. 268, rendered in 1860, wherein it was held that an agreement entered into between two or more persons to divide the profits resulting from a business venture did not afford conclusive evidence of a partnership, destroyed the foundation upon which the conclusion in *M'Gregor v. Bainbrigge* and *Robinson v. Anderson* was predicated, and hence the text relied upon to support the decree herein is of little value in determining the question of partnership *inter se*. Every partner is a principal having a joint interest in the property and business of the firm of which he is a member. He is also an agent of each of his associates therein, and a communion of profit and loss is the test of his relationship towards them. 17 Am. & Eng. Enc. Law, p. 829. Upon the dissolution of a partnership by the death of a member the right to make contracts, incur liabilities, manage the whole business, and dispose of the whole property, passes to the surviving members, and not to the representatives of the deceased. *Dwinel v. Stone*, 30 Me. 384; *Donnell v. Harshe*, 67 Mo. 170. In *Finckle*



v. *Stacy*, Macn. Sel. Cas. 2d ed. 40, the plaintiff and defendant performed certain work for the Duke of Marlborough under a joint contract with him, for which they jointly received and immediately divided certain sums of money paid on account thereof. There being a sum in arrear, however, which the duke refused to pay, the defendant requested plaintiff to join him in maintaining an action to recover the same; but, the latter declining to comply therewith, the defendant brought an action against the duke, and recovered one half of the sum due under the contract, whereupon the plaintiff instituted a suit to recover a moiety thereof on the ground that a partnership existed between the parties, and that the money which the defendant so recovered was secured on their joint account; but it was held that the joint contract entered into with the duke was an agreement to do a particular act, and not to form a partnership, and that the plaintiff was not entitled to recover. It is elementary, however, that, when the parties have so intended, a partnership may be formed for a single transaction. *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803; *Solomon v. Solomon*, 2 Ga. 18; *Musier v. Trumbour*, 5 Wend. 274.

In the case at bar the evidence shows that Nash paid all the costs and expenses of the suits and actions in which the plaintiff and defendant appeared as his attorneys, and hence they never expected to share and did not participate in the losses incident to the trial of said causes. They shared the compensation paid by Nash for their joint service, but, as such participation in the joint earnings is not conclusive evidence of a partnership, it cannot be said from this fact alone that they sustained that relation to each other, without being driven to the deduction that the employment of more than one attorney to make preparation for or to try a cause *ipso facto* creates a special partnership,—a conclusion to which we cannot yield our consent. To hold otherwise is to conclude, in the absence of any evidence to the contrary, that a local attorney, employed only to assist in impaneling a jury, because of his knowledge of and acquaintance with the jurors in attendance, entitled him to an equal share of the attorney fee paid for the preparation required to be made and the care necessarily exercised in the trial of a cause, which would be carrying the doctrine of special partnership to the very verge of absurdity. It was incumbent upon the plaintiff to establish by a preponderance of the evidence the existence of the special partnership relied upon to give a court of equity jurisdiction of the cause; but in this respect we think he has failed. Our statute for the protection of private rights contains the following provision: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law." Hill's Anno. Laws (Or.) § 380. A court of equity and a court of law in this state, 53 L. R. A.

though presided over by the same judge, are essentially different forums, and the rule is well settled that a court of equity will not grant relief where there is an adequate remedy at law. *Wells, F. & Co. v. Wall*, 1 Or. 295; *Phipps v. Kelly*, 12 Or. 213, 6 Pac. 707; *Miller v. Tobin*, 16 Or. 540, 16 Pac. 161; *Love v. Morrill*, 19 Or. 545, 24 Pac. 916; *Ming Yue v. Coos Bay, R. & E. R. & Nav. Co.* 24 Or. 392, 33 Pac. 641; *Stemmer v. Scottish Ins. Co.* 33 Or. 65, 49 Pac. 588, 53 Pac. 498; *Denny v. McCown*, 34 Or. 47, 54 Pac. 952.

Having concluded that no partnership, either general or special, existed between the parties, the important question to be considered is whether the plaintiff, has a plain, adequate, and complete remedy at law. In *Dawson v. Gurley*, 22 Ark. 381, it was held that an agreement entered into between several persons to divide, when received, a reward offered for the apprehension of a fugitive from justice, did not constitute a partnership, and that, if one of the parties to the agreement received the entire reward, he was liable to each of the others for his proportion in an action for money had and received. So, too, in *Hurley v. Walton*, 63 Ill. 260, it was held that the joining of two or more persons in a single adventure, in which the profits were to be equally divided, does not constitute them copartners in such a sense as will oust a court of law of jurisdiction in respect thereto. If it be assumed that the money which the defendant received was paid on account of the services rendered by the parties, the plaintiff has a plain, adequate, and complete remedy at law in an action for money had and received to his use, and hence a court of equity never had jurisdiction of the cause.

It follows from these considerations that the decree is reversed and the suit dismissed.

A petition for rehearing having been filed, Moore, J., on May 4, 1901, handed down the following response:

In the petition for a rehearing of this cause, it is contended by plaintiff's counsel that this court placed too much reliance upon the defendant's testimony, and hence erred in reversing the decree of the court below and dismissing the suit. It is proper to say that, having concluded that the relation of partners did not exist between the parties, and that the plaintiff had an adequate remedy at law, to avoid any prejudice that might result in an action in that forum from a comment upon the testimony, a review of that given by either party was studiously avoided, except where it was uncontradicted, or where that given by one party was tacitly admitted by the other. The averment in the answer that the plaintiff had a full, complete, speedy, and adequate remedy at law for the redress of his alleged wrongs was treated in the nature of a demurrer to the evidence, in view of which plaintiff's testimony only was considered; and deeming it, for the purpose insisted upon, to be true, we concluded that it was in-

sufficient in law to prove the existence of a special partnership. Nash, being the party in interest, was obligated to pay the costs and expenses incurred in the suits and actions in which the plaintiff and the defendant were retained, and hence the business in which they were engaged was not in any sense a venture. They were not expected to participate in any gains or to share any losses, but to divide the fees which were earned by them as compensation for the performance of their professional duties. The lower court, in decreeing the existence of a partnership, probably relied upon the rule promulgated by Mr. Lindley in his work on Partnership (vol. 1 [2d Am. ed.] \*118), and felt constrained to follow the seeming approval thereof in *Bloomfield v. Buchanan*, 13 Or. 108, 8 Pac. 912; but we think that the principle there announced is not conclusive in a suit between parties, one of whom insists that they were not partners. As between them, no partnership could exist without an intention to enter into that relation; and the plaintiff does not even testify that such was their purpose, but seeks to establish a partnership by the proof of independent facts from which the principal fact is inferable. This would allow a party, upon whom the duty of proving the existence of an intention to enter into a partnership devolved, the rights of a stranger who had relied upon their conduct in entering into a contract with one of them as evidence of that relation. The plaintiff knew whether it was their intention to form a partnership, and, if such an intention existed, it was his duty so to testify; and, having failed in this respect, we are compelled to overrule the petition.

Julia E. HOFFMAN, *Exrx.*, etc., of Lee Hoffman, Deceased, *Respt.*,

v.

E. H. HABIGHORST *et al.*, *Appts.*

(.....Or.....)

The fact that the principal debtor does not join in signing the note will not take the case out of the rule that parol evidence is admissible to show that signers of a note did so, with knowledge of the payee, as sureties.

(January 21, 1901.)

**A** PPEAL by defendants from a judgment of the Circuit Court for Multnomah County, Department 2, in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by **Bean**, Ch. J.:

This action was brought on a promissory note for \$15,000, executed by the appealing

**NOTE.**—For other cases in this series as to admissibility of extrinsic evidence to show who is liable as maker of note, see *Keldan v. Winegar* (Mich.) 20 L. R. A. 705, and note; *Bulkeley v. House* (Conn.) 21 L. R. A. 247; and *Shuey v. Adair* (Wash.) 39 L. R. A. 473. 53 L. R. A.

defendants and five others, payable to Mrs. Sarah Wertheimer, and by her assigned to the plaintiff after maturity. The complaint is in the usual form, setting out the note *in hæc verba* as follows:

\$15,000. Portland, Oregon, Feb. 29th, 1892.

One year after date, without grace, we jointly and severally promise to pay to the order of Mrs. Sarah Wertheimer, fifteen thousand dollars, for value received, with interest from date at the rate of eight per cent per annum until paid, principal and interest payable in U. S. gold coin; and, in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit. Interest payable quarterly.

[Signed]

E. H. Habighorst.  
G. W. Williams.  
D. L. Edwards.  
J. P. Looney.  
S. A. Stansbery.  
Maria A. Smith.  
G. W. Staver.  
R. Kelly.  
Osmon Royal.  
John Corkish.  
E. P. Fraaser.  
J. P. Rasmussen.  
Alfred Kummer.  
Thos. Van Scoy.  
F. L. Posson.

The answering defendants deny the allegations of the complaint, and as a further defense plead, in substance: That the Portland Guarantee Company, a corporation, desiring to obtain from Mrs. Wertheimer a loan of \$15,000, applied to them and their comakers to act as its sureties, and, by way of inducement, represented, with the knowledge of Mrs. Wertheimer, that it was solvent, and promised that, if they would sign the note, and permit it to be pledged as collateral security for the loan, it would execute to them its own note for a like amount, and secure the same by deed to real property of the value of \$30,000. That, relying on such representations, they signed the note as sureties only, without any consideration whatever moving to them, and it was delivered to and accepted by the payee, with knowledge of the facts, as collateral security for a loan made by her to the guarantee company. That the company failed and neglected to keep and perform its contract with the defendants, but sold and disposed of a large amount of its property and applied the proceeds to other uses. That in consideration of an increase in the rate of interest from 8 to 10 per cent, to be paid by the guarantee company, and additional security by deed of conveyance to her from the company of 100 lots in University Park, Mrs. Wertheimer, the payee of the note, after its maturity, and without the knowledge or consent of the defendants or the other makers, entered into the following contract in writing with the guarantee company:

Whereas, Sarah Wertheimer, on the 29th

day of February, 1892, loaned to E. H. Habighorst, G. W. Williams, and thirteen others the sum of \$15,000 for one year, and took their promissory note therefor, bearing interest, payable quarterly, at the rate of 8 per cent per annum, and said note remains unpaid; and whereas, said Habighorst, Williams, and others borrowed said sum for the Portland Guarantee Company, a corporation, and said company at the time of said borrowing received said sum, and has ever since had and used the same, and paid to said Wertheimer the interest thereon quarterly as it has fallen due; and whereas, said company desires a further extension of the time of said loan, and, in order to further secure the repayment thereof has this day executed and delivered to said Wertheimer the deed conveying to her the following described lands in the city of Portland, county of Multnomah, state of Oregon, to wit, all of blocks 49, 51, 53, 57, as shown and described on the duly recorded plat of University Park,—in consideration of all of which it is now hereby agreed by and between said Wertheimer and said company that said Wertheimer shall and will extend the time for the payment of said loan so that it may be paid by said company on or before the 29th day of August, 1894; that she will reconvey to said company all of the lands described in said deed upon the repayment of said loan in full; and that said company shall and will pay or cause to be paid to said Wertheimer, at Portland, Oregon, interest quarterly on said note to August 29, 1893, at the rate of 10 per cent per annum. Witness our names hereunto set by our authority this 21st day of August, 1893. Executed in duplicate.

[Signed] Sarah Wertheimer,  
by Ben Selling.

[Signed] Portland Guarantee Company,  
by P. L. Willis, Secretary.

That afterwards, on the 24th of September, 1895, Mrs. Wertheimer, without the knowledge or consent of the makers of the note, released to the guarantee company all the security for the payment of such indebtedness which she had previously received from it. That the security so released was worth more at the time than the amount of such indebtedness, and was wholly lost to defendants. That the plaintiff, at the time she received the note from Mrs. Wertheimer, had full knowledge of all the foregoing facts. These matters are pleaded in detail as three separate defenses: (1) As a failure of consideration; (2) as a release and discharge from liability thereon because of the agreement extending the time of payment in consideration of an increase in the rate of interest, and of further and additional security, and the subsequent release to the company of such security without the knowledge or consent of the defendants or their co-makers; and (3) as, in legal effect, a payment by the guarantee company of the debt or obligation for which the note was executed. A demurrer to the first and second further and separate defenses was sustained 53 L. R. A.

by the court below on the ground that they did not state facts sufficient to constitute a defense and a portion of the third was stricken out on motion. A trial was subsequently had before a jury, resulting in a verdict and judgment in favor of the plaintiff, from which the defendants appeal.

**Messrs. Dell Stuart and Fenton, Brounagh, & Muir, for appellants:**

Parol evidence is admissible to show that the apparent makers were in fact either accommodation makers for the real principal, and as such had the rights of sureties, or that they were sureties in fact; and such evidence does not vary or alter the writing, but is admissible to prove a collateral fact, the result of which is under certain circumstances to effect a discharge.

*Meggett v. Baum*, 57 Miss. 26; *Smith v. Clopton*, 48 Miss. 84; *Goodman v. Litaker*, 84 N. C. 8, 37 Am. Rep. 602; *Summerhill v. Tepp*, 52 Ala. 227; *McCartier v. Turner*, 49 Ga. 311; *Grafton Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414, and note; *Davis v. Barrington*, 30 N. H. 524; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39; *Walker v. Goldsmith*, 7 Or. 161; *Findley v. Hill*, 8 Or. 247, 34 Am. Rep. 578; *Gray v. Holland*, 9 Or. 512; *Brown v. Rathburn*, 10 Or. 158; *Thompson v. Coffman*, 15 Or. 631, 16 Pac. 713; *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689; *Rose v. Williams*, 5 Kan. 483; *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529; *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358, 11 N. W. 196; *Stevens v. Oaks*, 58 Mich. 343, 25 N. W. 309; *Bank of British Columbia v. Jeffs*, 15 Wash. 233, 46 Pac. 247; *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834; *Piper v. Newcomer*, 25 Iowa, 221; *Riley v. Gregg*, 16 Wis. 670; *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. Rep. 437; *Key v. Simpson*, 22 How. 341, 16 L. ed. 260; *Holmes v. Goldsmith*, 147 U. S. 159, 37 L. ed. 121, 13 Sup. Ct. Rep. 288; *Bank of Steubenville v. Hoge*, 6 Ohio, 18; *Cummings v. Little*, 45 Me. 183; *Mariner's Bank v. Abbott*, 28 Me. 284; *Hubbard v. Gurney*, 64 N. Y. 457; *Stillwell v. Aaron*, 69 Mo. 539, 33 Am. Rep. 517; *Phares v. Barbours*, 49 Ill. 375; *Ward v. Stout*, 32 Ill. 410; *Kennedy v. Evans*, 31 Ill. 258; *Irvine v. Adams*, 48 Wis. 473, 33 Am. Rep. 817, 4 N. W. 573; *Bradford v. Hubbard*, 8 Pick. 155; *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254; *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311; *Wilson v. Foot*, 11 Met. 287; *Carpenter v. King*, 9 Met. 514, 43 Am. Dec. 405; *Guild v. Butler*, 127 Mass. 389; *Barron v. Cady*, 40 Mich. 260; *United States v. Howell*, 4 Wash. 620, Fed. Cas. No. 15,405; 1 Brandt. Suretyship & Guaranty, 2d ed. § 29; Colebrooke, Collateral Securities, 2d ed. § 203; Tiedeman, Com. Paper, § 422; 2 Randolph, Com. Paper, § 909; 2 Dan. Neg. Inst. §§ 1336-1338; 2 Rice, Ev. pp. 1130-1136.

If it may be shown that some of the apparent makers of a promissory note as to the payee are sureties in fact, and if such fact when shown in certain circumstances

entitles such parties to be discharged of their apparent obligation, there is no reason in principle why all of the apparent makers of a promissory note may not be shown to be in fact sureties, and entitled to the rights of sureties. A sole maker of a promissory note may be shown to be an accommodation maker, and in certain circumstances having the rights of a surety; or such sole maker may be shown to be a surety in fact as to the payee, who has notice thereof.

1 Brandt, Suretyship, & Guaranty, 2d ed. § 38; 2 Randolph, Com. Paper, § 909; *Dickerson v. Ripley County Comrs.* 6 Ind. 128; *M'Questen v. Noyes*, 6 N. H. 19; *Guild v. Butler*, 127 Mass. 389; *Bradford v. Hubbard*, 8 Pick. 155; *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254; *Sweet v. McAllister*, 4 Allen, 354; *Montgomery v. Page*, 29 Or. 329, 44 Pac. 689; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288, Affirming, 1 L. R. A. 816, 36 Fed. 484.

Parol evidence showing want of consideration of a note does not tend to vary the contract or writing, and is admissible.

*La Grande Nat. Bank v. Blum*, 26 Or. 52, 37 Pac. 48; 1 Greenl. Ev. 15th ed. § 284, note A; *American Contract Co. v. Bullen Bridge Co.* 29 Or. 549, 46 Pac. 138; *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254.

If the creditor receives securities from the real debtor, and thereafter voluntarily surrenders such securities or releases the same without the consent of the sureties, such act upon the part of the creditor operates as a discharge of the sureties to the extent of the value of the securities released.

*Colebrooke. Collateral Securities*, § 240; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39; *Denny v. Seeley*, 34 Or. 364, 55 Pac. 976.

*Mr. Guy G. Willis*, for respondent:

Parol evidence is not admissible to show that the apparent makers of the note sued on were none of them actual makers of the note, but were sureties thereon, and that a party not named in or on such note was the actual maker thereof.

*Fentum v. Pocock*, 5 Taunt. 192; *Washington Bank v. Krum*, 15 Iowa, 61; *Bank of Montgomery County v. Walker*, 9 Serg. & R. 229, 11 Am. Dec. 709, 12 Serg. & R. 382; *Aud v. Magruder*, 10 Cal. 282; *Bull v. Allen*, 19 Conn. 101; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. ed. 316; *Specht v. Howard*, 16 Wall. 565, 21 L. ed. 349; *Forseythe v. Kimball*, 91 U. S. 291, 23 L. ed. 352; *The Waldo*, 2 Ware, 165, Fed. Cas. No. 17,056; *Arnold v. Sprague*, 34 Vt. 402; 1 Hill's Anno. Laws (Or.) § 692, p. 544; *Hoxie v. Hodges*, 1 Or. 251; *Smith v. Caro*, 9 Or. 278; *Marv v. Schwartz*, 14 Or. 177, 12 Pac. 253; *Looney v. Rankin*, 15 Or. 617, 16 Pac. 660; *Stoddard v. Nelson*, 17 Or. 417, 21 Pac. 456; *Portland Nat. Bank v. Scott*, 20 Or. 421, 26 Pac. 276.

If the Portland Guaranty Company signed the note as principal, and the appellants signed it as sureties only, they have not alleged sufficient in the answer to en-

title them to a release from their liability to pay the note.

*Beam, Ch. J.*, delivered the opinion of the court:

The position of the plaintiff is that the demurrer to the answer was properly sustained, because it cannot be shown by parol that the defendants were in fact accommodation makers, or sureties, for the Portland Guaranty Company. It is argued in support of this position that to permit the introduction of such evidence would be a violation of the well-settled rule that parol evidence is not admissible to vary, alter, or affect the terms of a written contract. There is some conflict in the authorities, and especially among the earlier adjudications, as to the right of one who appears on the face of a negotiable promissory note as a maker to show at law by parol that he was in fact a surety for a comaker. But the doctrine of this court, supported by the great weight of authority, is that he may do so for the purpose of affecting the creditor, who, having notice of the true relationship of the parties, is bound to act so as not to impair the legal rights or diminish the remedies of the surety. *Findley v. Hill*, 8 Or. 247, 34 Am. Rep. 578; *Brown v. Rathburn*, 10 Or. 158; 1 Am. & Eng. Enc. Law, 2d ed. p. 343; 1 Brandt, Suretyship & Guaranty, 2d ed. § 29; *Colebrooke. Collateral Securities*, 2d ed. § 203; *Tiedeman, Com. Paper*, § 422; 2 Randolph, Com. Paper, 2d ed. § 909; *American & General Mortg. & Invest. Corp. v. Marquam*, 62 Fed. 960; *Hubbard v. Gurney*, 64 N. Y. 457; *Riley v. Gregg*, 16 Wis. 666; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288; *Grafton Bank v. Kent* (N. H.) 17 Am. Dec. 414, and note. The question first came before this court in *Findley v. Hill*, 8 Or. 247, 34 Am. Rep. 578, which was an action on a joint and several promissory note executed by two parties. One of them set up as a defense that he was a surety for the other, and that the payee, without his assent, had entered into an agreement with his principal by the terms of which the time of payment was extended; and the court said: "If this was a valid agreement, it is quite clear that it operated as a discharge of the appellant, for it is well settled that, where time is given to the principal debtor without the assent of the surety, by a valid agreement which ties up the hands of the creditor, the surety is discharged." *Brown v. Rathburn*, 10 Or. 158, was also an action on a joint and several promissory note, and it was held that one of the makers might allege and prove at law that he was in fact a surety, for the purpose of showing that he had been discharged because of a voluntary relinquishment by the creditor, with knowledge of his suretyship, of collateral security of equal or greater value than the amount of his debt. And in the recent case of *Hughes v. Pratt*, 37 Or. 45, 60 Pac. 707, it was held that one joint maker of a promissory note might set up and prove at law that he was a mere surety for a comaker who had subsequently paid

and discharged the note, but caused it to be assigned to another, who brought an action thereon to recover from the surety. The admission of parol evidence to show the true relationship of the makers of a promissory note, and that the payee had notice thereof, does not alter or vary the terms of the original contract, or affect its integrity. It is merely proof of an independent or collateral fact, which operates to relieve the surety from liability when the creditor, with knowledge of the fact, has changed the original or made a new contract with the principal debtor, without the knowledge of the surety, or released any security he may hold for the payment of the debt. "The fact that one debtor is a surety for the other is no part of the contract with the creditor," says Mr. Chief Justice Gray, "but is a collateral fact showing the relation between the debtors; and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence." *Guild v. Butler*, 127 Mass. 386. The creditor may rely upon the note as it is made, and hold the makers thereof to a strict performance of their contract, and it cannot be contradicted or varied by parol. If a creditor, however, has knowledge that they are in fact sureties for another, he may not deal with such person in relation to the debt without incurring the risk of releasing the sureties. The right of the surety to be thus protected against the acts of the creditor does not depend upon the terms of the contract, but upon the equities arising out of the circumstances of the case, and the creditor is affected by the knowledge of the true relation of his debtors, acquired at any time before he does the act altering the position of the surety.

It is contended that, while parol evidence may be admissible to show that one or more of the makers of a promissory note are sureties, such fact, although known to the payee, cannot be shown as to all the makers, where the real debtor does not join in the primary obligation. But, within the meaning of the rule under consideration, everyone who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the position of a surety, whatever may be the form of his obligation. It is true that generally the primary obligor or real debtor joins in the contract with the sureties. This is not, however, believed to be necessary or essential. "The relation of suretyship," say the editors of *White & Tudor's Leading Cases in Equity*, "grows out of the assumption of a liability at the request of another, and for his benefit. It may, consequently, arise, although the name of the principal does not appear in the instrument which constitutes the evidence of the debt." [*Dering v. Winchelsea*] 1 *White & T. Lead. Cas. in Eq.* 4th ed. 149. And in [*United States v. Howell*] 2 *Am. Lead. Cas. Hare & W.'s notes*, 5th ed. 441, it is said: "In this, however, as in other cases, equity has regard to the substance of the transaction. If a promise be made for the benefit of another, without sharing in

the consideration, the promisor will be a surety, whatever may be the form of the agreement. . . . The obligation of the surety may be indirect that another shall perform or direct that he will perform himself; he may be jointly bound or appear on the face of the writing as the sole debtor without his being on that account less a surety, or losing the equitable rights which belong to him in that capacity." And Mr. Chief Justice Cooley, in speaking to the same question, says: "Now, a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities,—as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but, if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt he shall not lose sight of the surety's equities." *Smith v. Sheldon*, 35 Mich. 42, 24 *Am. Rep.* 529. Within these principles there seems no valid reason why it may not be shown by parol that a promissory note was in fact made to secure the debt and liability of another, and thus all the makers be entitled to the rights of a surety as to the payee of such note having knowledge of the facts. If such a note is enforced against the makers, they would clearly be entitled to be indemnified by the principal debtor; and this is given as one of the tests of suretyship. The form of the obligation would not prevent the introduction of such evidence, because, as said by Mr. Justice Campbell, in *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358, 11 N. W. 196, "it is always competent to show that any obligation, whatever its form, was in fact made for the debt or liability of another; and, where this is the case, the contract is one of suretyship, and the surety, if he is held to pay it, may sue for reimbursement. . . . And when a creditor knows that his debtor is a surety he is bound to take no steps which will change the liability of the principal, without the surety's consent. . . . This doctrine is too elementary to require any discussion." Mr. Brandt says: "The sole maker of a promissory note is sometimes entitled to stand in the position of a surety." 1 *Brandt, Suretyship & Guaranty*, 2d ed. § 38. This statement of the text writer is supported by *M'Questen v. Noyes*, 6 N. H. 19, in which it appeared that some time before the date of the note sued on, Noyes, the defendant, had signed a note to a bank as surety for one Wyatt; that, shortly before it became due, Wyatt, who had gone from home, wrote

to Noyes, saying that he should not be able to return in season to make payment, and requesting him to obtain the money of plaintiff, and pay the note, promising that he would replace it on his return. Noyes showed the letter to plaintiff, and obtained the money by giving his individual note, joined in by a third party, and paid the amount received over to the bank. Wyatt, on his return, offered to pay the note, but the plaintiff permitted him to retain the money, and agreed to wait for the amount due until some future time. It was held that Noyes was entitled to stand in the position of a surety, and that, under the circumstances, Wyatt's offer to pay should be regarded as a payment, and the agreement to wait as a new loan to him. Richardson, Ch. J., speaking for the court, said: "The defendants in this case gave the note on account of Wyatt, who promised to replace the money on his return from Canada; and all this was known to the plaintiff. The defendants, then, are, in our opinion, entitled to stand on the ground of sureties with respect to the plaintiff, in the same manner as if Wyatt's name had been upon this note as a principal." The doctrine that the offer of Wyatt to pay the note, and the agreement of the holder that he might retain the money, were sufficient to justify the jury in finding that there was a contract for an extension of payment, has been doubted (*Hoyt v. French*, 24 N. H. 198, 203), but the holding that Noyes was entitled to the rights of a surety has not been questioned, so far as we are advised. It is a familiar rule that, when property of any kind is mortgaged or pledged by the owner for the debt of another, it occupies the position of a surety or guarantor, and anything that would discharge an individual surety who was personally liable will, under similar circumstances, discharge such property. 1 Brandt, *Suretyship & Guaranty*, 2d ed. § 34; 24 Am. & Eng. Enc. Law, p. 722. And no reason is apparent why the same rule should not apply to one who has loaned the credit of his name as security for the payment of another's obligation. There is no greater virtue, as a matter of law, in a tract of land or a chattel that may be pledged to secure the payment of a debt than in the name of the owner. According to the answer, the individual credit of the makers of the note upon which the action is founded was given for the debt of the guarantee company, to the knowledge of the payee; and under such circumstances the principles of equity and natural justice would prevent her from dealing with the real debtor in any way so as to change the status of the parties or the contract without the consent of all. Now, it is elementary law that a surety will be discharged where a valid contract is made between the creditor and the principal debtor extending the time of payment, or where securities held by the creditor are voluntarily surrendered without the consent of the surety, at least to the value of such securities. The answer alleges and the demurrer

admits that Mrs. Wertheimer, the original payee of the note, not only made a contract with the guarantee company extending the time of the payment of the debt, but at the same time, took a mortgage on real property from it as additional security, of greater value than the amount of the debt, and afterwards released such mortgage without the knowledge or consent of the defendants. If this is true, and the defendants were in fact sureties for the company, or entitled to stand in the position of sureties, it is a complete defense, for the reason, stated by Mr. Colebrooke, that: "The surety is entitled upon payment to be subrogated to the collateral securities held by the creditor from the principal debtor, whether such securities were received at the time the contract of suretyship was entered into or subsequently, or without the knowledge of the surety. This right of the surety is one not founded upon contract, but is supported upon principles of equity and natural justice, and the tendency is to enlarge and extend its application." Colebrooke, *Collateral Securities*, 2d ed. § 212. This question arose in the case of *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311, where the surrender of a horse and gig of the principal, which had been received from him as security after the debt was contracted, was held to exonerate the surety; and it was said that this result would follow whenever the creditor relinquished assets or effects of any description which might have been applied in payment. "Now, it seems to be a well-settled principle in equity," says Parker, Ch. J., "that a creditor who has the personal contract of his debtor, with a surety, and has also, or takes afterwards, property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself; and, if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered." To the same effect is *Brown v. Rathburn*, 10 Or. 158; also *Denny v. Seeley*, 34 Or. 364, 55 Pac. 976. Under the law, then, and upon the facts pleaded, it seems to us clear that the defendants stand in the position of accommodation makers, or sureties, as between themselves and the Portland Guarantee Company, and that, if the payee, with knowledge of that fact, so dealt with the company as to relinquish or release to it any securities she may have had for the payment of the debt, she thereby discharged the defendants from liability to the extent and value of the securities so released; and, as the plaintiff purchased with full knowledge of all the facts, she stands in no better position than her assignor.

In our opinion, therefore, the court below was in error in sustaining the demurrer to the answer, for which reason the judgment must be reversed, and the cause remanded, with directions to overrule the demurrer, and for such further proceedings as may be proper, not inconsistent with this opinion.

## SOUTH CAROLINA SUPREME COURT.

Robert MASON, Admr., etc., of Clara Belle  
Mason, Deceased, *Respt.*,  
v.

SOUTHERN RAILWAY COMPANY, *Appt.*

(58 S. C. 70.)

1. Evidence of failure to ring the bell or blow the whistle for a railroad crossing a mile from the scene of an accident by which an infant upon the track was killed is admissible, where the complaint charges gross negligence and recklessness in running the train, and the answer sets up contributory negligence on the part of the infant's parents, while the complaint alleges that the mother of the child was accustomed, when she heard the signals given for that crossing, to look out upon the track to see if any of the children were in danger.
2. Refusing to allow a witness to answer a question which calls for an expression of opinion will not warrant reversal, even if erroneous, when it was harmless.
3. Error in refusing to allow the cross-examination of a witness may be cured by subsequently permitting such cross-examination.
4. Testimony as to declarations of employees after an accident for which the employer is sought to be held liable may be admitted to contradict a witness, when the foundation has been properly laid therefor.
5. Proof of damages is not necessary to sustain a recovery for the death of a child under Rev. Stat. § 2316, providing that "the jury may give such damages as they think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought."
6. An inapplicable illustration in an instruction to the jury is not prejudicial error if it is not such as to mislead them.
7. A technical error in saying that an infant sixteen months old could not be a trespasser is not prejudicial error in an instruction to the jury as to the killing of the infant by a train, when the remarks of the judge draw the attention of the jury to the distinction between the infant and an adult, and state that such an infant cannot be guilty of contributory negligence, and does not know right from wrong.
8. A railroad company is liable for causing the death of an infant upon its track, if the direct and proximate cause of the accident was negligence in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury.

(June 27, 1900.)

**A** PPEAL by defendant from a judgment of the Common Pleas Circuit Court for

NOTE.—As to the duty of a railroad company to maintain lookout on a railroad train, see *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 287, and note; also *Pickett v. Wilmington & W. R. Co.* (N. C.) 30 L. R. A. 257; and *Neal v. Carolina C. R. Co.* (N. C.) 49 L. R. A. 684.

Also, on the question of the care required to prevent injuring small children upon the track, see *Bottoms v. Seaboard & R. R. Co.* (N. C.) 25 L. R. A. 784, and note; and *Gunn v. Ohio River R. Co.* (W. Va.) 36 L. R. A. 575.

53 L. R. A.

Greenville County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. T. P. Cothran, for appellant:

A railroad company does not owe the same duty to a trespasser that it does to a passenger or one of its employees.

*Hale v. Columbia & G. R. Co.* 34 S. C. 299, 13 S. E. 537; *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489; *Darwin v. Charlotte, C. & A. R. Co.* 23 S. C. 531, 55 Am. Rep. 32; 19 Am. & Eng. Enc. Law, 1st ed. p. 935; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 9 So. 468; *Thomas v. Chicago, M. & St. P. R. Co.* 103 Iowa, 649, 39 L. R. A. 399, 72 N. W. 783; *Seaboard & R. R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 775; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350; *Texas & P. R. Co. v. Smith*, 31 L. R. A. 321, 14 C. C. A. 509, 30 U. S. App. 176, 67 Fed. 525; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L. R. A. 181, 13 C. C. A. 364, 31 U. S. App. 177, 66 Fed. 115; *Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362; *Sheehan v. St. Paul & D. R. Co.* 22 C. C. A. 121, 46 U. S. App. 498, 76 Fed. 201.

Up to the point of discovery, the duty of a railroad company to all trespassers, whether infant or adult, is exactly the same.

A child sitting upon the track, at a place not open to travel, must occupy some relation to the company. It is either lawfully or unlawfully upon the track; there is no middle ground. There is no pretense that it had a legal right to be there; it must therefore have been there unlawfully, and if so, it must have occupied the relation of trespasser.

*Littlejohn v. Richmond & D. R. Co.* 49 S. C. 12, 28 S. E. 967; *Sheehan v. St. Paul & D. R. Co.* 22 C. C. A. 121, 46 U. S. App. 498, 76 Fed. 205.

In operating its trains, a railroad owes no more duty towards an infant, as such, than towards an adult trespasser.

*Buswell, Personal Injuries*, § 78; 3 *Elliot, Railroads*, § 1259; *Alabama G. S. R. Co. v. Moor*, 116 Ala. 642, 22 So. 900; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Johnson v. Boston & M. R. Co.* 125 Mass. 75; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; 2 *Wood, Railroads*, 1496, note; *Ex parte Stell*, 4 Hughes, 157, Fed. Cas. No. 13,358; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Wright v. Boston & A. R. Co.* 142 Mass. 290, 7 N. E. 866; *Woodruff v. Northern P. R. Co.* 47 Fed. 689; *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, 11 N. E. 380.

Children have no right to be upon the track of a railway, and it is contrary to all the principles underlying this branch of the

law to hold that the company is bound to respond in damages for an injury to them, when they are there wrongfully, unless it could have prevented the injury by the exercise of such care as ought to be observed by them in view of the locality.

2 Wood, Railroads, 1476; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Darwin v. Charlotte, O. & A. R. Co.* 23 S. C. 531, 55 Am. Rep. 32; *Atchison & N. R. Co. v. Flinn*, 24 Kan. 627; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 409; *McMahon v. Northern O. R. Co.* 39 Md. 438; *Ostertag v. Pacific R. Co.* 64 Mo. 421; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457.

Notice cannot be imputed upon the fact alone that the engineer was in position to see the plaintiff on the track, but his presence must have been observed under circumstances which clearly impute knowledge of his helpless condition.

*Sheehan v. St. Paul & D. R. Co.* 22 C. C. A. 121, 46 U. S. App. 498, 76 Fed. 205.

The alleged declaration of the engineer was not in any event evidence of negligence. It really tends to support the defendant's contention that the engineer did not see the child, and recognize it as such, in time to avoid striking it.

*Louisville, N. O. & P. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957.

The presiding judge erred in admitting evidence of the defendant's failure to give the statutory signals for the Burnett Crossing. The signals required to be sounded for that crossing were for the protection of persons at that crossing.

*Neely v. Charlotte, O. & A. R. Co.* 33 S. C. 136, 11 S. E. 636; *Hale v. Columbia & G. R. Co.* 34 S. C. 292, 13 S. E. 537; *Barber v. Richmond & D. R. Co.* 34 S. C. 444, 13 S. E. 630; *Kinard v. Columbia, N. & L. R. Co.* 39 S. C. 517, 18 S. E. 119; *Hankinson v. Charlotte, O. & A. R. Co.* 41 S. C. 1, 19 S. E. 206.

*On petition for rehearing.*

When the circuit judge ruled that the defendant must show that the accident was unavoidable, that they could not help it, such ruling had a double effect; it formed the basis of his refusal of the nonsuit, and it required the defendant to put up testimony. The burden of proof was cast upon it to disprove the prima facie case made out by the simple fact of killing.

The effect of the judge's error is palpable. We were deprived by this ruling of two substantial rights: (1) To rest our case upon the plaintiff's testimony; (2) to secure the right to open and reply in argument. The position of this court that the ruling was "harmless error" is substantially to hold that neither of these privileges is worthy to be taken into account.

The question as to which party is entitled to open and reply has always been regarded as a material matter.

*Addison v. Duncan*, 35 S. C. 165, 14 S. E. 305; *State v. Atkins*, 49 S. C. 481, 27 S. E. 484; *Frost v. Berkeley Phosphate Co.* 42 S. C. 414, 26 L. R. A. 693, 20 S. E. 280.

He who in a court of justice undertakes to

establish a claim against another, or set up a release from another's claim against himself, must produce the proof necessary to make good his contention. If he undertakes to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him.

Wharton, Ev. § 356; *Brown v. Brown*, 44 S. C. 382, 22 S. E. 412.

Is it harmless error to relieve the plaintiff of this plain legal duty, and cast the burden upon the defendant to disprove what the plaintiff must establish?

*Barry v. Butlin*, 6 Curt. Eccl. Rep. 637; *Davis v. Rogers*, 1 Houst. (Del.) 95; 2 Am. & Eng. Enc. Law, 1st ed. p. 655.

An error in ruling on the burden of proof is a prejudicial error.

2 Enc. Pl. & Pr. 553.

*Messrs. A. H. Dean and Joseph A. McCullough*, for respondent:

In an action against a railroad company for negligence, at common law, evidence of its failure to give the signals required by statute at public crossings near the accident is competent to support the allegation of reckless negligence.

*Maack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905.

The admissions of a party may always be given in evidence against him.

*Charleston & S. R. Co. v. Blake*, 12 Rich. L. 634.

Even if the engineer and fireman be viewed only in the light of agents of the defendant, the said admissions and declarations, being made within the due scope of their agency, would be binding upon the defendant.

2 Wharton, Ev. § 1177; *Morse v. Connecticut River R. Co.* 6 Gray, 450; 1 Am. & Eng. Enc. Law, 2d ed. pp. 690 et seq.; *Waldrop v. Greenwood, L. & S. R. Co.* 28 S. C. 158, 5 S. E. 471; *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448, 31 S. E. 334.

The testimony was entirely competent as being a part of the *res gestæ*.

*State v. Arnold*, 47 S. C. 13, 24 S. E. 926.

Plaintiff proved facts from which negligence on the part of the railroad company could reasonably be inferred, and therefore there was no error on the part of the circuit judge in refusing the order for nonsuit.

*Bridger v. Asheville & S. R. Co.* 25 S. C. 29.

Children so young as to be *non sui juris* cannot be guilty of contributory negligence.

7 Am. & Eng. Enc. Law, 2d ed. p. 405; *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546, 36 W. Va. 173, 14 S. E. 465, 37 W. Va. 421, 16 S. E. 628; *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L. R. A. 226, 19 S. E. 565; *Layne v. Ohio River R. Co.* 35 W. Va. 438, 14 S. E. 123; *Heard v. Chesapeake & O. R. Co.* 26 W. Va. 455; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784, 19 S. E. 730.

We invite the court's attention especially to the cases of *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 786, 19 S. E. 730; *Chicago*



*City R. Co. v. Wilcox*, 138 Ill. 370, 21 L. R. A. 76, 27 N. E. 899.

These were cases involving the liability of a railroad company for the killing of infants who happened to wander upon the track of the respective defendants; and the duty of the railroad company to keep a proper lookout, and the question of trespass and contributory negligence, are considered at length, and the authorities are clear, exhaustive, and convincing.

Gary, A. J., delivered the opinion of the court:

The facts of this case are thus succinctly set forth in the preliminary statement prefacing the argument of the appellant's attorneys, and admitted to be correct by the respondent's attorneys, to wit: "Action for damages, \$1,999.99, instituted in the court of common pleas for Greenville county September 29, 1899, by Robert Mason, as administrator of Clara Belle Mason, deceased, for alleged negligent killing of intestate by defendant, Southern Railway Company, near South Tiger trestle, in Spartanburg county, on Atlanta & Charlotte Air-Line Railway, August 21, 1898. The intestate was a child sixteen months old, and was killed on the track, about 70 yards from a neighborhood crossing, near the house of her father, the plaintiff in this suit. Tried before Judge Gary and a jury at Greenville November 22, 1899. Verdict for plaintiff, \$1,999.99. The plaintiff alleges that on the day named the child crawled, unobserved, from the plaintiff's house, which is near the track and in full view, and got upon the track, the mother at the time having no servants about the place, and being herself engaged in domestic duties; that the plaintiff was away from home at the time; that, about a mile from the point of collision, defendant's track crosses a public highway, and the mother was accustomed to watch upon the track for her children when the signals for that crossing were given; that upon the occasion in question the defendant failed to give the signals, and, if the signals were given, the mother did not hear them; that, while the child was seated upon the track, one of the defendant's trains, which was behind time, and run at an unusually rapid speed, recklessly and with grossest negligence ran over the child and killed it; that at the time the child was seated on the track at a point where a neighborhood road or 'traveled place' crosses said track, and the required signals were not given; that the agents of the defendant knew the location of the plaintiff's house, and for almost a mile in the direction from which the train approached the track was straight; that the engineer and fireman saw the child upon the track in ample time to have stopped the train before striking it, and, if they did not actually see and recognize it, they could, by the exercise of ordinary care in keeping a lookout, have seen and recognized it, and stopped the train in time to avoid striking it. The specific acts of negligence recapitulated in the complaint are stated to be (1) 53 L. R. A.

in not stopping the train, after having observed the child, in time to avoid the collision; (2) after first seeing the object, in not keeping a strict watch upon it, by which they would have recognized it as a human being in time; (3) in not keeping a proper lookout along this stretch of track, which ordinary care and a proper regard for life (human and animal) demanded, as well as the law of the land, which would have enabled the fireman or engineer to have seen the child in time. The remaining allegations of the complaint are formal, referring to the incorporation of defendant, the heirs at law of the intestate, the appointment of the plaintiff as administrator, and the amount of damages. The answer of the defendant admits its corporate existence, that the child was killed by its train, and denies the other allegations of the complaint. It alleges that the child was a trespasser upon the track at a place where she had no legal right to be, and where the servants of the company had no reason to suppose she would be; that as soon as she was discovered they did all in their power to avoid the accident; that the defendant owed no duty to the child, save to exercise ordinary care to avoid injuring it after discovery; that it was impossible for the engineer to have seen the child in time to avoid striking it, as the child crawled upon the track on the left side of the engine, when the train was not more than 150 feet away, and too close for the engineer to avoid the collision. The defendant also pleads the contributory negligence of the parents." The appellant has argued the exceptions under the heads of "Evidence," "Motion for Nonsuit," "Burden of Proof," and "Judge's Charge."

Subdivision "a" of the first exception assigned error as follows: "(a) The presiding judge erred in admitting evidence to the effect that the defendant failed to ring the bell or blow the whistle for the Burnett crossing, a mile from the scene of accident, for the reason that said testimony was irrelevant to the issue. This exception applies to the testimony of Robert Mason, T. J. Burnett, Ida Mason, Henry Pinson, and William Smith upon this point, and the ruling of the presiding judge to this effect: 'I think the failure to blow the whistle or ring the bell is, according to law, evidence of negligence.'" The complaint alleges gross negligence and recklessness on the part of the defendant in running its train at the time the accident occurred, and the answer sets up the defense of contributory negligence on the part of the infant's parents. The complaint also alleges that the highway crosses the defendant's track about a mile from the place where the collision took place, and that when the statutory signals were given when approaching said crossing the mother of the child was accustomed to look out upon defendant's track to see if any of the children were in danger; that the defendant failed to give the statutory signals (at least, she did not hear them) on that occasion. Under these circumstances, the circuit judge properly allowed the jury to consider

this testimony in determining the proximate cause of the injury. *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905.

Subdivision "b" alleges error as follows: "(b) The presiding judge erred in refusing to allow the witness J. D. Pettus to answer the question: 'If it had been one of your own children on that track at the time, could you have done anything more to prevent striking it?'—such question being competent and relevant to show that degree of care exercised by the engineer after he discovered the child crawling upon the track." This question merely called forth an expression of opinion, and, even if it could be regarded as erroneous, it was harmless.

Subdivision "c" is as follows: "(c) The presiding judge erred in refusing to allow the defendant to cross-examine the witness Ed. James, who was put up by plaintiff." When a witness is sworn, he becomes subject to examination in chief and to cross-examination. The right of cross-examination is not destroyed by the failure to examine in chief. This error was, however, cured when the defendant's attorney thereafter was permitted to cross-examine the witness.

Subdivision "d" is as follows: "(d) The presiding judge erred in overruling defendant's objection to, and allowing the witness Ed. James to answer, the question: 'Did Mr. Pettus say, down there at the track, that he thought that it was a dog or a chicken until he got too close? Answer. Yes, sir; he did,'—upon the ground that the declaration was not a part of the *res gestæ* and was irrelevant to the issue." When Pettus was on the stand he was asked if he did not say to Mason, the father of the child, when the train backed to the place where the collision took place, at the time Mason climbed up in the cab, that he thought it was a dog or a chicken on the track, and that he did not have time to stop then. He answered, "No." The foundation was properly laid for contradicting the witness, and the testimony was at least admissible for that purpose.

Subdivisions "e," "f," and "g," are as follows: "(e) The presiding judge erred in overruling defendant's objection to, and allowing the witness Hampton Mason to answer, the question: 'Did you hear the fireman say to the engineer, "If you had paid attention to me when I told you that there was something on the track, maybe this thing would not have happened?"' Yes, sir,—for the same reason as in 'd,' *supra*." (f) The presiding judge erred in overruling defendant's objection to, and allowing the witness Robert Mason to answer, the question. 'And did he [engineer] say, "I thought it was a dog or a chicken until I got up close to it?"' Yes, sir,—for the same reason as in 'd,' *supra*." (g) The presiding judge erred in overruling defendant's objection to, and allowing the witness Ida Mason to answer, the question, 'Did you hear the engineer say to your husband that he thought that the child was a dog or a chicken until he got too close to it?' for the same reason as in 53 L. R. A.

'd,' *supra*." They are disposed of by what was said in considering subdivision "d."

The second exception is as follows: "The presiding judge erred in overruling defendant's motion for a nonsuit: (a) There was an entire failure of proof of negligence on the part of the defendant. (b) The evidence shows that the child was upon the track at a point where it had no legal right to be, and where the defendant is not presumed to have supposed that it would be. It was incumbent upon plaintiff to offer testimony tending to show that the child was discovered by defendant's agents in time to avoid striking it, and that they negligently failed, after such discovery, to avoid the disaster. There is a total failure of the testimony upon both of these points. (c) It was error to hold that a child could not be a trespasser on a railroad track. (d) It was error to hold that the child was not wrongfully on the track. (e) It was error to apply the rule in *Danner's Case* [4 Rich. L. 329, 55 Am. Dec. 678], to the facts of the case at bar. (f) It was error to hold that the burden of proof was upon the defendant to show that the accident was unavoidable; that it could not be helped. (g) There was no proof of damages." The defendant made a motion for a nonsuit on two grounds: "(1) Because there was no negligence on the part of the railroad company; and (2) that there was no proof of damages resulting to the plaintiff in this case from the death of the child." The presiding judge, in overruling the motion for nonsuit, stated somewhat at length the reasons that induced him to refuse the motion. The only questions, however, that are properly before this court for consideration, are whether there was error in refusing the motion for nonsuit on the grounds that there was an entire failure of testimony showing negligence, and that there was no proof of damages resulting to the plaintiff from the death of the child. Without stating the different circumstances tending to show negligence, this court is satisfied that there was evidence tending to prove that fact. We will next consider the second ground of the motion for a nonsuit. Rev. Stat. § 2316, provides that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought." In the case of *Petrie v. Columbia & G. R. Co.* 29 S. C. 303, 7 S. E. 515, cited with approval in *Strother v. South Carolina & G. R. Co.* 47 S. C. 375, 25 S. E. 272, the court says: "Again, it will be noticed that our statute, unlike many others of a similar character, does not speak of a pecuniary loss or injury, which might possibly tend to show that the injury for which damages are allowed was confined to the deprivation of some legal claim, susceptible of measurement by a pecuniary standard; but its language is much broader, and gives to the jury the right to award such damages as they may think proportioned to the injury resulting from such death." The statute and the cases construing it show that the second

ground of the motion for nonsuit was properly overruled. We have not considered whether the circuit judge erred in his interpretation of the rule in *Danner's Case*, as his remarks in reference thereto were made in refusing the motion for a nonsuit. We are not, however, to be understood as approving his construction thereof.

The third exception alleges error as follows: "The presiding judge erred in holding, upon motion for a nonsuit, that the burden of proof was upon the defendant to show that the accident was unavoidable, and that it could not help it; thus depriving the defendant of the option of putting up testimony, or not, as it may have been advised." This exception is disposed of by what was said in considering the second exception. But, even if it be conceded that there was error, it was harmless.

Subdivision "a" of the fourth exception is as follows: "(a) The presiding judge erred in illustrating the law applicable to the case by the hypothetical case stated to the jury, for the reason that in the case stated by him the driver upon the highway and a child upon the highway had the same right to be there, whereas in the case at bar the railroad company, at the point of accident, had exclusive right to the use of its track. The illustration, therefore, was inapplicable." The only error of which the appellant complains is that the illustration was inapplicable. Even if it was inapplicable, it was not such as to mislead the jury.

Subdivisions "b," "c," "d," "e," "f," and "g" are as follows: "(b) The presiding judge erred in refusing defendant's first request to charge, which was as follows: 'A railroad company owes no duty to a trespasser upon its track until the employees actually see him in a position of danger,'—and in holding, 'An infant cannot commit a trespass;' it being submitted that said request embodied a correct principle of law, applicable alike to adults and children, and that an infant may become a trespasser. (c) The presiding judge erred in refusing defendant's third request to charge, which was as follows: 'The law imposes upon a railroad company no duty to trespassers upon its track, except the duty of exercising reasonable care not to inflict injury upon them after they are discovered,'—and in holding: 'A child cannot become a trespasser. A child can do no wrong. It has no appreciation of right or wrong, and therefore can do no wrong;' it being submitted that said request embodied a correct principle of law, applicable alike to adults and children. Every animate object upon the track must occupy the relation either of trespasser or of one lawfully there. (d) The presiding judge erred in refusing defendant's fifth request to charge, which was as follows: 'A railroad company owes no duty to trespassers, to be on a lookout for them at a point where they have no legal right to be, and where the company has no notice that they will probably be.' It is submitted that this request embodied a correct principle of law applicable to the case. (e) The presiding

judge erred in refusing defendant's sixth request to charge, which was as follows: 'The above rules apply equally to adults and children of very tender age. Up to the point of discovery of the trespasser by the employees of the company, the duty of railroads to adults and children of tender years is exactly the same.' It is submitted that the request embodied a correct principle of law, applicable to the case. (f) The presiding judge erred in modifying the defendant's seventh request to charge by adding the following: 'That is true, unless they had been negligent in not discovering the child.' It is submitted that the defendant was entitled to the charge unqualified; the rule being that, up to the point of discovery, the defendant owed the child trespassing on its track no duty, and consequently could not be guilty of negligence in not discovering it. The seventh request is as follows: 'Seventh. After discovery of a child by the employees of the company, the duty of the company to children incapable of realizing their danger is higher than that due to adults. The employees may assume that an adult will heed the signals of danger and get off the track. An infant, however, cannot be assumed to possess this capacity, and the employees upon discovering it, must use all reasonable efforts to stop the train. This duty, however, does not arise until the perilous position of the child has actually been discovered by the employees.' (g) The presiding judge erred in modifying the defendant's ninth request to charge by adding the following: 'That I charge you, unless they were negligent in not seeing the child.' It is submitted that the defendant was entitled to the charge unqualified; the rule being as stated in 'f,' *supra*. The ninth request is as follows: 'Ninth. If the jury believe from the evidence that the employees of the company made every reasonable effort to avoid striking the child after discovering it upon the track, the company is not liable, and their verdict should be for the defendant.'

The exception of these subdivisions raises two questions, to wit: (1) Was there error on the part of the presiding judge in charging the jury that the infant, by reason of its tender years, could not be a trespasser? (2) Was there error in refusing to charge the jury that the law does not impose upon a railroad company any duty to trespassers upon its track, except the duty of exercising reasonable care not to inflict injury upon them after they are discovered? We will first consider whether the presiding judge erred in charging that the infant, by reason of its tender years, could not be a trespasser. While, in strictness of law, an infant may be a trespasser when it goes upon the track of a railroad company without its permission or without lawful authority, there are, nevertheless, well-defined distinctions between an adult and an infant trespasser. An infant sixteen months of age does not know right from wrong, and therefore when it goes upon a railroad track it cannot be said that it intended to commit such an act as in an adult would make him

a trespasser or wrongdoer. It cannot be guilty of contributory negligence. It is not amenable to the criminal law, and is not liable in damages when an adult would be under similar circumstances. When all the remarks of the presiding judge are considered together, it will be seen that he drew the attention of the jury to this distinction, and, although he was technically in error in saying that an infant could not be a trespasser, the jury, after his explanation, could not have been misled. We will next consider whether there was error in refusing to charge that the law does not impose upon a railroad company any duty to trespassers upon its track, except the duty of exercising reasonable care not to inflict injury upon them after they are discovered. The ruling of the presiding judge must be considered with reference to the fact that the infant was of very tender years, to wit, only sixteen months of age. The question whether a railroad company owes any duty to an infant trespassing upon its track, until it discovers the infant, has given rise to much discussion, and the authorities upon this subject are in irreconcilable conflict. Even conceding that a railroad company is not bound, as a general proposition, to look out for trespassers upon its track, it nevertheless is bound to exercise ordinary care in running its trains. The law imposes upon it the duty of keeping a reasonable lookout for obstructions on its track. The safety of its passengers and the rights of the public generally demand the enforcement of this rule. It is a general rule of law that a railroad company is liable in damages for an injury inflicted by it, when its negligence was the direct and proximate cause of the injury. If the direct and proximate cause of the infant's death was negligence of the defendant in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence after discovering the child upon its track. *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784, 19 S. E. 730; *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546; *Wood, Railroads*, pp. 1275-1280.

Subdivision "h" is as follows: "(h) The presiding judge erred in not charging defendant's eleventh request to charge, which was as follows: 'If the jury believe from the evidence that an employee of the company has made a statement or declaration after the accident, and not a part of the *res gestæ*, inconsistent with his testimony in this case, they may consider such inconsistency as tending to discredit his testimony, but not as independent evidence of the company's negligence;' it being submitted that such request embodied a correct principle of law, applicable to the case." The plaintiff, in opening his case, offered in evidence the said declarations; but they were held to be inadmissible, on the ground that they did not form part of the *res gestæ*. The employees, when examined in behalf of the defendant, were cross-examined by the plaintiff in re-

gard to the said declarations, and they denied making them. The plaintiff, in reply, then offered the witnesses originally produced to prove the declarations. The record shows that the following took place: "Mr. Cothran objects on the ground that this question is irrelevant, and that counsel proposes to contradict the witness upon an irrelevant point, and submits that it can't come in unless it is part of the *res gestæ*, and within the proper scope of his agency. The Court: The testimony must be relevant. I think it is competent. Mr. Cothran excepts. By Mr. Dean: Did Mr. Pettus say that you went back there to see whether the track was straight or curved? Mr. Cothran: I ask that your honor will instruct the jury, upon the delivery of that testimony, that they can consider that testimony only for the purpose of discrediting the witness, if they believe this evidence. If they believe the statement to be true, and that the engineer is mistaken, then they can consider this testimony only to the extent of discrediting the engineer, and not for the purpose of introducing it as independent evidence. The Court: Yes, gentlemen of the jury, Mr. Cothran has stated the ground upon which the testimony is to be considered, clearly, to you, and it is correct." The request was not read to the jury, and there was no necessity to charge the proposition therein stated, as the jury had already been instructed upon the subject.

Subdivision "i" is as follows: "(i) The charge of the presiding judge was inconsistent, contradictory, and confusing to the jury. For instance, he charged the fourth and eighth requests, which we submit were good law, and qualified the seventh and ninth requests by holding that the defendant may have been guilty of negligence in not discovering the child." When the charge of the presiding judge is considered in its entirety, it will be seen at a glance that the objections urged by the appellant are unfounded.

*It is the judgment of this court that the judgment of the Circuit Court be affirmed.*

Rehearing denied.

Christina GAFFNEY

v.

Samuel JEFFERIES.  
(and Thirty-five Other Cases.)

(59 S. C. 565.)

1. A sale by a man of the undivided interest which he holds in common in a tract of land, followed by a partition by the tenants in common in kind, will not bar the dower rights of his wife, who did not join in the deed.

NOTE.—For cases in this series as to effect of partition sale upon dower rights of wife not a party, see *Holley v. Glover* (S. C.) 16 L. R. A. 776, and note; and *Haggerty v. Wagner* (Ind.) 39 L. R. A. 384.

2. The dower right of a woman whose husband was seised of an undivided interest in common in a tract of land, which he conveyed by deed in which she did not join, will, after voluntary partition in kind among the tenants in common, attach to the parcel allotted to her husband's grantee, and will not extend to his former interest in the whole tract.

(March 28, 1901.)

**CROSS-APPEALS** from a judgment of the Common Pleas Circuit Court for Cherokee County assigning dower to the widow of Thomas E. Gaffney, deceased; the defendants appealing from so much as allowed the right of dower; and plaintiff appealing from so much as directed it to attach to the whole of the tract held in common by the husband, and not alone to the parcel which had been allotted in partition proceedings to the husband's grantee. *Reversed on plaintiff's appeal.*

The decree of the lower court, referred to by the supreme court, was as follows:

I hold that the plaintiff is entitled to dower; but as the husband's seisin was of an undivided interest in the whole 1,219 acres, and as the wife is dowerable only according to the husband's seisin, it must follow that the plaintiff's claim of dower attached to every portion or part of the land in which her husband was seised of an undivided interest, proportionately to his interest. That is to say, she is entitled to one third of three undivided sixteenths, or to one sixteenth of every particle, or every acre, or whatsoever may be taken as the unit of the entire 1,219 acres. It cannot be said that she is entitled to have her entire claim of dower assigned to her in the lands of which Samuel Jefferies is now seised, or of which he became seised upon the partition; for that would be to hold that she was dowerable according to the seising of Samuel Jefferies, rather than according to the seising of her husband. Thomas E. Gaffney was never seised of other than an undivided three-sixteenths interest in the land, which was afterwards set off to Samuel Jefferies in severalty. It does not appear that Samuel Jefferies assumed the entire burden of plaintiff's dower at the time of the partition. In the absence of some stipulation to that effect, the court has no right to add such a provision to his contract of partition. The conclusion is inevitable that plaintiff is entitled to but one sixteenth of the land which passed into the sole possession of Samuel Jefferies. It will be observed that at the partition, in 1873 or 1874, a tract of 95 acres was set off to Samuel Jefferies in severalty, and a half interest in another tract of 216 acres was also allotted to him, the other half being allotted to J. G. Gaffney and W. G. Gaffney, who subsequently conveyed their half interest to Samuel Jefferies. Plaintiff in bringing these suits took the view that she was entitled to have the whole of her dower assigned to her on the lands which were allotted to Samuel Jefferies upon said partition, and therefore she de-

manded dower in the entire tract of 95 acres, and in but one half of the 216-acre tract. In the view that I have taken, she is entitled to the same proportion in each of said tracts; and inasmuch as it would but delay plaintiff in the assertion of a part of her claim, and at the same time result in vexing a part of the defendants with additional suits for the enforcement of the rest of plaintiff's claim against the lands in their possession, and all the parties concerned being before the court, the court will afford complete relief by adjudging and awarding to plaintiff the entire amount of her dower which she is entitled to in the lands of these defendants, to wit, one sixteenth thereof, as above ascertained. It is therefore adjudged that plaintiff is entitled to one-sixteenth part for life in and of the premises described in the complaints in all the above-stated cases as her dower therein, and that a writ in dower do issue out of this court according to law, entitled in all the above-stated cases, directed to one set of commissioners nominated and appointed according to law, requiring them, or a majority of them, to admeasure and set off to plaintiff her dower as herein determined in each of the premises described in each of the thirty-five complaints separately; requiring them to include all their assignments or assessments in one return, if practicable, but with the right to make as many returns, separate and distinct, as justice or the necessity of the several cases may require.

*Messrs. Wallace & Otts, for plaintiff:*

The judge correctly held that the actual partition did not defeat dower.

*Holley v. Glover*, 36 S. C. 408, 16 L. R. A. 776, 15 S. E. 605; 1 Washb. Real Prop. p. 199, ¶ 10, p. 410; *Potter v. Wheeler*, 13 Mass. 504.

Thomas E. Gaffney was but a tenant in common with the other owners. In strictness there is no seisin of land; the seisin is of an estate or interest in the land, and not of the land itself.

*Bradley v. Fuller*, 23 Pick. 1; 1 Jones, Mortg. ¶ 796, note 4; 21 Am. & Eng. Enc. Law, p. 1057.

When the husband's interest in the land was carved out to Jefferies in the partition, the husband's seisin, which Jefferies represented, was carved out with it; and the entire dower followed this seisin and estate.

*Holley v. Glover*, 36 S. C. 408, 16 L. R. A. 776, 15 S. E. 605; *Potter v. Wheeler*, 13 Mass. 504; 1 Washb. Real Prop. p. 199, ¶ 10, p. 410; *Blossom v. Blossom*, 9 Allen, 254.

The lien of a judgment on the interest of a tenant in common in land is transferred upon partition, and attaches to the portion set off to him in severalty, or to his interest in the fund when sold.

*Ketchin v. Patrick*, 32 S. C. 443, 11 S. E. 301.

The lien of a mortgage on the undivided interest of a tenant in common is transferred to the portion set off to him or his grantees in severalty.

1 Jones, Mortg. ¶ 706.

**Messrs. J. C. Jefferies and Ansel, Cotheran, & Cotheran**, for defendants:

The husband, a tenant in common, conveys his undivided interest in real estate; partition in kind by agreement is had between the husband's grantee and the other tenants in common; a certain portion is allotted to such grantee; the husband dies; the widow is barred of her dower.

If there had been regular partition proceedings and a sale thereunder, the question would admit of no doubt.

*Holley v. Glover*, 36 S. C. 404, 16 L. R. A. 776, 15 S. E. 605.

There seems to be no good reason why a voluntary performance of an act to which a party is compellable by law should not have the same effect as if produced by compulsion.

*Potter v. Wheeler*, 13 Mass. 506.

As the husband is compelled by legal proceedings to make partition with his cotenants, it is universally conceded that he may do voluntarily that which the law will otherwise compel him to do.

*Freeman, Cotenancy & Partition*, § 411.

In case it is adjudged that the dower is not barred, then such claim of dower is limited to the husband's seisin,—three sixteenths of the entire tract. It cannot be enforced entirely against the real estate allotted to Samuel Jefferies.

*Holley v. Glover*, 36 S. C. 416, 16 L. R. A. 776, 15 S. E. 605; 1 Co. Litt. 684; *Sutton v. Rolfe*, 3 Lev. 84.

In such case dower shall be assigned in common: for the widow cannot have it otherwise than her husband had it.

2 Cruise, § 20, 561; 1 Hilliard, Real Prop. 4th ed. § 24, 804; 2 Minor, Inst. 438; *Rank v. Hanna*, 6 Ind. 20; 1 Scribner, Dower, §§ 15, 342; *Lloyd v. Conover*, 25 N. J. L. 47.

**Jones, J.**, delivered the opinion of the court:

The above-entitled thirty-six actions for dower, involving the same question, were, by consent, heard together by Judge Klugh. From the statement of facts it appears: "That in February, 1873, Thomas E. Gaffney, who was then married to plaintiff, and remained in coverture with her until his death, in 1899, was seised and possessed in fee simple of a three-sixteenth undivided interest in 1,219 acres of land known as the 'Michael Gaffney Lands.' That in June, 1873, he sold and conveyed, in fee simple, to Samuel Jefferies, his said undivided interest in the said land, the plaintiff not renouncing dower. Thereafter the said tract of land, containing 1,219 acres, was partitioned in kind among the tenants in common, having been divided into eight equal parts, according to the number of shares, by commissioners chosen by the parties in interest. In this partition there was assigned to Samuel Jefferies a half interest or share in lot No. 3, containing 216 acres, and one town lot, and the full share or interest in lot No. 7, containing 95 acres, and certain town lots. Subsequently, Samuel Jefferies, in 1874, purchased the one-fourth interest

of J. G. Gaffney and W. G. Gaffney, respectively, in lot No. 3, and owns the same in fee simple. The defendants in all the foregoing cases take fee-simple title through Samuel Jefferies, and it is admitted in all the amended answers that the defendants are in possession of the premises described in the complaints, and that all of the lands are part and parcel of the said lot No. 3 or lot No. 7, and that in such lots as are a part of lot No. 3 plaintiff sues for dower in one-half interest, and in all lots of No. 7 and its subdivisions for dower in the whole interest, or full dower thereon. The two first-entitled actions relate to such divisions of lot No. 3, and the remaining 34 relate to subdivisions of lot No. 7."

The defendants contended (1) that the plaintiff is barred of dower by the conventional partition in kind among the alienees of her husband and the other tenants in common; (2) that, if dowerable the widow is only dowerable according to the husband's seisin, which was three sixteenths of the entire 1,219 acres. The decree of the circuit court overruled the first contention and sustained the second, adjudging that the plaintiff was entitled to one sixteenth for life in the entire 1,219 acres. See the decree officially reported herewith. Both sides appeal, the defendants from the ruling on the first proposition, and the plaintiff from the ruling on the second proposition.

1. We agree with the circuit court on the first question. The case of *Holley v. Glover*, 36 S. C. 404, 16 L. R. A. 776, 15 S. E. 605, (wherein the point decided was that the wife of a tenant in common is not a necessary party to a suit in partition, notwithstanding her husband had made prior conveyance of his interest, and that her inchoate right of dower would be barred by a sale under partition proceedings to which she was not a party), is grounded upon the principle that the inchoate right of dower is subject to the paramount right of the cotenants to partition. The case also recognized that such partition may be made other than by compulsory proceedings in court, in the following language by Chief Justice Melver, at page 415, 36 S. C. page 785, 16 L. R. A., and page 613, 15 S. E.: "While the wife of one of several tenants in common has all inchoate right of dower in her husband's portion of the real estate held in common, yet such right is subordinate to the paramount right of the tenants in common to have partition of the common property in any of the modes by which such partition may be lawfully made." It is unquestionably lawful for parties *sui juris* to partition land by agreement in writing, as in this case. One may lawfully do voluntarily what the law would compel him to do. It is not necessary now to limit this statement by remarking that a partition by agreement must not be in fraud of the right of dower: for in this case the demandant accepts the partition, and there is no suggestion of unfairness. The parties, by their voluntary act, have only done what the court would have done. Under these cir-

cumstances, there does not seem to be any substantial distinction between a partition by agreement and a partition by suit in reference to this question. Since a partition in kind in a judicial proceeding would not bar the wife of her dower, there is then no reason to suppose that a partition by agreement would.

But it is said that while the husband, during his seisin, might enter into such a partition without barring the wife's inchoate right of dower, the husband's alienee could not. We fail to realize the force of this contention. The husband's alienee is privy to the husband, is in under the husband's seisin, and must have the husband's right of partition as cotenant. Speaking of the situation of an alienee of the husband prior to the partition, in *Holley v. Glover*, 36 S. C. 404, 16 L. R. A. 776, 15 S. E. 605, the court said: "It seems to us that the conveyance to Wise Holley placed him in the shoes of Alfred Holley, invested him with the same seisin, subject to the same qualifications, with which his grantor, Alfred Holley, had previously been invested, and made him a tenant in common with the other joint owners of the land." While the wife of a cotenant would be barred of her inchoate right of dower by a sale under the paramount right of partition, it would not be barred by a partition in kind. In the former case, the sale is incident to the enforcement of a paramount right, and this paramount right protects the title of a purchaser at such sale against the subordinate right of dower, and leaves no seisin to which the dower may attach. In the latter case, after the paramount right is consummated by partition in kind, there is still left a seisin in the husband or his privy of the property, subject to the inchoate right of dower.

2. This brings us to the next question, as to what land is subject to the right of dower in this case, and the extent of the right in the designated tracts or lots. In this mat-

ter we disagree with the circuit court, and hold that the plaintiff is entitled to dower in accordance with her contention,—not in the entire tract of 1,219 acres, as if no partition had been made, but in the portions of said tract which were assigned to Samuel Jefferies, the alienee of the plaintiff's husband, in the said partition; that is to say, as to lot No. 3 plaintiff is entitled to one sixth for life of each subdivision thereof, and as to lot No. 7 she is entitled to one third for life of each subdivision thereof. The wife's right depends upon the seisin of the husband, and must follow the husband's seisin. When the husband is a tenant in common, the seisin being of an undivided interest, the dower is of such undivided interest. When, however, there is a lawful partition in kind, as in this case, the husband's seisin of a divided interest is converted or transmitted into a seisin of the specific portion assigned. This must result from the right of partition among cotenants, which necessarily compels a shifting or transmutation of the seisin of each in an undivided interest to a seisin in severalty by metes and bounds. Under this view, the interests in severalty assigned under partition to the other cotenants are free from the claim of dower, since they hold, not by virtue of any right derived from the plaintiff's husband, but by virtue of the paramount right of partition, which designates their own seisin by metes and bounds; whereas, on the other hand, Jefferies takes by partition only what he derives from the plaintiff's husband, and of course must take subject to the plaintiff's dower. Jefferies having received in the partition what represents the whole seisin of the plaintiff's husband, he, and those claiming under him, should hold subject to the full claim of plaintiff's dower.

*The judgment of the Circuit Court is reversed, and the case is remanded for further proceedings in conformity with the view herein announced.*

### TENNESSEE SUPREME COURT.

#### KNOXVILLE & OHIO RAILROAD COMPANY, *Appt.*, v.

James A. HARRIS, State Comptroller.

(99 Tenn. 684.)

1. A clear grant of organic or statute law must be shown by one who claims exemption from taxation.
2. An exemption from privilege taxation is not included in the exemption by charter of the capital stock, dividends, road, and fixtures, depots, workshops, and vehicles of a railroad company.

NOTE.—For other cases in this series as to uniformity and equality of tax on railroad property generally, see *Cass County v. Chicago*, B. & Q. R. Co. (Neb.) 2 L. R. A. 188, and *note*; *Richmond & D. R. Co. v. Reidsville* (N. C.) 2 L. R. A. 284; *St. Louis, I. M. & S. R. Co. v. Wor-* 53 L. R. A.

3. Exemption from ad valorem taxation does not include exemption from privilege taxation.

4. A privilege tax on the occupation of railroad companies which do not pay ad valorem taxes is not invalid as being a tax on the privilege of exemption from ad valorem taxation, given by charter.

5. A corporation is a "person" within the meaning of the provision against taking property without due process of law; and it is a "man" within the provision against taking property otherwise than by "the law of the land."

6. Classification of railroads for privi-

then (Ark.) 7 L. R. A. 374; *Pittsburgh, C. & St. L. R. Co. v. State* (Ohio) 16 L. R. A. 380; *Cleveland, C. C. & St. L. R. Co. v. Backus* (Ind.) 18 L. R. A. 729; and *Hogg v. Mackay* (Or.) 19 L. R. A. 77.

lege taxation by imposing the tax on those which do not pay ad valorem taxes is not an unnatural and unreasonable classification which makes the tax a deprivation of property without due process of law, although there are but two railroads in the class.

7. A constitutional provision against diminishing corporate powers by special laws does not apply to the mere imposition of a privilege tax on a company which is not exempt therefrom.
8. The good faith of the legislature in imposing a privilege tax on railroad companies that have charter exemptions from ad valorem taxation, or a motive to deprive them of that exemption, cannot be inquired into by the courts.
9. A legislature which has the legal right to impose a privilege tax can exercise its discretion as to the amount of the tax.
10. A railroad privilege tax "for taking up and transporting freight and passengers from one point in this state to another point in this state" does not affect interstate commerce.

(December 8, 1897.)

**A**PPEAL by complainant from a decree of the Court of Chancery Appeals which reversed a decree of the Chancery Court for Knox County in complainant's favor in a suit to recover back taxes which were alleged to be illegal and were paid under protest. *Affirmed.*

The facts are stated in the opinion.

**Mr. W. A. Henderson, with Messrs. Lucky, Sanford, & Tyson, for appellant:**

Complainant's charter, both by necessary implication and by express language, involves an exemption from the payment of a privilege tax for the very purpose for which complainant was chartered, to wit, the operation of its railroad for the transportation of freight and passengers; and the acts of the Tennessee legislature seeking to impose such a privilege tax impair the obligations of complainant's charter contract.

Complainant's charter exemption from taxation necessarily involves an exemption from the payment of a privilege tax for the use of its exempt property in the very business for which the company was chartered, and which is nothing more nor less than an indirect ad valorem tax.

To deny the right of direct taxation on the property, but permit the same result to be reached by a special privilege tax for the use of the exempt property for the corporate purposes, would completely defeat the original intention of the parties, and violate the entire spirit of the contract.

Every element of estoppel which prevents the state from asserting the right to lay an ad valorem tax upon the property of complainant equally prevents it from attempting to accomplish the same result by indirect in the guise of a privilege tax.

*State v. Nashville, C. & St. L. R. Co.* 12 Lea, 595; *Knowville & O. R. Co. v. Hicks*, 9 Baxt. 453; *East Tennessee, V. & G. R. Co. v. Pickerd*, 24 Fed. 611; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558.

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An exemption from an ad valorem tax involves exemption from a privilege tax for the use of the exempt property for the corporate purposes.

2 Hare, *American Const. Law*, p. 759; *Memphis v. Hernando Ins. Co.* 6 Baxt. 527; *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75.

Complainant's exemption from taxation, contained in § 33 of the charter, specifically exempts it from any tax whatever until it pays 6 per cent dividends, and thus specifically prohibits the privilege tax in question.

*Buchanan v. Knoxville & O. R. Co.* 18 C. C. A. 122, 37 U. S. App. 499, 71 Fed. 324.

The very purpose for which complainant is chartered prevents the imposition of such privilege tax.

If complainant's charter exempts it from the payment of a privilege tax, the statutes in question are unconstitutional in that they impair the obligation of complainant's charter contract, in violation of the Constitution of the United States.

*State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993.

The privilege tax sought to be imposed in this case is not in substance and in fact a privilege tax upon the business or occupation of transporting freight and passengers by railroad, but is merely an attempt to tax complainant by reason of and on account of its exemption from the payment of an ad valorem tax, and is in fact a tax upon this exemption, imposed, not upon any occupation or business, but upon an entirely distinct and unconnected matter, which is not the subject-matter of a privilege tax, to wit, complainant's exemption from an ad valorem tax.

Under the power to tax privileges, the legislature cannot declare anything to be a privilege which it may elect; nothing can be so declared except the right or privilege of exercising a business or occupation or other analogous affirmative right which can be granted or prohibited by the legislature.

A privilege is limited to the exercise of an occupation.

*French v. Baker*, 4 Sneed, 193; *Columbia v. Guest*, 3 Head, 413, 465; *State v. Schlier*, 3 Heisk. 281; *Jenkins v. Ewin*, 8 Heisk. 456; *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593; *Turnpike Cases*, 92 Tenn. 371, 22 S. W. 75.

The alleged privilege-tax legislation is partial and class legislation, not assessed alike upon all persons engaged in this occupation, but attempting arbitrarily to select and tax a subclass of a class engaged in this occupation, to wit, those railroad companies which do not pay an ad valorem tax to the state,—such classification being based upon no good and valid reason and being arbitrary and unnatural.

*Stratton v. Morris*, 89 Tenn. 497, *sub nom. Dibrill v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Bank of the State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517; *Budd v. State*, 3 Humph. 492, 39 Am. Dec. 189; *Memphis v. Fisher*, 9 Baxt. 239; *Hatcher v. State*, 12 Lea, 370; *Woodward v. Brien*, 14 Lea, 522; *Burkholtz v. State*, 16 Lea, 73; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401.



The legislative discretion in this matter is not beyond the control of the Constitution.

*Nashville v. Althrop*, 5 Coldw. 554; *State v. Schlier*, 3 Heisk. 281; *Fulgum v. Nashville*, 8 Lea, 635; *Voase v. Memphis*, 9 Lea, 294; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 525, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Daly v. State*, 13 Lea, 232; *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178, 30 S. W. 750.

The legislation in question is partial and void for the reason that it is only levied upon "railroad companies" engaged in the business of transporting freight and passengers, and does not apply to other persons not formed into railroad companies who may be engaged in the same business, even though they may operate under a charter exempting them from the payment of an ad valorem tax.

*Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679.

The legislation in question is in violation of §§ 8, 10, art. 1, of the Constitution of the United States, in that it constitutes an unlawful regulation of interstate commerce.

25 Am. & Eng. Enc. Law, p. 34, note; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Messrs. **Cordell Hull** and **G. W. Pickle**, for appellee:

No legislative body sitting under a state Constitution of the usual character has the right to sell, give, or bargain away forever the taxing power of the state.

*Washington University v. Rouse*, 8 Wall. 443, 19 L. ed. 499; *Ford v. Delta & P. Land Co.* 164 U. S. 668, 41 L. ed. 592, 17 Sup. Ct. Rep. 230; *Wilmington & W. R. Co. v. Alsbrough*, 110 N. C. 137, 14 S. E. 652; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 185, 33 L. ed. 306, 10 Sup. Ct. Rep. 68; *Memphis & I. R. R. Co. v. Railroad Comrs.* 112 U. S. 618, sub nom. *Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 840, 5 Sup. Ct. Rep. 290; *Bank of Commerce v. Tennessee*, 161 U. S. 145, 40 L. ed. 649, 16 Sup. Ct. Rep. 456; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 668, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; *Hoge v. Richmond & D. R. Co.* 99 U. S. 350, 25 L. ed. 303; *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 575, sub nom. *Ohio, B. & K. O. R. Co. v. Missouri ex rel. Guffey*, 30 L. ed. 734, 7 Sup. Ct. Rep. 693; *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150; 4 Thomp. Corp. § 5575; *Wilson v. Gaines*, 9 Baxt. 551; *Memphis v. Union & Planters' Bank*, 91 Tenn. 550, 19 S. W. 758; *State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993; *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *Grand Lodge, F. & A. M. v. New Orleans*, 166 U. S. 146, 41 L. ed. 952, 17 Sup. Ct. Rep. 523.

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The exemption clause of the charter of the Knoxville & Kentucky Railroad Company did not confer upon the corporation immunity from privilege taxes.

The exemption of the "capital stock in the said company," and of "the dividends thereon," is manifestly an exemption of the interests of shareholders, and not of the company.

*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558.

There is entire omission from the statutory enumeration of:—

(a) The franchise, which is property of the corporation, and susceptible of separate assessment.

*South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348; *Louisville & N. R. Co. v. Bate*, 12 Lea, 573.

(b) The capital stock of the corporation, which is not the same thing as its tangible property, and certainly not the same thing as enumerated parts of its property.

(c) Surplus and undivided profits, which are taxable despite an exemption of the shares of stock.

*Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *State v. Bank of Commerce*, 95 Tenn. 237, 31 S. W. 993.

The exemption covers some, but not all, of the property of the corporation.

*Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

An exemption of particulars, and only part of the property of a corporation, is not at all out of the usual course.

*Buchanan v. Knoxville & O. R. Co.* 18 C. C. A. 122, 37 U. S. App. 499, 71 Fed. 329; *Central R. & Bkg. Co. v. Wright*, 164 U. S. 329, 41 L. ed. 454, 17 Sup. Ct. Rep. 80; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222.

Any occupation which is not open to every citizen, but can only be exercised by a licensee from some constituted authority, is a privilege.

*French v. Baker*, 4 Sneed, 193; *Robertson v. Heneger*, 5 Sneed, 258; *Columbia v. Guest*, 3 Head, 414; *State v. Schlier*, 3 Heisk. 283; *Jenkins v. Ewin*, 8 Heisk. 456.

An exemption of property from the regular ad valorem tax is a totally different thing from the exemption of the business or occupation of the property holder from a privilege tax thereon.

*New Orleans v. Citizens' Bank*, 167 U. S. 375, 42 L. ed. 203, 17 Sup. Ct. Rep. 905; *Howe Mach. Co. v. Gage*, 9 Baxt. 518; *State v. Fisk University*, 87 Tenn. 241, 10 S. W. 284; *Lightburne v. Shelby County Taxing Dist.* 4 Lea, 219; *Memphis v. Carrington*, 91 Tenn. 511, 19 S. W. 673; *Lumberville Dela-*

*ware Bridge Co. v. State Bd. of Assessors*, 55 N. J. L. 529, *sub nom. State, Lumberville Delaware Bridge Co. v. State Bd. of Assessors*, 25 L. R. A. 134, 26 Atl. 711.

Taxes like the one involved in this case have been repeatedly held not to be a property tax, but an excise, license, franchise, or privilege tax, and cannot, therefore, be embraced within an exemption from property taxes only.

*Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Horn-Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

As a result of the strict construction of exemptions from taxation it has been held that an exemption from "taxes" or "taxation" does not include exemption from special assessments for municipal or other public improvements.

4 Thomp. Corp. § 5575; *Ford v. Delta & P. Land Co.* 164 U. S. 667, 41 L. ed. 592, 17 Sup. Ct. Rep. 230; *Bailey v. Maguire*, 22 Wall. 215, 22 L. ed. 850; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293.

An exemption of the property of a corporation from taxation protects only such property as is necessary and actually employed in its business, leaving all other subject to taxation.

*De Soto Bank v. Memphis*, 6 Baxt. 415, 32 Am. Rep. 530; *Bank of Commerce v. McGowan*, 6 Lea, 703; *Central R. & Bkg. Co. v. Wright*, 164 U. S. 335, 41 L. ed. 454, 17 Sup. Ct. Rep. 80; *Memphis & O. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222; *Bank of Commerce v. Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

The words "rights, privileges, franchises, benefits, powers, etc.," are cut down by construction so as not to include an exemption from taxation of any character.

*Wilson v. Gaines*, 9 Baxt. 546; *Nashville, C. & St. L. R. Co. v. Hodges*, 7 Lea. 665; *Memphis v. Phoenix F. & M. Ins. Co.* 91 Tenn. 566, 19 S. W. 1044; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 26 L. ed. 152; *Cucullu v. Hernandez*, 103 U. S. 117, 26 L. ed. 327; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 642, 32 L. ed. 1053, 9 Sup. Ct. Rep. 640.

An exemption of "capital stock" will protect the corporation or the stockholders, but not both.

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*State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Central R. & Bkg. Co. v. Wright*, 164 U. S. 335, 41 L. ed. 458, 17 Sup. Ct. Rep. 80; *Memphis & O. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

But will not protect the surplus.

*Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456, 95 Tenn. 222, 31 S. W. 993.

Exemptions from taxation are held a personal privilege, and not vendible or transferable without express legislative authority.

*Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Mercantile Bank v. Tennessee use of Memphis*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461; *Wilson v. Gaines*, 103 U. S. 417, 26 L. ed. 401; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *State ex rel. Gaines v. Whitworth*, 8 Lea, 594; *Wilson v. Gaines*, 3 Tenn. Ch. 597.

And such exemptions cannot be renewed, extended, or transferred by legislative authority since the Constitution of 1870.

*Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045; *Mercantile Bank v. Tennessee use of Memphis*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461; *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938; 4 Thomp. Corp. § 5576.

Exemptions will not be extended by implication to other than the things enumerated.

*Union Bank v. State*, 9 Yerg. 490; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *Anne Arundel County Comrs. v. Annapolis & E. R. R. Co.* 47 Md. 592; *State, Hall, Prosecutor, v. Parker*, 33 N. J. L. 315; *State v. Northorn P. R. Co.* 39 Minn. 25, 38 N. W. 635.

There is no estoppel by *res judicata* growing out of former suits over this matter to prevent defendant from denying the existence, transfer, and validity of said exemption,—at least so far as concerns privilege taxes.

A privilege is whatever the legislature chooses to declare to be a privilege, and to tax as such.

*Kurth v. State*, 86 Tenn. 134, 5 S. W. 593; *Columbia v. Guest*, 3 Head, 414; *Jenkins v. Ewin*, 8 Heisk. 456; *Wiltse v. State*, 8 Heisk. 544; *Mabry v. Tarber*, 1 Humph. 94.

A statute is not objectionable as not being "the law of the land," which embraces all persons who are or may come into like situation and circumstances.

*Stratton Claimants v. Morris Claimants*, 89 Tenn. 521, *sub nom. Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87.

The 14th Amendment does not prohibit legislation by the states limited as to persons, objects, or territory, if all persons subject to it are treated alike.

*Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri P. R. Co. v. Mackey*, 127 U. S. 206, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176.

This amendment does not abridge the police power of the states.

*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Nor trammel in the least the taxing power of the states.

*Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 484, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Columbia Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

Caldwell, J., delivered the opinion of the court:

The state, through James A. Harris, comptroller of the treasury, demanded of the Knoxville & Ohio Railroad Company privilege taxes for the years 1893, 1894, 1895, and 1896, in all \$4,820. Controverting its liability for these taxes, the railroad company, pursuant to the statute in relation to disputed revenue claimed by the state (Mill. & V. Code, §§ 926-928; Shannon's Code, §§ 1059-1061), paid them under protest, and within thirty days from the time of payment brought this action to recover from the state the sum so paid. The suit was commenced in the chancery court of Knox county against the comptroller to whom the taxes were paid.

The complainant alleged, in substance, that it was a Tennessee corporation, owning and operating a line of railroad in this state between 25 and 100 miles in length, and having rail and traffic connection at its termini with other railroads, which deliver certain of its freight and passengers at points of destination in other states, and from which it receives freight and passengers starting in other states and destined to points on its line in this state; that it was successor, through judicial sale, to the Knoxville & Kentucky Railroad Company, and as such was, by the terms of the latter's charter, exempt from all taxation; that its successorship to that company, and consequent exemption from ad valorem taxes, had been more than once adjudged in courts of competent jurisdiction; that, notwithstanding this, the legislature of the state had attempted by various acts to impose a privilege tax upon complainant; that by virtue of these acts, though obnoxious to the Federal and state Constitutions in several designated particulars, the comptroller had wrongfully required the complainant to pay the sum for which it sues.

The defendant demurred to the bill upon several grounds. The chancellor overruled the demurrer, and, exercising a legal discre-

tion (Code, § 3157; Mill. & V. Code, § 3874; Shannon's Code, § 4889), permitted an appeal. On reaching this court the cause was transferred under § 14, chap. 76, Acts 1895, to the court of chancery appeals for hearing and decision. That tribunal sustained the demurrer and dismissed the bill. From the decree of dismissal the complainant appealed, and brought the cause into this court again.

Since a demurrer raises questions of law only, and causes decided by the court of chancery appeals are appealable on all questions of law (Acts 1895, chap. 76, § 11), and the complainant has prosecuted a broad appeal, the present cause is now before this court, and it was before the other tribunals, for consideration and determination of the legal questions raised by the bill and demurrer.

Owing to the state's attitude in this case, it is not worth while to decide whether the complainant is the legal successor to the Knoxville & Kentucky Railroad Company, and in that relation entitled to exemption from ad valorem taxation to the extent provided in the latter's charter, as it was held to be in *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442, and in *Buchanan v. Knoxville & O. R. Co.* 18 C. C. A. 122, 37 U. S. App. 492, 71 Fed. 324. The statutes lay a privilege tax on such railroad companies only as operate or control lines in this state and are not subject to ad valorem taxation; hence the state, by its demand and receipt of the money here involved, treated the complainant as in that situation, and thereby precluded itself from denying in this suit that such was its real status before the law. Therefore, without approving or disapproving the decision made in the two cases just mentioned, or deciding the question anew, it will be assumed that the complainant is really the successor to the Knoxville & Kentucky Railroad Company, and as such is entitled to exemption from ad valorem taxation to the extent provided by that company's charter. These observations, however, are scarcely more than introductory. They do not solve any of the seriously litigated questions.

Ad valorem taxation and privilege taxation are different things, having no necessary connection. They are distinct burdens laid by the government upon those receiving its protection, and, when legally imposed, must be borne as a recompense for that protection. The same person may be subject to both, or to one and not the other. Subjection to one does not mean subjection to the other, nor does exemption from one include exemption from the other. Hence the assumption here in that the complainant has the same exemption from ad valorem taxation that its predecessor, the Knoxville & Kentucky Railroad Company, had under its charter, does not imply that it has exemption from privilege taxation also. Whether it has the latter exemption is to be determined by an original construction of the charter. This question did not arise in any of the previous litigations with this complainant, but is presented for the first time in this cause. Liability

for ad valorem taxes only was involved in the former cases.

Under the Constitution of 1834 (art. 2, § 28, and art. 11, § 7), which was in force at the date of this charter, the legislature was permitted to grant exemption from both ad valorem and privilege taxation (*Memphis v. Memphis City Bank*, 91 Tenn. 583-585, 19 S. W. 1045); and, if it did so in this instance, the state is conclusively bound thereby, notwithstanding a subsequent change and reversal of governmental policy and law, as shown by the Constitution of 1870 (art. 2, § 28, and art. 11, § 7; *Memphis v. Memphis City Bank*, 91 Tenn. 585-589, 19 S. W. 1045), and legislation thereunder. Valid corporate charters have long been held to be contracts, within the meaning of that provision of the Federal Constitution (art. 1, § 10), and of the state Constitution (art. 1, § 20), which prohibits the passage of any "law impairing the obligation of contracts." *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Farrington v. Tennessee*, 95 U. S. 684, 24 L. ed. 559; *Union Bank v. State*, 9 Yerg. 490; *Memphis v. Hernando Ins. Co.* 6 Baxt. 527; *State v. Butler*, 13 Lea, 408, 86 Tenn. 614, 8 S. W. 586; *Memphis v. Union & Planters' Bank*, 91 Tenn. 546, 19 S. W. 758; *Memphis v. Home Ins. Co.* 91 Tenn. 561, 19 S. W. 1042; *State v. Bank of Commerce*, 95 Tenn. 226, 31 S. W. 993. It follows, therefore, that if the charter of the Knoxville & Kentucky Railroad Company included exemption from privilege taxation as well as from ad valorem taxation, and if the complainant has acquired all the exemption of that charter (which latter proposition is assumed), the enactments, under which the complainant was required to pay the privilege taxes here involved, are obnoxious to both Federal and state Constitutions, in that they impair the obligation of the charter contract.

Did that charter grant exemption from privilege taxation? Taxes are the lifeblood of civil government. The right of taxation is an attribute of sovereignty. It is inherent in the state, and essential to the perpetuity of its institutions; consequently he who claims exemption must justify his claim by the clearest grant of organic or statute law. Every presumption is against any surrender of the taxing power, and every doubt must be resolved in favor of the state. Unless the intention to surrender that power is manifested by words too plain to be mistaken, it must be held still to exist. *Memphis v. Union & Planters' Bank*, 91 Tenn. 550, 19 S. W. 758; *Memphis v. Home Ins. Co.* 91 Tenn. 562, 19 S. W. 1042; *Memphis v. Memphis City Bank*, 91 Tenn. 579, 19 S. W. 1045; *Turnpike Cases*, 92 Tenn. 373, 22 S. W. 75; *State v. Bank of Commerce*, 95 Tenn. 227, 31 S. W. 993; *Wilson v. Gaines*, 9 Baxt. 551; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 435, 14 L. ed. 1005; *Delaware Railroad Tax*, 18 Wall. 226, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 894; *Erie R. Co. v. Pennsylvania*, 21 Wall. 498, 22 L. ed. 598; *Farrington v. Tennessee*, 95 U. S. 686, 24 L. ed. 560; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222; *Tennessee v. Whitworth*, 117 U. S. 136, 29 L. ed. 832, 6 Sup. Ct. Rep. 645; *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, *sub nom. Chicago, B. & K. O. R. Co. v. Missouri ex rel. Guffey*, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 195, 36 L. ed. 122, 12 Sup. Ct. Rep. 406; *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461. In the case last cited, Chief Justice Taney, speaking for the Supreme Court of the United States, said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 393, 13 L. ed. 468. In *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625, decided many years later by the same court, Mr. Justice Gray, after quoting the foregoing language of Chief Justice Taney, said: "In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that 'neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken.' That exemption from taxation 'should never be assumed, unless the language used is too clear to admit of doubt.' That 'nothing can be taken against the state by presumption or inference. The surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state.' That a state 'cannot, by ambiguous language, be deprived of this highest attribute of sovereignty.' That any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.' And that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants construed *strictissimi juris*.'" Chief Justice Fuller, in *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 185, 33 L. ed. 306, 10 Sup. Ct. Rep. 72, expressed the rule thus: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*." Mr. Justice Peckham, in a more recent case, phrased the rule as follows: "Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must, on that account, be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption

*S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222; *Tennessee v. Whitworth*, 117 U. S. 136, 29 L. ed. 832, 6 Sup. Ct. Rep. 645; *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, *sub nom. Chicago, B. & K. O. R. Co. v. Missouri ex rel. Guffey*, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 195, 36 L. ed. 122, 12 Sup. Ct. Rep. 406; *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461. In the case last cited, Chief Justice Taney, speaking for the Supreme Court of the United States, said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 393, 13 L. ed. 468. In *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625, decided many years later by the same court, Mr. Justice Gray, after quoting the foregoing language of Chief Justice Taney, said: "In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that 'neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken.' That exemption from taxation 'should never be assumed, unless the language used is too clear to admit of doubt.' That 'nothing can be taken against the state by presumption or inference. The surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state.' That a state 'cannot, by ambiguous language, be deprived of this highest attribute of sovereignty.' That any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.' And that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants construed *strictissimi juris*.'" Chief Justice Fuller, in *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 185, 33 L. ed. 306, 10 Sup. Ct. Rep. 72, expressed the rule thus: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*." Mr. Justice Peckham, in a more recent case, phrased the rule as follows: "Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must, on that account, be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption

is founded. It has been said that a well-founded doubt is fatal to the claim. No implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly-expressed intention of the taxing power." *Bank of Commerce v. Tennessee*, 161 U. S. 146, 40 L. ed. 649, 16 Sup. Ct. Rep. 460. In a still later case Mr. Justice Brewer said: "It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter, or the necessary scope, of the exempting clause." *Ford v. Delta & P. Land Co.*, 164 U. S. 666, 41 L. ed. 592, 17 Sup. Ct. Rep. 232. This rule of construction, so firmly fixed in the jurisprudence of this country, is applicable in every case,—to ad valorem and privilege taxation equally, and whether the claim be of total or partial exemption. The exact measure of immunity in each case is to be ascertained from the language employed in the particular grant.

The exemption clause in the charter of the Knoxville & Kentucky Railroad Company, under which the complainant asserts immunity, is found in § 33, chap. 217, Acts 1855-56, and is as follows: "That the capital stock in said company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses, and vehicles of transportation belonging to said company, shall be forever exempt from taxation; and it shall not be lawful for the state, or any corporation or municipal police, or other authority thereof, or of any town, city, county, or district thereof, to impose any tax upon such stock or dividends, property or estates: provided, the stock or dividends, when the said dividends shall exceed the legal interest of the state, may be subject to taxation by the state in common with and at the same rate as money at interest; but no tax shall be imposed so as to reduce the part of the dividends to be received by the stockholders, below the legal interest of the state." To meet the condition contained in the proviso, the complainant alleged, as a matter of fact, that "no dividend had ever been paid on its capital stock." The demurrer admitted the allegation. Thus, it is established that the time has not yet arrived for the state to resume any part of the taxing power actually surrendered by the preceding portion of the section.

What part of that power was there surrendered? For reasons already stated, it is assumed, and the state is precluded from denying, that the corporation was granted complete immunity from ad valorem taxation, and it was so adjudged in the two cases cited. It cannot escape observation, however, that only certain parts of the corporation's property, present and prospective, were mentioned for exemption, and that, if the question of ad valorem taxation were now before the court, the exemption should be limited to those parts. The company's franchise and its surplus are two elements

of corporate property not mentioned or included. The former of these is a subject of taxation, and when not exempt must be included in the assessment (*South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348; *Louisville & N. E. Co. v. Bate*, 12 Lea, 573); and the same is true of the latter (*Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *State v. Bank of Commerce*, 95 Tenn. 222, 31 S. W. 993). Corporate property has been said to consist of three separate and distinct things,—capital stock, franchise, and surplus. *People ex rel. Union Trust v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818. In this view, the word "property" in the exemption clause of this charter might well be held to include franchise and surplus, but for its restrictive qualification. The exemption is not of "property" in the broadest sense, but of "such property" meaning that previously enumerated. The grant particularized the things to be exempt, and for that reason the exemption should be limited to the particulars of the enumeration.

About exemption from privilege taxation there appears to us less room for plausible debate. After a careful study of the exemption clause in all of its parts, this court is not able to discover even an indication of an intention on the part of the legislature thereby to grant immunity from privilege taxation, and much less is it able to discover in the language used an unmistakable purpose to do so. Such an intention is not expressed in the words employed, nor can it be legitimately implied from them. The thing upon which a privilege tax might be laid—the company's business or occupation—was not mentioned, directly or indirectly, in the whole clause. Only those things upon which an ad valorem tax might be laid—property of different kinds—were enumerated or included. The legislature well knew of the two kinds of taxation to which the company might be subjected, and of the things upon which the one tax and the other were separately leviable (Const. 1834, art. 2, § 28), and, with that knowledge, it granted immunity to certain of the things subject to ad valorem taxation, but did not mention or include that thing which alone was subject to privilege taxation. This action of that body can be explained upon no other reasonable hypothesis than that it intended, for reasons satisfactory to itself, and which no one may gainsay, to grant the immunity to the particular property named from that kind of taxation to which it would otherwise be subject, and to nothing else, and from no other taxation. *Expressio unius est exclusio alterius*.

The scope of the exemption given to the preceding portion of the section is in no degree enlarged, but only conditionally limited, by the proviso. The words "taxation" and "no tax," occurring in the latter, relate exclusively to the same kind of taxation previously contemplated, and to the same

things previously enumerated for exemption, and do not refer to any different kind of taxation, or introduce any new or additional subject-matter. It is worthy of repetition that privilege taxation relates to a business, an occupation, or the like; and ad valorem taxation, to property; and that neither includes the other.

In the present case the complainant is treated as having complete exemption from the latter, and it is urged that this necessarily involves exemption from the former. Not so. Exemption from ad valorem taxation no more includes exemption from privilege taxation than the imposition of an ad valorem tax includes the imposition of a privilege tax. If one imposition does not embrace both, one exemption does not embrace both. No more is it an answer to this interpretation to say that it leaves the immunity allowed less valuable to the complainant than it would otherwise be. That was a matter for the consideration of the legislature making the grant. *Memphis Gaslight Co. v. Shelby County Taming Dist.* 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *Turnpike Cases*, 92 Tenn. 372, 373, 22 S. W. 75. A like objection by the holders of exempt shares, to the taxation of a bank's surplus, though conceded to be sound in fact, was overruled as untenable in law, in the recent case of *Bank of Commerce v. Tennessee*, 161 U. S. 148, 40 L. ed. 650, 16 Sup. Ct. Rep. 456.

It is not to be implied from what has been said that no exemption from privilege taxation could have been granted without naming the subject of such taxation and exempting it in so many words. That result could have been accomplished by a statement that the company was to have exemption from all taxation, or by any other form of expression that would, beyond doubt, disclose such an intention. But in this case, as in that of *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 195, 36 L. ed. 122, 12 Sup. Ct. Rep. 406, there is "no evidence of an intention" to grant exemption from privilege taxation. The exemption clause construed in *Memphis v. Union & Planters' Bank*, 91 Tenn. 546, 19 S. W. 758, and held to include privilege taxation, recited that the charter tax named should "be in lieu of all other taxes." Of the same import were the exemption clauses before the court in *Memphis v. Hernando Ins. Co.* 6 Baxt. 527, and in *Union Bank v. State*, 9 Yerg. 490, where like holdings were made. Besides the great difference between the language of those grants and that of this one, which is controlling, it may be remarked, in passing, that there was some money consideration for those grants, in the form of a commuted tax, and there was none in this one. Privilege taxation was not "within the express letter, or necessary scope, of the exempting clause" (164 U. S. 666, 41 L. ed. 590, 17 Sup. Ct. Rep. 232) of this charter; hence it was not included, and the subsequent acts imposing the privilege taxes here complained of do not impair the obligation of the company's charter contract, and thereby violate § 10, art. 1, of the 53 L. R. A.

Federal Constitution and § 20, art. 1, of the Constitution of the state.

In the next place, it is alleged and urged against the validity of this legislation that the requisition made under the name of a privilege tax is not such in reality; that the so-called "tax" is not imposed on the business or occupation of the complainant, which alone could be the subject of privilege taxation, but solely upon an abstract condition—the mere fact of its "exemption from an ad valorem tax." The Constitution of the state (art. 2, § 28) recognizes only two general kinds of taxation,—ad valorem and privilege. These cover the whole domain of taxation, and beyond these the legislature may not go in the imposition of taxes. *Memphis v. Memphis City Bank*, 91 Tenn. 588, 19 S. W. 1045; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 168, 169, 34 L. R. A. 725, 36 S. W. 1041. In respect of the subjects of the latter kind, the legislative discretion has a very comprehensive range. At the least, any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege. *Turnpike Cases*, 92 Tenn. 372, 22 S. W. 75; *Kurth v. State*, 86 Tenn. 136, 5 S. W. 593; *Jenkins v. Ewin*, 8 Heisk. 456; *Wiltse v. State*, 8 Heisk. 544; *State v. Schlier*, 3 Heisk. 231; *Columbia v. Guest*, 3 Head, 414; *Robertson v. Heneger*, 5 Sneed, 258; *French v. Baker*, 4 Sneed, 193; *Mabry v. Tarver*, 1 Humph. 94. The legislation here impeached originated with § 5, chap. 130, p. 266, Acts 1889, and without material change, except in amount of annual tax, has been re-enacted by each succeeding legislature. Acts 1891 (Ex. Sess.) p. 71, chap. 25, § 4; Acts 1893, p. 145, chap. 89, § 5; Acts 1895 (Ex. Sess.) p. 592, chap. 4, § 7; Acts 1897, p. 76, chap. 2, § 6. The provision under which the aggregate sum here sued for was demanded and collected, so far as need now be quoted, is in these words: "That the following corporations shall pay directly to the comptroller's office the following taxes on the following privileges: Railroad companies, not paying an ad valorem tax to the state, each" a given amount per annum, according to mileage operated or controlled. Acts 1893, pp. 143, 145, chap. 89, § 5; Acts 1895 (Ex. Sess.) p. 592, chap. 4, § 7. This language disclosed, as we think, an obvious intent on the part of the assembly to declare the business, occupation, or employment of the class of railroad companies designated to be a privilege, and to impose a tax upon that business, occupation, or employment. The abstract condition or fact of "not paying an ad valorem tax to the state" is not the thing declared to be a privilege and taxed as such, but it is merely descriptive, and serves only as a designation of that class of railroad companies whose business, occupation, or employment is made a taxable privilege. In this aspect, the *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75, were precisely like this one, though this feature was not there discussed. The privilege tax there was laid on turnpike companies "that collect toll both ways." Yet the circumstance

of collecting "toll both ways" was not the thing privileged and taxed; it was only the means of identifying the companies whose business, occupation, or employment was taxed as a privilege. But if there was really a doubt (and there is none) between this construction of the present acts and that contended for by this complainant, and both were plausible, the former would prevail, if for no other reason, because it would sustain the validity of the legislation. All intentions are in favor of the constitutionality of an act passed with requisite form and ceremony, as was true in this instance; and, where one of two reasonable constructions would render the law obnoxious to the Constitution and the other would not, the latter would be adopted by the courts. *Sutherland*, Stat. Constr. § 332; *Cooley*, Const. Lim. 5th ed. 218; *Black*, Const. Law, § 28; *Brown v. State*, 12 Wheat. 436, 6 L. ed. 684; *State v. Yardley*, 95 Tenn. 560, 34 L. R. A. 656, 32 S. W. 481; *Cole Mfg. Co. v. Falls*, 90 Tenn. 469, 16 S. W. 1045; *Ellis v. State*, 92 Tenn. 93, 20 S. W. 505; *Illinois C. R. Co. v. Crider*, 91 Tenn. 507, 19 S. W. 618.

Complainant further assails this legislation, and says that it deprives the complainant of its property "without due process of law," thereby violating § 1, art. 14, of the Amendments to the Constitution of the United States; and that it deprives complainant of its property otherwise than by "the law of the land," thereby violating § 8, art. 1, of the Constitution of the state. This double assailing may be treated as one objection, since "due process of law" and the "law of the land" are synonymous phrases, and that which is violative of the one is violative of the other also, and *vice versa*. *State v. Staten*, 6 Coldw. 234, 244; *Knox v. State*, 9 Baxt. 207; *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 499; *Parsons v. Russell*, 11 Mich. 129, 83 Am. Dec. 728; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. ed. 616, 618; *Cooley*, Const. Lim. pp. 429 *et seq.* A corporation is a "person" within the meaning of the provision forbidding the deprivation of property "without due process of law" (*Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255), and a "man" within that forbidding deprivation of property otherwise than by "the law of the land." These acts impose a tax on certain corporations. The tax is to be paid in money, and money is "property." Consequently the imposition and collection of the tax is a deprivation of property, and the acts are void as in conflict with those provisions, if it be true that the tax imposed is collectible otherwise than by "due process of law" or by "the law of the land." The precise objection pressed against the acts is that they constitute vicious class legislation, in that, as alleged in the bill, they apply to only two of the seventy-five railroad companies operating or controlling lines of road in the state, and the classifica-

tion is unnatural and arbitrary. The acts do divide the railroad companies in the state into two classes: (1) Those "not paying an ad valorem tax to the state," and (2) those paying such tax; and they impose a privilege tax upon those of the former class only. This is class legislation, undoubtedly, but it is not of the vicious or forbidden kind. It applies equally to all corporations that are or may be in like situation or circumstances, and thereby meets the first requirement of valid class legislation; and it makes a natural and reasonable classification, thereby meeting the other requirements of such legislation. *Sutton v. State*, 96 Tenn. 696, 710, 33 L. R. A. 589, 36 S. W. 697; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178, 30 S. W. 750; *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *Illinois C. R. Co. v. Crider*, 91 Tenn. 490, 19 S. W. 618; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 500, *sub nom. Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Demoville v. Davidson County*, 87 Tenn. 214, 10 S. W. 353; *Debarclaben v. State*, 99 Tenn. 649, 42 S. W. 684; *Lowe v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396. That it meets the first of these requirements is self-evident, and that it meets the other one becomes manifest when it is considered that those companies upon which the privilege tax is imposed are not otherwise making any contribution to the support of the state government that protects their business and property in the same manner that it does those of the companies of the other class, which are contributing their part to that support by the payment of an ad valorem tax. What sounder and more natural reason could be found for a classification than that these are already bearing some of the burdens of government and those are not? A classification with such a reason to support it (and it may have been prompted by others which the court may not and need not state or discover) cannot justly be characterized as unnatural and arbitrary. The ground for the classification upheld in the *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75, was not so strong, and yet it was in some degree of the same nature. The act there questioned (Acts 1891 [Ex. Sess.] p. 67, chap. 25, § 3) imposed a privilege tax on all turnpike companies "that collect tolls both ways," and not on others. Manifestly the principal, if not the only, reason for this classification was that the companies subjected to the tax were enjoying greater advantages, with the sanction of the state, than

those enjoyed by the companies not so taxed. It is of no consequence that there may be but two railroad companies, as alleged in the bill, to which this privilege tax may apply; for "it matters not how few the persons are whomay be included in a class. If all who are or may come into the like situation and circumstances be embraced in the class, the law is general, and not partial." *Stratton Claimants v. Morris Claimants*, 89 Tenn. 522, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 92; *Budd v. State*, 3 Humph. 492, 39 Am. Dec. 189.

It is also alleged and urged that this legislation is in conflict with § 8, art. 11, of the state Constitution, in that it diminishes complainant's corporate "powers" by "special laws." There are two brief and conclusive answers to this impeachment: (1) The acts in question are general, and not special, laws; (2) they do not diminish complainant's corporate powers. The laws are general, within the meaning of this provision, because, as already seen, they include equally all persons who are or may be in the situation and circumstances contemplated. In this particular the requirement of § 8, art. 11, is the same as that of § 8, art. 1, of the Constitution. *Stratton Claimants v. Morris Claimants*, 89 Tenn. 522, 523, sub nom. *Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Sutton v. State*, 96 Tenn. 705, 706, 33 L. R. A. 589, 36 S. W. 697; *Debardelaben v. State*, 99 Tenn. 649, 42 S. W. 684. The corporate "powers" referred to are not diminished by the imposition of a privilege tax on a corporation that has no legal exemption from such a tax. This is inevitably so, since the imposition of the tax takes away nothing that the corporation had previously. Indeed, the "powers" of a corporation with a legal right to such an exemption would not be diminished by the wrongful imposition and collection of such a tax, because corporate "powers" do not include exemption from taxation. *Memphis v. Memphis City Bank*, 91 Tenn. 589, 590, 19 S. W. 1045. The latter would be an impairment of the obligation of the contract, but not a diminution of corporate powers.

It has been suggested, with the emphasis of repetition, that these acts were not passed in good faith, but with the unjust motive of depriving the companies affected thereby of an advantage previously conferred. Of this we see no indication. Moreover, the courts have nothing to do with the motives of the legislature, nor with the policy or impolicy of its laws. Const. art. 2, § 2; *Sutton v. State*, 96 Tenn. 698, 33 L. R. A. 589, 36 S. W. 697; *Cole Mfg. Co. v. Falls*, 90 Tenn. 481, 16 S. W. 1045; *Williams v. Nashville*, 89 Tenn. 488, 15 S. W. 364; *Peck v. State*, 86 Tenn. 262, 6 S. W. 389; *Ballentine v. Pulaski*, 15 Lea, 634; *Lynn v. Polk*, 8 Lea, 229; *Nichol v. Nashville*, 9 Humph. 253; *Louisville & N. R. Co. v. Davidson County* Ot. 1 Sneed, 668, 62 Am. Dec. 424; *Ferguson v. Miners' & M. Bank*, 3 Sneed, 609; *Cooley*, Const. Lim. 202.

A like reply must be made to the other 53 L. R. A.

suggestion, that this tax, if now sanctioned, may hereafter be so increased as to equal an ad valorem tax, which would make the burden upon complainant as great as if it had no exemption at all. If the legislature has the legal right to impose a privilege tax the amount of the imposition is a matter within its discretion. "Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." *Dela ware Railroad Tax*, 18 Wall. 231, sub nom. *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 896; *California v. Central P. R. Co.* 127 U. S. 1, 41, 32 L. ed. 160, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Jenkins v. Ewin*, 8 Heisk. 477. If this were not so, the courts, certainly, could not anticipate legislative action and pronounce decrees in advance of it.

Finally, it is said that this legislation is unconstitutional and void because it imposes a tax on interstate commerce. The Federal Constitution (art. 1, § 8, cl. 3) vests in Congress "power to regulate commerce with foreign nations and among the several states, and among the Indian tribes," and in doing so impliedly forbids any state the right to exercise such power without the consent of Congress. Commerce among the states is usually and appropriately called "interstate commerce." The controlling power of Congress in the regulation of this commerce, and the lack of independent power in this domain on the part of the states, have been strongly affirmed and explicitly decided in numerous cases. *Brennan v. Titusville*, 153 U. S. 302, 38 L. ed. 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Crutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 163, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Leisy v. Hardin*, 135 U. S. 108, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Leloup v. Port of Mobile*, 127 U. S. 645, 32 L. ed. 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 278, 23 L. ed. 348. Every tax on interstate commerce is a burden upon, and to that extent a regulation of, that commerce, and, when imposed by a state law and without the assent of Congress, it is illegal, and the law imposing it is obnoxious to the Federal Constitution, and for that reason null and void. *Welton v. Missouri*, 91 U. S. 278, 23 L. ed. 348; *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1. Therefore these acts, which were passed without the assent of Congress, must be adjudged invalid if the



tax imposed by them should be found to be upon interstate commerce. The complainant's line of road lies wholly within this state, yet it has traffic connections with other lines extending into other states, and in that sense is engaged in interstate, as well as internal, business or commerce. The railroad companies to which the acts apply are required to pay a privilege tax according to mileage, as follows: "Each company operating or controlling 400 miles or more of road in this state, for taking up and transporting freight and passengers from one point to another in this state, per annum, \$10,000. Each company operating or controlling from 100 to 400 miles of road in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum, \$5,000. Each company operating or controlling from 25 to 100 miles of railroad in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum, \$1,000. Each company operating or controlling less than 25 miles of railroad in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum, \$100." Acts 1893, pp. 143, 145, chap. 89, § 5; Acts 1895 (Ex. Sess.) p. 592, chap. 4, § 7. There can be no doubt from this language that the legislative intent was to impose this tax solely and alone upon business or commerce done wholly within this state,—upon internal or intrastate commerce, as contradistinguished from interstate commerce. The imposition is made "for taking up and transporting freight and passengers from one point in this state to another point in this state," in which business there is no element of interstate commerce. The latter is effectually excluded from the operation of the law, and is in no way affected by it. That part of the business which may be interstate is permitted to go on without let or hindrance; no burden is laid upon it; nothing done to regulate or impede its free prosecution. Such legislation is valid, and not void. *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Crutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652, 11 Sup. Ct. Rep. 951; *Gibbons v. Ogden*, 9 Wheat. 195, 6 L. ed. 69; *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731, 14 So. 588; *Lumberville Delaware Bridge Co. v. State Bd. of Assessors*, 55 N. J. L. 529, sub nom. *State, Lumberville Delaware Bridge Co. v. State Bd. of Assessors*, 25 L. R. A. 134, 20 Atl. 711.

The unanimous opinion of the court is that the legislation drawn in question is without conflict with any provision of the Constitution, state or Federal.

Let the decree dismissing the bill be affirmed.

Writ of error dismissed by Supreme Court of United States February 1, 1900.  
53 L. R. A.

S. M. HOOPER, Admr., etc., of J. W. Lebow,  
Deceased, Appt.,

v.

ATLANTA, KNOXVILLE, & NORTHERN  
RAILWAY COMPANY.

(106 Tenn. 28.)

1. A statutory provision permitting the commencement of a new action within a certain time after judgment against plaintiff upon any ground not concluding his right of action applies in case complainant takes a voluntary nonsuit.
2. Complainant may take a voluntary nonsuit in an action removed by defendant to a Federal court, and begin another action in the state court for a less sum than will entitle defendant to removal.
3. An averment that the beneficiary of the recovery of an action is the same as that of a former one in which plaintiff took a voluntary nonsuit is not necessary to bring the case within the provisions of a statute permitting plaintiffs against whom judgment has been rendered to begin another action within a certain time, if it is averred that the suits are between the same parties and for the same cause of action.

(October 23, 1900.)

**A**PPPEAL by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed*.

The facts are stated in the opinion.

*Messrs. Washburn, Pickle, & Turner*,  
for appellant:

By Code, § 2755 (Shannon's Code, § 4446), it is provided: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff and is arrested or reversed on appeal, the plaintiff or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or the arrest." This statute applies to a voluntary nonsuit by the plaintiff.

*Memphis & C. R. Co. v. Pillow*, 9 Heisk. 248; *East Tennessee Iron & Coal Co. v. Broyles*, 95 Tenn. 612, 32 S. W. 761; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; 6 Enc. Pl. & Pr. 842; *Gassman v. Jarvis*, 94 Fed. 603.

Why the removal of this pending suit to the Federal court should deprive the state court of its original jurisdiction of the cause of action is not apparent.

*Gassman v. Jarvis*, 100 Fed. 146.

NOTE.—The decision in *Baltimore & O. R. Co. v. Fulton* (Ohio) 44 L. R. A. 520, which the court in the present case disapproves, is contrary to that rendered in *McIver v. Florida C. & P. R. Co.* 110 Ga. 223, 36 S. E. 775, which has been selected for this series, but is not yet reported because the case has been taken to the Supreme Court of the United States.

**Messrs. W. E. Drummmond and Mynatt & Fowler** also for appellant.

**Messrs. Smith, Hammond, & Smith and Journelmon, Welcker, & Hudson,** with **Messrs. Wright & Frantz**, for appellee:

The court below held that, the suit having been originally brought in that court and properly removed to the Federal court, and never having been remanded therefrom, the circuit court of Knox county had no jurisdiction to entertain the same, and dismissed the plaintiff's suit. The holding of the court on the question of jurisdiction is founded upon principle and reason.

*Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446; *Constitution Pub. Co. v. DeLaughter*, 95 Ga. 17, 21 S. E. 1000; *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265.

**McAllister, J.**, delivered the opinion of the court:

Suit to recover damages for personal injuries resulting in the death of plaintiff's intestate. Defendant company pleaded—First, not guilty; and, second, the statute of limitations of one year. Plaintiff, by replication to defendant's plea of the statute of limitations, avers that within twelve months after the cause of action accrued he brought suit against defendant company in the circuit court of Knox county. Thereupon defendant company, upon the ground of nonresidence, removed said cause to the circuit court of the United States at Knoxville, where said cause pended until the September term, 1899, of said court, when the plaintiff took a voluntary nonsuit. Subsequently thereto, and within twelve months after the dismissal of the first suit, plaintiff instituted the present suit in the circuit court of Knox county. Defendant company demurred to this replication, assigning for cause: "First. It doth not appear from said averments for whom the said S. M. Hooper was administrator in the original suit, nor for whose benefit said former suit was brought in the circuit court of Knox county, nor does it appear therein when said right of action accrued and when said former suit was brought. Second. Because it doth not appear what disposition was made of said cause after plaintiff's voluntary nonsuit in the circuit court of the United States at Knoxville. Third. Defendant says the removal of said cause was a removal of all the rights and remedies plaintiff had therein against defendant company, and, said cause not having been remanded to this court, this court is now without jurisdiction of same. Fourth. The defendant says that the running of the statute of limitations was in no wise affected or prevented by said proceedings." The court below sustained the demurrer of defendant to the replication, and held that the suit having been originally brought in that court, and properly removed to the Federal court, and never having been remanded therefrom, the circuit court of Knox county

had no jurisdiction to entertain the same, and dismissed the plaintiff's suit.

The principal question debated at the bar was whether after suit brought in the state court, and removed to the United States circuit court, and there dismissed by plaintiff taking a voluntary nonsuit, it can be renewed in the state court for a less sum than would entitle defendant to again remove same to Federal court, and, if this is so, would such nonsuit prevent the running of the statute of limitations of one year. Section 4446, Shannon's Code, provides, *vis.*: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested or reversed on appeal, the plaintiff or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest." This act has frequently been held to apply to a voluntary nonsuit by the plaintiff. *Memphis & C. R. Co. v. Pillow*, 9 Heisk. 248; *East Tennessee Iron & Coal Co. v. Broyles*, 95 Tenn. 612, 32 S. W. 761.

But it is argued that the removal of a cause from a state court to the Federal court thereby deprived the state court of all further jurisdiction, not only of that particular suit, but of the cause of action and subject-matter of that suit. Counsel for defendant company cites in support of his contention: *Cox v. East Tennessee, V. & G. R. Co.* 68 Ga. 446; *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265. In the latter case the court said, *vis.*: "It has been repeatedly decided that, where a case has been properly removed from a state to a Federal court, the jurisdiction of the former over the case immediately ceases, and it is its duty, in the language of the statute, to proceed no further in the cause. Its jurisdiction in that case ends with the removal. . . . The Federal court, having acquired jurisdiction of the action by its removal from the state court, must, on principle and the reason of the statute, retain it for all purposes,—for the purpose of determining whether it should be reinstated or recommenced after it has been dismissed by it or stricken from its docket, as well as for its determination on the merits. Its jurisdiction in such case does not merely embrace the suit brought and removed, but any suit thereafter brought on the identical cause of action, after the former suit has been dismissed by it, until the cause of action has been extinguished by a judgment on the merits. The cause of action—the 'controversy' between the parties—remains subject to the jurisdiction of the Federal court, and is forever excluded from that of the court from which it was removed, unless remanded with the consent of the defendant; and there are cases which make this a doubtful proposition, where the cause is a removable one. No one would claim that, after the case has been stricken from its docket by the Federal court, the

state court could determine whether it should be reinstated; and, by a parity of reasoning, the state court cannot pass on the right of the plaintiff to recommence the action after it has been dismissed by the Federal court. In either of these cases the question can only be determined by the court that had full and exclusive jurisdiction of the case at the time. And if there be any remedial rule, statutory or otherwise, by which a case that has been dismissed for failure to prosecute can be reinstated after the time fixed by the statute of limitations has expired, the remedy must be sought in that court. It is properly a step or proceeding in the same case. If this were not so, it would not only open the way to a violation of the policy of the statute authorizing removals, but be productive of a very inconvenient practice and much abuse. It would enable a party to permit his case to be dismissed by failing to prosecute in the Federal court, with the purpose of recommencing it in the state court, and thus compel the defendant to be at the trouble and expense of again causing it to be removed or submit to the jurisdiction of the state court. The view we have taken finds support in the well-considered case of *Cow v. East Tennessee, V. & G. R. Co.* 68 Ga. 446. It is there held that 'when a case has been removed from a state court to the circuit court of the United States, the jurisdiction of the former ceases, and, after nonsuit in the Federal court, the case cannot be renewed in the state court within six months, so as to avoid the statute of limitations.' Such right is given by statute on a nonsuit in the courts of that state, a nonsuit not being a decision on the merits. Referring to the statute, which reads as follows: 'If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing as to limitations with the original case,'—the court said: 'To be thus renewed, it must be the same case as to cause of action and parties; and this is identically the same case in both respects. So that the question is: Can a case which has been removed to the United States circuit court be renewed in the state court? We think not, because the act of removal, *ipso facto*, transfers the jurisdiction of the cause to the circuit court of the United States, and divests that of the state court,'—citing *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354. In the case before us, the plaintiff averred that the cause of action in the case removed was identical with the cause of action in his present petition. If it had not been, he could not have been within the provisions of § 4991, Rev. Stat., under favor of which he claimed the right to recommence his action in the state court."

This question arose, was well considered, and a contrary conclusion reached by the court, in *Gassman v. Jarvis*, 100 Fed. 146. Said the court: "The contention of the defendant is that the jurisdiction of this court upon removal is exclusive and continuous, and that, though the cause so removed

is dismissed without any trial or determination of the merits, no suit can thereafter be instituted and maintained for the same cause of action in the court from which the removal has been taken. This contention finds support in the case of *Cow v. East Tennessee, V. & G. R. Co.* 68 Ga. 446, and the case of *Baltimore & O. R. Co. v. Fulton*, 59 Ohio St. 575, 44 L. R. A. 520, 53 N. E. 265. The supreme court of Georgia decides that, where a case has been removed from a state court into the circuit court of the United States, the jurisdiction of the former ceases, and, after a nonsuit in the Federal court, the case cannot be renewed in the state court, although a statute of that state expressly provides that, if the plaintiff shall be nonsuited, he shall have the right to recommence his suit within six months, and that such renewed suit shall stand upon the same footing as to limitation with the original case. The court states the question for decision thus: 'Can a case which has been removed to the United States court be renewed in the state court?' That court holds that it cannot, and the only reason assigned is found in the following extract: 'We think not, because the act of removal *ipso facto* transferred the jurisdiction of the cause to the circuit court of the United States, and divests that of the state court, so that by the ruling of the Supreme Court of the United States, in the case of *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354, at the October term, 1880, all further proceedings in the state court are *coram non iudice* and void.' The case of *Kern v. Huidekoper* . . . furnishes no support for the doctrine that, when a case removed into a court of the United States has been dismissed without any trial or determination of the merits, a new suit cannot be brought on the same cause of action in a state court. . . . The state court possesses original jurisdiction of all such causes of action. The removal of the case, and its subsequent dismissal untried and undetermined, cannot, under any known rule of law, be held to be a merger of the cause of action, nor can the removal and dismissal of the cause be pleaded in abatement of the new suit brought in the state court. When a cause of action removed into a court of the United States is dismissed therefrom without any trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby, and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought. [See *Gassman v. Jarvis*, 94 Fed. 603.] . . . The decision of the supreme court of Ohio rests upon the authority of the Georgia case, and that case, as we have seen, finds no support in the case cited and relied upon by it. . . . No rule of law permits the mere dismissal of a case untried and undetermined to be interposed, either in bar or in abatement of a pending suit. . . . It was not the purpose of the Constitution, nor of the statutes passed in pursuance of

it, to interfere with the jurisdiction of the courts of the states further than is necessary to secure the jurisdiction of the courts of the United States in respect of those causes of action which may be brought in or removed to those courts."

We entirely concur in the views expressed by the court in the last case cited, which we think announces the sounder rule. We applied it at the last term of this court at Jackson in the case of *Western U. Teleg. Co. v. Bowcers*, which is unreported.

Another ground of demurrer is that the replication failed to aver that the beneficiary of the recovery named in the present suit is

the same as that named in the original suit. The replication averred that the former suit was between the same parties, and for the same cause of action, without naming the beneficiary in either suit. The beneficiary named in the present suit is J. M. Lebow. We hold these averments sufficient, without alleging that the beneficiary named in the present suit was also named in the former suit.

The result is that the action of the court in sustaining the demurrer is erroneous, *the judgment is reversed*, and the cause remanded.

### KANSAS SUPREME COURT.

C. W. SMITH, *Plff. in Err.*,  
v.

F. C. NEWMAN *et al.*

(.....Kan.....)

- \*1. A tenant not under any duty or obligation to pay taxes on rented land may purchase the land at tax sale, and thus acquire an adverse title as against his former landlord.
2. A landlord whose title was based on bare possession brought an action of ejectment against his former tenant, who had obtained a tax deed to the land, and in his petition admitted that he had lost his possession some time before his action was begun. Held, that, as the landlord had no possession or title, he was not in a position to attack the validity of the tax proceedings and tax deed under which his former tenant held.

(December 8, 1900.)

\*Headnotes by JOHNSTON, J.

NOTE.—*Right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy.*

- I. In general.
- II. Title derived from judicial sale during tenancy.
- III. Title derived from tax sale during tenancy.
  - a. When tenant has agreed to pay the tax.
  - b. When tenant has not agreed to pay the tax.
- IV. Adverse possession.
  - a. Character of tenant's possession, generally.
  - b. Power of tenant to initiate an adverse possession.
    1. Generally.
    2. During term for years.
  - c. How initiated.
    1. Requisites, generally; kind and amount of proof necessary.
    2. Holding over; presumption as to tenant's possession.
    3. Nondemand and nonpayment of rent.
    4. Acquisition of outstanding title or interest by tenant.
    5. Successors of tenant.

I. In general.

The familiar rule that a tenant, while remain-  
53 L. R. A.

**E**RROR to the District Court for Lyon County to review a judgment in favor of defendants in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

*Messrs. C. B. Graves and J. A. Smith*, for plaintiff in error:

The deed of September 10, 1895, is clearly voidable, the assessment roll showing that the land was assessed in two separate parcels and sold in one piece.

*Hall v. Dodge*, 18 Kan. 277; *Pritchard v. Madren*, 31 Kan. 47, 2 Pac. 691; *Dodge v. Emmons*, 34 Kan. 736, 9 Pac. 951.

The public notice of delinquent tax list 1892 for taxes of 1891 was never filed in the treasurer's office. This makes the deed void.

*For v. Cross*, 39 Kan. 350, 18 Pac. 300; *Blanchard v. Hatcher*, 40 Kan. 350, 20 Pac. 15; *Jackson v. Chalkiss*, 41 Kan. 247, 21 Pac. 87.

ing in possession of the premises, is estopped to deny the landlord's title, merely prevents the tenant from asserting a title that is inconsistent with, and involves a denial of the validity of, the title of the landlord at the commencement of the tenancy: it does not prevent him from showing that the title which the landlord then held has since been transferred, defeated, or extinguished, either voluntarily by the landlord, or by operation of law. This limitation or explanation of the rule is established beyond dispute. Among the many cases that might be cited in support of it, the following may be mentioned. *Clarke v. Clarke*, 51 Ala. 498; *Otis v. McMillan*, 70 Ala. 46; *Farris v. Houston*, 74 Ala. 162 (obiter); *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442; *Robertson v. Biddell*, 82 Fla. 304, 13 So. 358; *Winn v. Strickland*, 34 Fla. 610, 16 So. 606; *Hilbourn v. Fogg*, 99 Mass. 11; *Wolf v. Johnson*, 30 Miss. 513; *Jackson ex dem. Van Schaick v. Davis*, 5 Cow. 123, 15 Am. Dec. 451; *Jackson ex dem. Russell v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Lane v. Young*, 66 Hun, 563, 21 N. Y. Supp. 838; *Despard v. Walbridge*, 15 N. Y. 874; *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 10 L. R. A. 405, 20 Atl. 820; *Pierce v. Brown*, 24 Vt. 165; *Wade v. South Penn Oil Co.* 45 W. Va. 380, 32 S. E. 169; *England v. Slade*, 4 T. R. 682; *Doe ex dem. Jackson v. Ramsbotham*, 3 Maule & S. 516; *Neave v. Moss*, 1 Bing. 363, 8 J. B. Moore, 389.

The cases thus far cited merely go to the ex-

There was never any valid notice of sale of 1892 filed in the office of the treasurer of Lyon county.

*Bergman v. Bullitt*, 43 Kan. 712, 23 Pac. 938; *City R. Co. v. Ohseney*, 30 Kan. 199, 1 Pac. 520.

The tax roll of 1892 shows that the land was sold in a body, while the assessment roll shows that it was assessed in two separate pieces.

*Hall v. Dodge*, 18 Kan. 277; *Pritchard v. Madron*, 31 Kan. 47, 2 Pac. 691; *Dodge v. Emmons*, 34 Kan. 736, 9 Pac. 951.

Both of those tax deeds were void, and being void, the defendant had no paper title upon which to rest his case.

The tenant cannot deny his landlord's title. Before a tenant can deny or dispute his landlord's title or right of possession he must first deliver up to the landlord the possession derived from him.

tent of permitting the tenant, or one holding under him, to assert, as against the landlord or one holding under him, that the title which the landlord had at the commencement of the lease has devolved upon, or passed to, some third person. The right of the tenant, himself, to purchase and assert such title presents a somewhat different question. When the reversion passes to the tenant, immediately or mediately, by the voluntary act of the landlord, there can, of course, be no question as to the right of the tenant to hold and assert the title so acquired in an action by the landlord, or his successor, either for the possession of the premises, or for the rent subsequent to the time the title thus passed from him.

A tenant may buy the title of his landlord, or, if the title be assigned or transferred to another during the lease, he may set this up in bar of the landlord's right to recover possession of the property. *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221 (*obiter*).

A tenant, if it be done without fraud, may purchase the landlord's reversion. *Stout v. Merrill*, 35 Iowa, 47.

A tenant is estopped from controverting his landlord's title at the time he entered, but not from showing that the title afterwards passed from his landlord to him. *Ryeras v. Farwell*, 9 Barb. 615.

A tenant may show, in an action for rent, that since the lease he has acquired the title of his landlord. *Van Etten v. Van Etten*, 69 Hun, 499, 23 N. Y. Supp. 711.

Where a guardian rented land and took no security for the rent, and before the rent became due the ward became of age and conveyed the land in fee to the lessee, the rent, being incidental to the reversion, was extinguished by the conveyance. *Mixon v. Coffield*, 24 N. C. (2 Ired. L.) 301.

Where a tenant has acquired the title after the commencement of the lease, from the lessor himself, by descent, deed, or will, the relation of landlord and tenant is at an end, and the summary remedy to obtain possession no longer applies. *Debozeay v. Butler*, 2 Grant, Cas. 417.

A tenant may buy the landlord's title, or one consistent with it, and defend, under such purchase, a suit brought for the possession of the property. *McShan v. Myers*, 1 Iosey, Unrep. Cas. (Tex.) 100.

And, so, where a tenant has obtained a decree against the landlord for the title to be conveyed to him on some existing equity between them, the tenant may show such decree in a subsequent action against him by the landlord. *Swann v. Wilson*, 1 A. K. Marsh. 99. 53 L. R. A.

*Brenner v. Bigelow*, 8 Kan. 502; *Pettigrew v. Mills*, 36 Kan. 745, 14 Pac. 170; *Forbes v. Caldwell*, 39 Kan. 19, 17 Pac. 478; *Smith v. Cooper*, 38 Kan. 446, 16 Pac. 958; *Oliver v. Gary*, 42 Kan. 623, 22 Pac. 733.

The tenancy is extinguished only when the landlord's title is extinguished. So long as his title is not extinguished the tenancy subsists. If the tax title is invalid, then the title of the landlord is not extinguished, and the tax-title claimant still remains the tenant of the landlord who placed him in possession.

Possession is in and of itself title, and in fifteen years ripens into a title absolute,—title being only unlimited possession.

*Gilmore v. Norton*, 10 Kan. 507; *Hollenback v. Ess*, 31 Kan. 88, 1 Pac. 275; *Chicago Lumber Co. v. Fretz*, 51 Kan. 137, 32 Pac. 908; *Jones v. Kellogg*, 51 Kan. 284, 33 Pac.

It is held in *Cole v. Potts*, 10 N. J. Eq. 67, that where one who entered into possession of land as a tenant claims title and possession by virtue of a subsequent parol agreement of sale, and relies upon his possession as part performance, he must show by unequivocal proof that his tenancy was abandoned, and that his possession as a tenant was changed into that of a vendee under the specific contract he is seeking to enforce. *Schields v. Horbach*, 49 Neb. 262, 68 N. W. 524, is to the same effect.

It was held in *Campbell v. Fetterman*, 20 W. Va. 398, that the possession of one who entered as a tenant might, under the circumstances of the case, be referred to an oral contract of purchase with the landlord, and, so, relied upon to take the case out of the statute of frauds.

When the title or interest owned by the landlord at the commencement of the tenancy was a defeasible one, there is some conflict among the authorities as to the right of the tenant to acquire and assert against the landlord a title or interest based on the enforcement of the defeasance.

A tenant, under a landlord who merely had a contract for the purchase of land, may acquire title from the vendor after the landlord has forfeited his rights under the contract, and set up such title in a suit of forcible detainer brought against him by the latter. *McLeod v. Sharp*, 53 Ill. App. 406.

A tenant of one who holds land under a purchase from the state may, if the land is subsequently declared forfeited to the state for non-payment of interest due at the commencement of the tenancy, purchase the land from the state, and thereby acquire title paramount to his landlord. *Lang v. Crothers*, 21 Tex. Civ. App. 118, 51 S. W. 271.

In this case the tenant had formerly held the land under a purchase from the state, and had sold it to the landlord, remaining in possession under a proposition by the latter that he might hold the land for a year, by either paying taxes and interest due the state or one third of the crops raised thereon. He did not accept either proposition, but remained on the land, and neither paid the interest nor any part of the crops. The decision is upon the ground that the tenant did not, by setting up the purchase from the state, dispute the title under which he entered, but merely showed that that title had been extinguished.

In *Rector v. Gibbon*, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605, the United States Supreme Court held that where persons who originally held possession as tenants of one whose title was invalid as against the government

1997; *Douglass v. Ruffin*, 38 Kan. 532, 16 Pac. 793; *Christy v. Richolson*, 48 Kan. 178, 29 Pac. 398; *Redden v. Tefft*, 48 Kan. 305, 29 Pac. 157; *Guinn v. Spillman*, 52 Kan. 506, 35 Pac. 13.

*Messrs. L. B. Kellogg and J. M. Kellogg* for defendants in error.

*Johnston, J.*, delivered the opinion of the court:

This was an action brought by C. W. Smith to recover a tract of land in Lyon county from C. S. Cross. After the action was begun, Cross died, and the case was revived and prosecuted in the name of his heirs and the administrator of his estate. About 1881 E. W. Cunningham obtained a tax-sale certificate upon the land, and the interest thus acquired was sold and transferred to F. E. Smith, who subsequently transferred it to the plaintiff, C. W. Smith. The owner of the land redeemed it from the tax sale, and Smith surrendered his certificate to the county treasurer and received the redemption money. A wire fence was built by the Smiths, inclosing the land and

making it a part of a pasture controlled by them. C. S. Cross rented the land from the Smiths in 1893, and paid them rent thereon until the end of the year 1895. No taxes were paid on the land by the Smiths, and it was sold in 1892 for the taxes of the preceding year; and in 1895 a tax deed was executed to F. O. Lakin, who conveyed the same to C. S. Cross on December 28, 1895. In February, 1897, a tax deed based on other taxes which were in default upon the land was issued to C. S. Cross. After Cross obtained a tax title to the land he refused to pay further rent to the Smiths; and he held possession of the land for the years 1896, 1897, and 1898, and until the commencement of this action, holding it adversely to the Smiths and everyone else under the tax deeds referred to. At the trial Smith claimed title alone through the possession which he formerly held, while Cross based his right upon the tax titles the validity of which was attacked, and the court found in favor of the defendant. While the tax deeds under which Cross claims are valid upon their face, it is conceded that the proceed-

because of certain technical defects were awarded by the officials of the land department the right to purchase the land, under an act of Congress giving the preferential right of purchase to claimants or occupants, their title would be deemed to be held in trust for the benefit of the landlord. The ground of this decision, however, is that the act was not intended for their benefit, but for the benefit of the landlord.

A sublessee of a lessee under a lease for the term of ninety-nine years, renewable forever, upon reasonable demand during the term created by the lease may, after the expiration of the term of the original lease and the failure of the original lessee to exercise his option of renewal, purchase the reversion and assert it against the original lessee. *Presstman v. Silljacks*, 52 Md. 647.

A tenant may, in an action of ejectment against him by the landlord, show that he has a right to retain possession as the assignee of a mortgage to which the property was subject at the time of the lease. *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95.

A tenant of a mortgage may repudiate his tenancy by purchasing the mortgage (after condition broken), and may use the title thus acquired to protect his possession without surrendering the possession. *Pierce v. Brown*, 24 Vt. 165.

Where a tenant holds a mortgage upon the leased premises which matures on the day the lease expires, he may make title under his mortgage without first yielding and surrendering the possession to the landlord, and may assert such title in an action of ejectment against him by the latter. *Shields v. Losear*, 34 N. J. L. 496, 3 Am. Rep. 256.

In *Bates v. Conrow*, 11 N. J. Eq. 137, however, it is held that one who enters premises as a tenant, and subsequently takes an assignment of mortgages upon the property, cannot defend, at law, under his mortgage title, because, having gone into possession under the mortgage, he cannot dispute at law his landlord's title; but if he purchases the mortgage to protect his possession a court of equity will protect his equitable title and his possession under it until the mortgage is repaid.

And so, also, it is held in *Mattis v. Robinson*, 1 Neb. 3, that a tenant who, while holding over after the expiration of the term, purchases a 53 L. R. A.

mortgage which was outstanding at the time the tenancy commenced, cannot maintain a bill to foreclose the same against the landlord. The court said that, having purchased the mortgage while he was in possession as a tenant, it must be presumed that he did it for the only purpose permitted by law, *viz.*, to protect his possession; and that he was only entitled to be reimbursed for the amount he paid for the mortgage (if that amount did not exceed what was justly due thereon) with lawful interest thereon. The court cites and disapproves *Pierce v. Brown*, 24 Vt. 165, *supra*. Upon the same principle the same court, in *Thrall v. Omaha Hotel Co.* 5 Neb. 295, 25 Am. Rep. 488, held that a tenant who, during the term, purchased judgments which had been recovered by a third person against the landlord prior to the lease, and caused executions to be issued thereon, could not, upon the refusal of the landlord to apply the rent to the payment of the executions, maintain an action to have them set off against the rents, and to enjoin the landlord from disturbing him in the possession of the premises under the lease. The court said that it might be questionable whether the tenant could have divested the title of the landlord by causing the property to be sold under the executions, but did not pass upon that question.

But see *Carson v. Crigler*, 9 Ill. App. 83; *Ryder v. Mansell*, 66 Me. 167; *Bumpass v. Alexander*, 10 Helak. 545; *Pickett v. Ferguson*, 86 Tenn. 642, 8 S. W. 386; *Lausman v. Draho*, 10 Neb. 172, 35 Am. Rep. 468, 4 N. W. 956; *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545,—*infra*, II.

The majority of the appellate division of the third department, in *Willis v. McKinnon*, 35 App. Div. 131, 34 N. Y. Supp. 1079, held that a party who accepted a lease of premises from one of two tenants in common, with the assent of the other, who, however, did not sign the lease, was not estopped, as against the one who signed, to assert that he (the tenant) had acquired title of the other; but this decision was reversed by the court of appeals in 59 N. E. 1132, upon the dissenting opinion of Landon, J., in the appellate division.

Where at the time of the lease the landlord had a tax title which was subject to the right of a minor to redeem the tenant cannot acquire

ings upon which they are based are irregular and defective.

In behalf of the plaintiff it is contended that Cross, being a tenant of Smith, could not deny the latter's title, and before doing so he must surrender the possession derived from the landlord. The fact that Cross was holding under Smith does not deprive him of the right to acquire a tax deed to the property. The taxes upon which the Lakin deed was based accrued before the Cross tenancy began. Neither at that time nor during the tenancy was Cross under any obligation to pay taxes. That obligation rested upon the owner, or those claiming to own the land. In *Weichselbaum v. Ourlett*, 20 Kan. 709, 27 Am. Rep. 204, it was held that "a tenant under no obligation or duty to pay taxes may purchase the property at a tax sale made during his term, and resist the recovery of his former landlord for rent accruing after the tax sale, by virtue of an adverse title so acquired." See also *Shoup v. Central Branch Union P. R. Co.* 24 Kan. 547, 558. Cross had a right to, and did, acquire a tax title to the land; and after that time

he claimed and held possession under that title, and not under Smith. Even if the tax deed was void on its face, and the action had been brought by the owner of the fee-simple title, Cross, who had paid taxes, penalties, and costs, would have been entitled to hold possession until the tax charges had been fully paid. *Smith v. Smith*, 15 Kan. 291; *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157. He certainly was entitled to hold as against Smith, whose only claim was a bare possession, and which had been lost a considerable time before this action was begun. It is fundamental that a person attacking a tax deed must show title in himself to the land in question. *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 662. In his petition Smith admits that he is out of possession, and, not having that, he had nothing. He therefore had no standing to attack the validity of the tax proceedings or the tax deed under which Cross held.

*The judgment of the District Court will be affirmed.*

All the Justices concur.

the right of the latter and assert it against the landlord. *Stout v. Merrill*, 35 Iowa, 47.

*Jackson ex dem. Waldron v. Weiden*, 3 Johns. 282, was an action of ejectment by a landlord against his tenant. It appeared that during the tenancy a dispute arose as to the title to the property, and it was awarded by commissioners appointed by the state to a third person. The tenant then purchased the property from the latter, the landlord at that time stating that he gave up all claim to the land and for ten years thereafter acquiescing in the purchase. It was held that, even assuming that the award was not binding upon the landlord, he must prove his title, and cannot recover on the ground of the prior tenancy. The decision, however, is upon the ground of the plaintiff's acquiescence in the attornment.

## II. Title derived from judicial sale during tenancy.

It is apparent from what has been said in division I. that the rule that estops a tenant to deny his landlord's title without first surrendering possession does not prevent him from acquiring, at or through a judicial sale during the tenancy, the title that the landlord held at the commencement of the tenancy, or from holding that title in his own right and adversely to the landlord. Any objection that may be made to the acquisition and assertion of such a title by the tenant must be based upon some supposed relation of trust and confidence between the parties, which, while it would not prevent the tenant from showing that a third person had acquired the landlord's title, would disqualify him to acquire that title himself and hold it as against the landlord. The great weight of authority, however, denies the existence of any such disqualifying relation, and establishes the proposition that a tenant, or one claiming under him, may, if he acts fairly, acquire the title that the landlord held at the commencement of the tenancy by purchase at a judicial sale or from one who holds under such a purchase.

A tenant may plead, in an action of ejectment against him by the landlord, that he has acquired the latter's title by purchase from him or at a judicial sale. *Tewksbury v. Magrath*, 38 Cal. 237.  
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A tenant may purchase the premises under a judgment against the landlord, and set up the title thus acquired in bar of an action brought against him by the landlord. *Tilgham v. Little*, 13 Ill. 239. This, however, was not a case of a tenant, but of a purchaser under contract in possession.

A tenant cannot dispute the title of his landlord under which he entered, but in a suit for rent he may show that he acquired it by conveyance; and it makes no difference whether the conveyance is directly from his landlord, or from a trustee duly authorized to sell and convey the title by a former owner, provided the same is a prior lien to the right of the landlord. In such a case the tenant does not dispute the landlord's title, but recognizes and holds under it, and having acquired it, becomes entitled to all rent accruing after the execution of the deed. *Carson v. Crigler*, 9 Ill. App. 83. In this case the tenant purchased the property at a sale under a deed of trust which was a lien upon the land at the time of the lease.

A tenant may purchase from a third person the title acquired by the latter at a sale under an execution against the landlord subsequent to the lease, and set up such title as a defense against an action for rent. *Casey v. Gregory*, 18 B. Mon. 505, 56 Am. Dec. 581.

A tenant may show that the estate of the landlord has been extinguished by the foreclosure of a mortgage to which it was subject at the time of the lease, and that the tenant has himself acquired title under that foreclosure. *Ryder v. Mansell*, 66 Me. 167.

A tenant does not, by relying on such a title, do anything inconsistent with the lessor's right to grant the original lease. A tenant does not deny that the landlord had a title at the beginning of the lease by showing that the same title has expired. *Ibid.*

The purchase of the tenant's leasehold by a subtenant at an execution sale extinguishes the subtenancy. *Gunn v. Sinclair*, 52 Mo. 327.

The rule that a tenant is estopped to deny his landlord's title does not preclude him from acquiring the title of the landlord, either by a direct conveyance from the latter, or by an equivalent one through the operation of law. Where a lessee purchases the lessor's reversion at a sheriff's sale on an execution against the lessor, or acquires his interest in it as a re-

deeming creditor, the operation is the same as if the lessor had granted and conveyed the reversion to the lessee, and it will be valid as a bar to an action for rent or possession. *Higgins v. Turner*, 61 Mo. 249.

If a tenant purchases the reversion from the landlord or at a sheriff's sale the tenancy is thereby extinguished. *Zeysing v. Welbourn*, 42 Mo. App. 352.

A tenant may purchase the leased property at a sale under an execution against the landlord, and assert such title as a defense in an action for rent subsequently accruing, or he may purchase a portion of the premises at such a sale, and set up such purchase to mitigate the damages in an action for rent. *Neillis v. Lathrop*, 22 Wend. 121, 34 Am. Dec. 285.

A tenant may acquire title at a sheriff's sale under an execution against the landlord, and the title thus acquired terminates and extinguishes the landlord's title, and may be set up as a bar to an action for rent, or one to recover possession of the demised premises. *Hetsel v. Barber*, 69 N. Y. 1.

A tenant may purchase the leased property at a sale under an execution against the landlord, and assert such title in an action of ejectment. *Jackson ex dem. Russell v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557.

A tenant may become the purchaser of the reversion at a judicial or other sale, and so acquire the rights of his landlord, and relieve himself from liability as a tenant of the latter. *O'Donnell v. McIntyre*, 118 N. Y. 150, 23 N. E. 445 (*obiter*), *Affirming* 37 Hun. 623.

A tenant is not estopped from purchasing at a sheriff's sale during the term, and setting up the title thus acquired as a bar to an action of ejectment by the reverser. *Murrell v. Roberts*, 33 N. C. (11 Ired. L.) 424, 53 Am. Dec. 419.

Where, during the lease, the land is sold to a third person on a judgment against the landlord, and subsequently the tenant purchases at a sale under a judgment rendered against the landlord's devisor, from whom he acquired the title, such tenant is within the protection of an act providing that summary proceedings to put a purchaser at an execution sale in possession shall not lie where the party in possession shall make oath that he came into possession under title derived to him from the defendant in the execution before the judgment under which the execution and sale took place. *Elliott v. Ackia*, 9 Pa. 42.

A tenant cannot ordinarily dispute the title of his landlord, nor can he purchase an outstanding title and under it withhold possession from his landlord; but when he becomes the owner of the very title which his landlord claims, either by purchase from the landlord, or at a sheriff's sale upon a judgment which encumbers it, he may assert such title in an action of ejectment against him by the landlord. *Elliott v. Smith*, 23 Pa. 131.

A tenant by sufferance of property subject to a deed of trust has the same right as a stranger to purchase the property at a sale under the deed of trust. *Bumpass v. Alexander*, 10 Helsk. 545.

A tenant may acquire title at a judicial sale for the satisfaction of an encumbrance upon the property of the existence of which he was aware at the time he took the lease. *Pickett v. Ferguson*, 86 Tenn. 642, 8 S. W. 386.

A tenant may purchase the property at a sale under an execution, and assert such title in defense of an action by the landlord to recover possession of the property. *Camley v. Stanfield*, 10 Tex. 546, 60 Am. Dec. 219.

In *Lausman v. Drahos*, 10 Neb. 172, 35 Am. Rep. 468, 4 N. W. 956, however, it was held 53 L. R. A.

that where a tenant during the existence of the lease purchases the same at a judicial sale without yielding the possession of the premises and without notice to the lessor, it will be presumed that it was for the purpose of protecting his possession, and the landlord may redeem. The sale in this case was under a foreclosure decree to which the property was subject at the time of the lease.

So, also, it is held in *Scott v. Levy*, 6 Lea. 662, that a sublessee occupies such a fiduciary relation to the lessee that he cannot acquire a valid title as against the latter by purchasing the premises at the foreclosure of a deed of trust on the leasehold estate given by the lessee after the execution of the sublease. All that the sublessee can do is to hold the lessee liable, under the covenant for quiet enjoyment or warranty of title, for the amount expended.

But in *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545, which was a bill by the landlord to redeem, it was held that a tenant may purchase the leased property at a sale under a deed of trust, and hold the same free from any trust in favor of the latter.

And in *Smith v. Scanlan*, 21 Ky. L. Rep. 169, 51 S. W. 152, it was held that a tenant in possession may, to protect himself, buy the leased property at a sale under an execution against the landlord, and that his purchase will no more inure to the benefit of the landlord than if he had bought from the landlord himself in person.

In *Brinson v. Lassiter*, 81 Ga. 40, 6 S. E. 468, it was held that a sale of land to the tenant's wife was void; but this was upon the ground that the levy was grossly excessive and fraudulent.

The relation of landlord and tenant is so far a relation of trust and confidence as to render it inequitable for the tenant to purchase the property at a sale of which the landlord has no notice, under a judgment recovered by the tenant himself against a former owner upon a bond secured by a mortgage on the land. *Matthews' Appeal*, 104 Pa. 444.

A tenant who buys his landlord's property at a sale on judicial process, in the absence of the landlord, for a sum hardly equal to its yearly rental value, by unfair practices which prevented other persons from bidding, may be compelled in equity to account and reconvey to his landlord. *Cocks v. Izard*, 7 Wall. 559, 19 L. ed. 275. The decision in this case is upon the ground that, under the circumstances, the purchase by the tenant for his own benefit was a fraud, and not upon the ground that a purchase by the tenant would, under any circumstances, be inconsistent with his duty to the landlord, and would so inure to the latter's benefit.

In *Pujol v. McKinlay*, 42 Cal. 559, a lessee redeemed the property from a sale under an execution against the landlord, and, after receiving the sheriff's deed, recovered a judgment in ejectment against the landlord. He afterwards brought an action to quiet his title as against the landlord. It appeared in this action that he made the redemption in trust for the lessor, and the court held that, although at law the lease was merged in the lessee's new title, in equity there was no merger, and that upon a settlement of accounts the lessee was chargeable with rents during the whole time.

Where a tenant acquires a title of the leased premises, having its inception in a sale under a deed of trust given by the landlord, and the landlord subsequently redeems from the sale, the doctrine of merger does not apply farther than to suspend the relation of landlord and tenant until the redemption; and the act of redemption not only restores the title of the landlord, but re-establishes the relation of landlord and



tenant as it had existed before the sale. *Otis v. McMillan*, 70 Ala. 46.

This decision was on the ground that a purchaser at such a sale acquires only a defeasible title until the period of redemption has expired.

But a tenant who purchases the property at a sale under an execution against the landlord, under an arrangement by which the latter is to be allowed to redeem, may, in the absence of redemption, assert such title in an action of ejectment by a grantee of the landlord. *Franklin v. Palmer*, 50 Ill. 202.

### III. Title derived from tax sale during tenancy.

#### a. When tenant has agreed to pay the tax.

The cases are all agreed that a tenant cannot acquire a valid title as against the landlord, by virtue of a tax sale, during the tenancy, for taxes which he (the tenant) had agreed to pay. *Busch v. Huston*, 75 Ill. 343; *Burgett v. Talliaferro*, 118 Ill. 510, 9 N. E. 334; *Carlithers v. Weaver*, 7 Kan. 110; *Haskell v. Putnam*, 42 Me. 244; *Bertram v. Cook*, 32 Mich. 518; *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113, 7 N. W. 707 (*obiter*); *Blake v. Howe*, 1 Alk. (Vt.) 306, 15 Am. Dec. 681; *Williamson v. Russell*, 18 W. Va. 623.

*Reilly v. Lancaster*, 39 Cal. 354, was not the case of a purchase by a tenant, but the court announced the general principle that a party in possession of land, whose duty it is to pay the taxes thereon, can derive no advantage from a sale for taxes which he ought to have paid without a sale.

Any title thus acquired by the tenant is held for the benefit of his landlord. *Bertram v. Cook*, 32 Mich. 518, *supra*.

The purchase of such title only operates as a payment of the taxes. *Williamson v. Russell*, 18 W. Va. 623.

Where a lessee permits the leased property to be sold for the nonpayment of an improvement assessment which he had covenanted to pay, and, after the expiration of the term, acquires the title based on such sale, the lessor may recover a judgment requiring him to quitclaim the premises, and restraining him from encumbering or disposing of the same or bringing ejectment for them. *Shepardson v. Elmore*, 19 Wis. 424.

One who enters into possession under a tenant is subject to the same disqualification as the latter with reference to purchasing property at a sale for taxes which by the terms of the tenancy the tenant was bound to pay. *Bertram v. Cook*, 32 Mich. 518, *supra*.

Where one enters into possession under a lease from the grantee of one having only a dower interest in the property, and by the terms of the lease is required to redeem from a prior tax sale, the purchase of the tax title by him works a redemption merely as against the owner of the fee, notwithstanding that his landlord abandoned all interest in the property upon learning that he had only acquired a dower interest by his deed. *Lyebrook v. Hall*, 73 Miss. 509, 19 So. 348.

But a married woman may, out of her separate estate, acquire a title to land of which her husband is a tenant, based on a tax sale for nonpayment of taxes which he was bound to pay, in the absence of collusion with him; and the possession of those occupying the property will be none the less adverse to the former owner because her husband acts as her agent in collecting rents, etc. *Wood v. Armour*, 88 Wis. 488, 60 N. W. 791.

And it was held in *Willard v. Ames*, 130 Ind. 351, 30 N. E. 210, that the wife of a tenant who was bound by the terms of the tenancy to pay 53 L. R. A.

the taxes might, in the absence of any fraud or collusion with her husband, purchase the land at a sale for taxes which her husband was bound to pay, and thereby acquire, at least, a right to be refunded the amount so expended as a condition of a decree in favor of the landlord quieting the title as against her.

#### b. When tenant has not agreed to pay the tax.

There is considerable conflict among the authorities upon the question whether a tenant who has not agreed to pay the taxes, and who is not legally bound to pay them, may acquire, and hold adversely to the landlord, a title based on a tax sale during the tenancy. The decision in *SMITH v. NEWMAN* that he may is clearly supported by the following cases:

A tenant who is under no legal obligation to pay the taxes assessed upon the land may purchase the land at a sale for the nonpayment of taxes, and set up the title so acquired in an action of ejectment brought against him by the landlord. *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442. The court held that the tenant was not bound by virtue of his relation to see that the taxes assessed on the premises were paid.

A tenant in possession at the date of a tax sale may purchase the premises, and the purchase not only extinguishes the landlord's title, but cuts off the lease. *Ferguson v. Etter*, 21 Ark. 160, 76 Am. Dec. 361.

A tenant may purchase property at a tax sale and set up a title thus acquired against the landlord. *Waggener v. McLaughlin*, 33 Ark. 195 (*obiter*).

A tenant cannot, in an ejectment suit by the landlord, assert a title acquired under a tax sale prior to the execution of the lease; but he may purchase at such a sale made after the execution of the lease, or he may take an assignment from the purchaser at such sale. *Sharpe v. Kelley*, 5 Denio, 431.

A tenant who is under no obligation or duty to discharge taxes on the property may purchase it at a tax sale during his term. *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204.

A tenant may acquire the tax title based on a sale for taxes during the term, and avail himself of it as a defense against an action for rent or for the possession of the land. *Higgins v. Turner*, 61 Mo. 249.

A tenant may acquire a title to the leased premises based on a sale for the nonpayment of taxes accruing during the tenancy, and assert such title against the landlord in an action by the latter to recover possession of the property, if the tax title is valid. *Maxwell v. Griftnar*, 13 Ohio C. C. 816.

In none of the foregoing cases, except *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204, *supra*, is anything said as to whether or not any rent was due from the tenant at the time of the tax sale. In that case the court alludes to the fact that at the time of the tax sale all the rent had been paid, but does not say whether the result would have been changed if the fact in that respect had been otherwise.

In *Gaskins v. Blake*, 27 Miss. 675, however, it was held that, conceding that a tenant may legally purchase the land at a tax sale for taxes accruing during his tenancy, such a purchase operates only as a redemption where the tenant, at the time of the sale, was indebted to the owner, on account of the use of the property, in a sum exceeding the amount of the taxes due.

And in *Duffit v. Tuhau*, 28 Kan. 292, it was held that where one enters into possession of premises with the consent of the owner, but without any agreement as to payment of rent, and pays no rent, she cannot acquire the title by virtue of a sale for taxes accruing during

her tenancy, and set up such title as a bar to an action of ejectment by the landlord. The ground of the decision is that, under the circumstances, it was the tenant's duty to pay the taxes accruing during her tenancy.

A purchase of lands at a tax sale by one who is receiving the rents and profits and ought to keep down the taxes can never strengthen his title. *Hunt v. Gaines*, 33 Ark. 267.

In *Pulford v. Whicher*, 76 Wis. 555, 45 N. W. 418, a party who had obtained a tax deed secured possession by fraudulent collusion with a tenant of the owner. The court held that under such circumstances the holder of the tax deed must be deemed the tenant of the owner. While he was thus in possession he acquired another tax deed. It appeared that at the time of acquiring the later deed he had received rents for the use of the property in excess of the amount paid for such deed. The court held that the owner was entitled to redeem from both tax deeds.

In *Lyebrook v. Hall*, 73 Miss. 509, 19 So. 348, the court held that a purchase, by a tenant by sufferance, of a tax title based on a sale for taxes during the possession, operated merely as a redemption. The court said it was the tenant's duty to pay the taxes; but did not indicate how such duty arose. It seems, however, that the tenant had been in possession receiving rents and profits, apparently without paying rent; and the court may have regarded this circumstance as creating the duty.

When the tenant is by statute legally liable to pay the taxes, although as between the landlord and himself it is the former's duty to pay them, the weight of authority seems to establish that the tenant is disqualified to acquire a title, based on a tax sale, that he may hold as against the landlord.

One who is under a legal or moral obligation to pay taxes on another's land of which he is in possession cannot, by neglecting to pay the same and allowing the land to be sold in consequence of that negligence, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94.

The character of the purchaser's occupancy is not shown; but under the statute the land was required to be listed in his name, the owner not being known.

A tenant in possession, who is liable under the statute to pay the taxes, cannot acquire a title to the premises as against the owner by purchasing a tax title based on a sale for taxes during the tenancy. *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 590.

A tenant in possession of land at the time of its sale for taxes is under obligation to pay the taxes, and therefore cannot buy so as to obtain title as against the landlord. The land itself is, in fact, the debtor to the public, and prima facie it is the tenant's tax because all the remedies are against him. *Walker v. Harrison*, 75 Miss. 665, 23 So. 392.

The Illinois supreme court in *Seaver v. Cobb*, 98 Ill. 200, held that one in possession of land, but not under any claim of title, might purchase the property at a sale for taxes, and assert the title in an action of ejectment against him by the former owner. The court said, however, that a tenant holding a lease, a purchaser in possession under a contract for a deed, or a mortgagor, is estopped from so purchasing as to affect the title of the persons under whom they hold. It is not clear whether or not this statement, so far as it applies to a purchase by a tenant, is based on the assumption that the tenant was under a statutory or contractual duty to pay the taxes.

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It was held in *Curtis v. Smith*, 42 Iowa, 665, that possession under a deed which conveyed no interest would not prevent the grantee from purchasing the property when sold for taxes. The court, however, intimated that a tenant would be prevented from acquiring a tax title; and it would seem that the intimation is based on the assumption that the tenant was bound to pay the taxes.

But some of the authorities clearly deny the right of the tenant to acquire such a title as against the landlord without reference to his contractual or statutory liability to pay the taxes. Thus:

A purchase of land at a tax sale by a tenant, even if he is not under any contractual or statutory duty to pay the tax, operates only as a payment, and confers no title on him as against the landlord or one claiming under the latter; nor can he acquire a title, as against the landlord, by purchasing the certificate of sale issued to another person as purchaser, and subsequently procuring a deed as assignee. *Bailey v. Campbell*, 82 Ala. 342, 2 So. 646; *Jackson v. King*, 82 Ala. 432, 3 So. 232.

So, also, it was said in *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 599, *supra*, that one in possession of land as another's tenant, whether bound by statute or covenant to pay taxes or not, cannot acquire a title to the premises as against the owner by purchasing a tax title based on a sale for taxes during tenancy. In this case, however, the tenant was, as a matter of fact, liable under the statute to pay the taxes.

In *Williamson v. Russell*, 18 W. Va. 623, *supra*, II. a, the court found that there was an agreement by the tenant to pay the taxes; but it was said in the opinion: "I would not be understood as implying that it is necessary for the tenant expressly to agree to pay the taxes, before he can be in all cases disqualified from buying at a sheriff's sale for [nonpayment of the] taxes, though, I doubt not, in some cases he would be at liberty to bid at such sale where he had not agreed to pay the taxes, and where the facts and circumstances imposed on him no moral duty toward his landlord to pay such taxes. See *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442. On the other hand, there are cases where I think the tenant would be disqualified from buying the land at a tax sale, though he had not agreed to pay the taxes; but it is unnecessary here to draw the line between these cases."

A tenant cannot avail himself of his possession as a basis to acquire title as an actual settler where the land has been forfeited to the state for the nonpayment of taxes. *Waggner v. McLaughlin*, 38 Ark. 195.

A purchase of property at a tax sale, by a tenant at the request or suggestion of the owner, amounts only to the payment of the taxes on the property, and the deed executed in pursuance thereof confers no title adverse to the landlord. *Petty v. Mays*, 19 Fla. 652.

In *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360, the tenant procured deeds of the property based on tax sales. The court held that, even if the deeds had been regular, they would not have benefited him, as, in that event, the legal conclusion would be that he, as tenant of the lessor, held the title in trust for the latter. It appeared in this case, however, that the tax sales were made, and the time to redeem therefrom had expired, before the tenant went into possession.

*Walker v. Harrison*, 75 Miss. 665, 23 So. 392, held that a tenant might acquire the state's title to the leased premises, the premises having been sold to the state for the nonpayment of taxes prior to the time he took possession under his lease. This decision seems to conflict with

the rule that a tenant is estopped to deny the landlord's title unless there still remained in the landlord a sufficient interest, after the sale to the state, to justify him in making the lease, and to have enabled him to have recovered possession at the end of the term had such interest not been extinguished during the tenancy.

The foregoing review of the authorities seems to show that a tenant cannot acquire, as against the landlord, a valid title based on a tax sale during the tenancy, even if he has not expressly agreed to pay the taxes, where he is legally bound to pay them, or where he is indebted to the landlord for rent in excess of the amount due for taxes. Upon the question whether he can acquire such a title under any circumstances, the decisions are conflicting.

#### IV. Adverse possession.

##### a. Character of tenant's possession, generally.

The general rule is that possession, however long continued, of a tenant, whether for years, from year to year, at will, or by sufferance, is not adverse, but is in subordination to the title of the landlord, and will not operate to confer a title upon the tenant, unless something has occurred to convert it from a friendly into a hostile possession. Thus:

Occupancy of land by permission and subservient to the true owner will not establish a title by adverse possession. *Johnson v. Butt*, 46 Neb. 220, 64 N. W. 691.

When one puts another into possession of land as a home for him, and the latter enters under such authority, he is estopped, even after being in possession for thirty years, to deny the landlord's title. *Conwell v. Mann*, 100 N. C. 234, 6 S. E. 782.

One who enters into possession under a conveyance of an estate for the life of another, and continues in possession after the death of the latter, becomes a tenant by sufferance of the person entitled to the reversion, and his possession is not adverse to the latter's title. *Learned v. Tallmadge*, 26 Barb. 443.

One who takes possession under a parol lease for a longer period than one year will be presumed to hold during the full period in subordination to the landlord's title, notwithstanding that the lease was not valid for a longer period than one year. *Doolan v. McCauley*, 66 Cal. 476, 6 Pac. 130.

A claim under a tax lease, for a term of years, is not adverse to the owner in fee, and will not by lapse of time create a valid title. *Sanders v. Riedinger*, 30 App. Div. 277, 51 N. Y. Supp. 937; *King v. Townshend*, 141 N. Y. 358, 36 N. E. 518.

##### b. Power of tenant to initiate an adverse possession.

###### 1. Generally.

It is now established beyond contradiction that the fact that one entered into possession of premises as a tenant does not prevent him, at least after the expiration of the term, from assuming a hostile attitude toward the landlord and converting his possession, originally held in subordination to the latter's title, into an adverse possession which, if continued for the statutory period, will confer the title upon the tenant. This principle was declared and vindicated by the United States Supreme Court in *Willison v. Watkins*, 3 Pet. 43, 7 L. ed. 506, where it was held that the possession of a tenant becomes adverse and will ripen into title upon the expiration of the statutory period, where, to the knowledge of the landlord, the tenant disclaims the tenancy, and sets up a title

adverse to the landlord. The court conceded the general rule that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy; but held that it did not apply to defeat the right of the tenant to acquire title by adverse possession after a repudiation of the tenancy brought home to the landlord.

A tenant may repudiate the relationship of landlord and tenant and set up an adverse claim and possession in himself, which, when properly brought home, whether expressly or by implication, to the knowledge of the landlord, will put in operation the statute of limitations in the tenant's favor. *Wells v. Sheerer*, 78 Ala. 142.

If a tenant at will publicly disclaims his landlord's title and possession, and claims to hold under a hostile title, the statute of limitations will begin to run at the time of such disclaimer. *Bowman v. Wathen*, 2 McLean, 399, Fed. Cas. No. 1,740 (*obiter*).

Adverse possession commences to run against the landlord and in favor of the tenant as soon as the former has notice of the latter's adverse claim; and it is not necessary that the tenant should first vacate the premises. *Greenwood v. Moore* (Miss.) 30 So. 609.

The general rule is that a tenant cannot dispute his landlord's title, and the estoppel continues, not to the end of the term merely, but to the end of the tenant's occupation, or, where there has been a repudiation of the tenancy and a subsequent adverse holding by the tenant, until the statute of limitations has run in his favor. *Tewksbury v. Magraff*, 33 Cal. 237.

The tenant may, without actual surrender to his landlord, remain in possession, assert title in himself, and lay a foundation for the completion of the title by adverse possession. *Morris v. Wheat*, 8 App. D. C. 379.

Where the tenant under a lease which by its terms was to run during the lessor's life remained in possession for fifty-seven years after lessor's death, claiming the property as his own and without the payment of any rent or claim made against him, either for the land or profits, the jury are authorized to presume a restoration of the land to the heirs of the lessor, and afterwards an actual ouster of them by the lessee, so that the tenant's adverse possession will ripen into title. *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60.

If a tenant disclaims the title of his landlord, and claims the premises adversely, either for himself or another, his possession from that moment becomes tortious, and the landlord may treat the tenancy as dissolved, and regain the possession by the summary proceeding for a forcible detainer. *Fusselman v. Worthington*, 14 Ill. 135.

A tenant, after the expiration of his lease, may disavow and disclaim his tenancy and the title of his landlord, and drive the latter to his action for recovery of possession within the period of the statute of limitations. *Wilkins v. Pensacola City Co.* 36 Fla. 36, 18 So. 20.

Possession by a tenant, if adverse in fact, may be considered adverse also in law from the moment when the landlord or his legal representative had full knowledge of such adversary holding. *Turner v. Davis*, 1 B. Mon. 151 (*obiter*).

When a tenant disclaims to hold under the title of his landlord, and claims to hold adversely, the statute of limitations commences to run against an action by the landlord for the recovery of the property as soon as he has notice of the hostile attitude assumed by the tenant. *Farrow v. Edmundson*, 4 B. Mon. 606, 41 Am. Dec. 250.

The possession of the tenant is the possession of the landlord, but it is competent to show by proof an actual ouster and adverse holding by the tenant, and if, from the time of such ouster and adverse holding, the landlord has with the full knowledge of the fact laid by and made no entry or effort to assert his claim, the statute of limitations will bar him. *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78.

Even a tenant may, by open and notorious renunciation of his allegiance to his landlord, hold hostile to him. *Whipple v. Earick*, 93 Ky. 121, 19 S. W. 287.

Though a tenant is estopped to controvert the title of his landlord, he is not estopped to show that his title has been extinguished or has expired; and, even in the case of an ordinary tenancy, cases may occur in which he will be permitted from lapse of time, and the attitude which he has occupied in relation to his landlord, to rely upon the statute of limitations. *Sebastian v. Ford*, 6 Dana, 438.

A tenant, even, may repudiate his tenancy and set up an adverse claim in his own right, and if this is made known to the landlord the term of the statute of limitations begins to run at that time. *North v. Barnum*, 10 Vt. 220. The occupant in this case was an administrator, and not a tenant.

If, after the termination of the relation of landlord and tenant by an unequivocal act on the part of the tenant distinctly known to the landlord, the latter lies by without asserting any claim of title by ejecting the wrongdoer, his right of entry is barred by the statute of limitations, and the title quieted in the adversary. *Greeno v. Munson*, 9 Vt. 37, 31 Am. Dec. 805.

While the rule is that a tenant cannot ordinarily set up an adverse possession, and will be prima facie deemed to continue in that character so long as he remains in the occupation of the land, it is well settled that a tenant who has openly disavowed the title of the landlord, and notoriously held adversely to him under a clear and positive claim of title, to the knowledge of the landlord, will be protected by the statute of limitations after the lapse of the statutory period. *South v. Marcum*, 22 Ky. L. Rep. 841, 58 S. W. 527.

"When it is said, in the books, that the tenant cannot dispute the title of his landlord, or that the grantor cannot dispute the title of his grantee, nothing more is meant, I apprehend, than that he cannot prevail against his landlord, or grantee, in disputing his title in a court of law. He has no legal or moral right to dispute such title, but he has nevertheless the physical ability so to do; and, when he sees fit to exercise that ability, the legal effects of the act are to put him in an antagonistic position, the same as if he had originally entered into the possession unlawfully." *Stevens v. Whitcomb*, 16 Vt. 121.

Where a tenant at will gives notice to the landlord that he shall hold the land in his own right his tenancy must be considered to have been so far thrown off by the notice as to enable him from this time to commence a possession adverse to his landlord. *Ripley v. Yale*, 19 Vt. 156.

The rule that a tenant may initiate adverse possession which will eventually ripen into title by means of which he may resist the landlord's claim for possession or rent is not in conflict with the rule that a tenant is estopped to deny the landlord's title. As shown in division I., *supra*, the latter rule merely prevents the setting up of a title inconsistent with that of the landlord at the commencement of the tenancy. The title acquired by the tenant by adverse possession for the statutory period after disclaimer of the land-

lord's title is not inconsistent with that title, but is based on the assumption that such title has been extinguished. The adverse possession of the tenant, however, does not, until the expiration of the full statutory period, confer any rights upon the tenant, or relieve him of any of the obligations incident to his tenancy. This is shown by the following cases:

The rule that a tenant cannot, without surrendering possession, dispute the landlord's title, applies as well after the expiration of the term as before. The only effect of a disclaimer of the landlord's title by the tenant is to bar the entry of the landlord, if, after knowledge of such disclaimer, he permits the tenant to remain in possession until the statute of limitations forbids an entry. *Shelton v. Doe ex dem. Elava*, 6 Ala. 230.

For the purpose of fixing a period from which the statute of limitation will run against the landlord, the holding of the tenant has been regarded as adverse from the time he notifies the landlord that he shall no longer hold under him; but for other purposes the principle of disputing a tenancy without first rendering possession does not apply. *Mattis v. Robinson*, 1 Neb. 3.

A tenant, by distinct notice to his landlord that he will no longer hold the premises under him, has been regarded as committing an absolute disseisin, and after that as holding adverse to the landlord, and, unless evicted before the term of the statute of limitations expires, he will, by such adverse possession, acquire title in his own right; but for other purposes than the statute of limitations the original relation between the parties has its legal effect upon their respective rights, and the principle has not been extended to an action for the rent in such a manner as to excuse the tenant from paying rent, or from his liability for use and occupation under the contract by which he made his entry for the full term of the occupancy. *Sherman v. Champlain Transp. Co.* 31 Vt. 162. These statements were *obiter*, and were made merely by way of analogy.

There are expressions in the opinions in a few of the cases that seem to deny the right of the tenant to initiate adverse possession without a surrender and re-entry.

In *Butler v. Bertrand*, 97 Mich. 59, 56 N. W. 342, the court says that one having entered presumptively as a tenant there was no room for a defense of adverse possession, "It being settled that a tenant cannot turn a holding of this character into an adverse holding." Probably the court merely meant that the possession must, in the absence of anything to show that it was hostile, be presumed to have been in subordination to the landlord's title. It says that under the facts proved and admitted the holding was not hostile, but in plain subordination, to the landlord's title, to whom the property was assessed by the occupant himself in his capacity as supervisor.

When possession is acquired by virtue of the relation of landlord and tenant, the latter cannot set up his adverse holding against the landlord as a basis of a prescriptive title without first surrendering the possession of the premises to the landlord. *Dasher v. Ellis*, 102 Ga. 830, 30 S. E. 544. The reason given for the rule was, first, because the tenant cannot dispute the landlord's title; and secondly, because possession thus acquired by a tenant becomes fraudulent the moment it become adverse, and therefore cannot be the basis of prescription. It is to be observed that, under the decisions in Georgia, if any person takes possession of land which he knows does not belong to himself or anyone from whom he purchases, no prescription will run in his favor, however long he may

hold possession of the same. His possession under such circumstances is deemed to have originated in fraud, and time will not cure or sanctify the fraud.

A tenant cannot deny the title of his landlord, nor rid himself of his relation as tenant, without a complete surrender of the possession. To allow him to get, and profess to hold, possession under the landlord, and at the same time hold covertly for himself or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do; on the contrary, the rules of law founded in good faith and sound public policy render such a thing impossible. *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405. If by "surrender" in this case the court means a literal surrender, or anything more than an open repudiation of the landlord's title and assertion of an adverse claim brought home to the landlord's knowledge, this decision is opposed to the overwhelming weight of authority.

*Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360, was a bill in equity by the landlord to compel the tenant to convey to the former a tax title acquired by the latter. The court was asked to follow, by analogy, the statute of limitations which govern courts of law, it appearing that the tenant had disclaimed the tenancy and set up an adverse title in himself, but the court said that such disclaimer did not have any just influence to support the defense of limitation or laches, inasmuch as the case shows that it was without any just cause or legal excuse.

## 2. During term for years.

While in many of the cases cited in the previous subdivision, the rule that a tenant may initiate adverse possession by disclaiming the landlord's title and asserting an adverse claim, to the knowledge of the landlord, is stated in broad terms and without any qualification, yet it seems doubtful whether adverse possession may be initiated before the expiration of the term, when the lease is for a term of years. Some of the cases, however, seem to favor the doctrine that adverse possession will commence as soon as the landlord has notice of the disclaimer and adverse claim, notwithstanding that the term has not expired. The tenancy involved in *Willison v. Watkins*, 3 Pet. 43, 7 L. ed. 596, was one at will or from year to year; but the court, in support of the general doctrine that the tenant, by disclaiming the landlord's title to the knowledge of the landlord, may initiate an adverse possession, said: "Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser; as much so as if no relation had ever existed between them. Having thus a right to consider the lessee as a wrongdoer, holding adversely, we think that, under the circumstances of this case, the lessor was bound so to do. It would be an anomalous possession, which, as to the rights of one party, was adverse, and as to the other fiduciary, if after a disclaimer with the knowledge of the landlord, and attornment to a third person, or setting up a title in himself, the tenant forfeited his possession and all the benefits of the lease he ought to be entitled to, such as result from his known adverse possession. No injury can be done the landlord unless by his own laches. If he sues within the period of the act of limitations he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time."

In a subsequent case, *Walden v. Bodley*, 14 53 L. R. A.

*Pet. 156*, 10 L. ed. 398, the same court, in discussing the right of one who entered under a purchaser, to set up a title adverse to the vendor, said: "It is a general rule that a tenant shall not dispute his landlord's title; but this rule is subject to certain exceptions. If a tenant disclaims the tenure, and claims the fee in his own right, of which the landlord has notice, the relation of landlord and tenant is put an end to, and the tenant becomes a trespasser, and he is liable to be turned out of the possession though the period of his lease has not expired." While this case does not, even by way of a *dictum*, hold that the landlord in such a case is bound to turn the tenant out of possession before the expiration of the lease under penalty, if he does not, of having the tenant's possession during the remainder of the term regarded as adverse, yet, by conceding to the landlord under such circumstances the right to turn the tenant out of possession before the expiration of the term, it obviates one of the objections that might, otherwise, be made to the doctrine permitting a tenant to initiate adverse possession before the expiration of the term, namely, the inability of the landlord to protect himself against such adverse possession during the term.

In *Fusselman v. Worthington*, 14 Ill. 135, *supra*, also, the court held that the landlord might treat the tenant's disavowal of his title as a forfeiture of the lease, and institute proceedings to oust the tenant from possession, but did not pass on the question whether the landlord was bound to oust the tenant at the risk of having his subsequent possession regarded as adverse.

In *Tillotson v. Doe ex dem. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330, a tenant for a term of years disclaimed the landlord's title, to the knowledge of the landlord, before the expiration of the term, and the supreme court held that the trial court erred in supposing that the statute of limitations did not begin to run from the time of the tenant's disclaimer of the landlord's title and knowledge thereof by the latter, and not until the expiration of his lease.

In *Greeno v. Munson*, 9 Vt. 37, 31 Am. Dec. 605, the court says: "And in some cases it has been held that it makes no difference whether this disclaimer of tenure by the one in possession is during the existence of the lease or after the contract, or after it has expired. The unexpired term is forfeited, it is said, and the tenant is quasi a trespasser, and immediately liable to action of ejectment without notice to quit, and cannot protect himself in his possession, in any other way, except by title acquired by the statute of limitations;" citing *Willison v. Watkins*, 3 Pet. 43, 7 L. ed. 596, *supra*. The occupant in *Greeno v. Munson*, however, was a purchaser under a contract, and not a tenant, or at least not a tenant for an unexpired term.

The tenancy involved in *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462, was one at will, or from year to year. The opinion, however, seems to imply that a tenant for a term of years may by a disclaimer to the knowledge of the landlord initiate an adverse possession even before the expiration of the term. It says: "The tenant cannot, during the term, when holding by force of a written contract, or when holding from year to year, rightfully disclaim the landlord's title. . . . Neither can he [the tenant] at his pleasure put an end to the contract; yet, if the tenant disavows the title of the landlord, and claims to hold for himself, or for another, he forfeits his lease and title, and may be proceeded against as a trespasser by an action of ejectment; but this is at the election of the landlord, who may still treat him as tenant if he prefers it [this, in view of what follows, evi-

dently merely means that the landlord may treat him as a tenant for all purposes, except the running of adverse possession]. If, after such forfeiture, the tenant hold out the landlord attempting to enter, this amounts to 'an actual ouster,' places the tenant in the condition of an adversary to his lessor, and is such a trespass against him as to create an adverse holding on part of the lessee, by force of which the statute of limitations will commence its operation to confirm the adverse claim set up by the tenant." The opinion, after stating that an "actual ouster" may be inferred from circumstances, which circumstances are matters of evidence to be left to the jury, says: "It is going far enough to say . . . [that the landlord] was holden out so soon as he had knowledge . . . [that the tenant] claimed adversely, and that this knowledge was equal to an actual turning out or holding out on an attempt to enter for the forfeiture."

*Chambers v. Pleak*, 6 Dana, 426, 82 Am. Dec. 78, was a case of a tenancy at will. The opinion at one point, however, seems to imply that adverse possession may commence during the term, the court saying: "As a tenant or quasi tenant may oust and expel his landlord, and hold adverse to him, especially after the expiration of his lease;" and at another that the adverse possession can commence only after the expiration of the term, the court saying: "And if after the expiration of his lease, if his lease is for a specific term, he has held adversely for twenty years or more, it would seem that his landlord or quasi landlord, or those claiming under him, would be barred of their right of entry."

The court, in *Holman v. Bonner*, 63 Miss. 131, said: "Even after the term has expired a tenant in possession cannot dispute his landlord's title without first surrendering possession or giving notice to the landlord that he claims under another title." This statement apparently intimates that a tenant may, by giving notice of an adverse claim to the landlord, initiate adverse possession, even during the term; but in this case the claim of adverse possession failed because notice thereof was not brought home to the landlord.

In *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, the court said: "We take it that it is now fully established that wherever the relation of landlord and tenant is terminated by any hostile act, such as the conveyance of lands demised to the tenant for years, during such term, to another in fee simple, it becomes the bounden duty of the landlord to protect his title by regaining possession." In this case property had been leased for the term of seventy-five years for a sum in gross paid at the beginning of the lease, the yearly rent reserved by the lease being merely nominal—"one barley corn." An assignee of the lease, during the term, undertook to convey the premises by a deed in fee simple, and the premises were thereafter claimed under such deed and subsequent deeds for more than twenty years before the expiration of the term of the lease. The court held that the adverse possession for such length of time raised a legal presumption of a grant in fee by the owner of the reversion, and the latter was defeated upon this ground in an action to recover a portion of the property, brought within about two years after the expiration of the term. The court characterizes the presumption as a rebuttable one, but it appears that all that was meant was that it was rebuttable by proof negating the adverse holding and its continuity.

While this was not a case of a tenant continuing in possession after disclaimer of the landlord's title, but was the case of persons claiming 53 L. R. A.

under a chain of deeds originating with an assignee of the lease, yet the court does not seem to base any distinction upon that fact. Apparently the only significance attached to the deeds was in their effect as a disclaimer of the title, and it will be observed that the court says: "Wherever the relation of landlord and tenant is terminated by any hostile act, such as the conveyance of the lands demised to the tenant for years." Neither is any distinction based on the fact that the lease reserved merely a nominal rent. The latter fact, however, would seem to obviate an objection that might be urged against the extension of the doctrine to a tenancy for an unexpired term, in case of a lease reserving a substantial rent. It is true, in view of what was said in the previous subdivision, that, even if a disclaimer during an unexpired term for years would initiate an adverse possession, yet, for all purposes, except the running of adverse possession, the landlord might treat the tenancy as still in force, and hold the tenant liable for the rent until the expiration of the period required for the adverse possession to ripen into title; but adverse possession would be running against him in the meantime, and where, as is the case of *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, the unexpired term exceeded the period required for the completion of title by adverse possession, the landlord would be obliged to evict the tenant before the expiration of the term, or lose his title. It might then be urged that the landlord, by evicting the tenant, would necessarily elect to regard the tenancy as terminated, and therefore could no longer hold the tenant for rent. Perhaps that argument might be met by the position that, as the right of the tenant to initiate adverse possession by a disclaimer rests upon the theory that the disclaimer is equivalent to, or a substitute for, an actual abandonment of the premises and a subsequent entry under an adverse claim (see *infra*, II. c), the tenant by the disclaimer (in its character as a substitute for an actual abandonment) has put himself in the same position as a tenant who actually abandons the premises and then re-enters, not as a tenant, but claiming adversely. In such a case the tenant could scarcely claim that the landlord, by evicting him after the re-entry, had elected to treat the tenancy as terminated. Inasmuch as the tenant would, at least by an actual abandonment, put an end to his possession as a tenant, it would seem that his eviction after a re-entry under an adverse claim would no more prevent the landlord from holding him for the rent, than would the eviction of a third person entering under an adverse claim after the abandonment of the premises by the tenant. And if this would be so in case of an actual abandonment and re-entry by the tenant, it might plausibly be argued that it would also be so in case of a disclaimer, which amounts to a constructive abandonment and re-entry.

There are other cases that apparently deny the power of a tenant to initiate adverse possession during the term. The language of the court in *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979, is: "The trustee may disavow the trust; the tenant the title of his landlord after the expiration of his lease."

*Wilkins v. Pensacola City Co.* 36 Fla. 36, 13 So. 20, *supra*, in stating the doctrine likewise limits it to the case of a disclaimer after the expiration of the term.

In *Rowman v. Wathen*, 2 McLean, 399, Fed. Cas. No. 1,740, *Wells v. Sheerer*, 78 Ala. 142, and *Ripley v. Yale*, 19 Vt. 156, the statement of the rule limits it to tenancies at will.

The New York court of appeals, in *De Lancey v. Ganong*, 9 N. Y. 9, held that an oral denial

of the landlord's title during the term, by a tenant for years under a sealed lease, did not work a forfeiture of the term, or authorize the landlord to maintain ejectment for the lands demised. Counsel in this case cited *Willson v. Watkins*, 3 Pet. 43, 7 L. ed. 596; *Jackson ex dem. Bradstreet v. Huntington*, 5 Pet. 402, 8 L. ed. 170, and *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979, as establishing the proposition that a tenant, by denying the tenancy, may initiate a good adverse possession with respect to the statute of limitations, and argued that if the tenant can by thus disclaiming his relation to the landlord hold adversely to him, the latter must, of necessity, be able to terminate such adverse possession by maintaining an action to recover the possession. The court, however, said: "It is unnecessary to inquire whether all these cases would be considered good law in this state, for neither of them professes to hold that the tenant of a definite term for years, under a sealed lease, can by any act or declaration on his part render his possession adverse to the reversioner. That he cannot has long been settled beyond the possibility of question (citing *Jackson ex dem. Van Schaick v. Davis*, 5 Cow. 123, 15 Am. Dec. 451; *Jackson ex dem. Webber v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517; *Falling v. Schenck*, 3 Hill, 344)."

A tenant cannot, by a disclaimer, or by mere words denying the landlord's title and setting up one of his own, work a forfeiture of his tenancy, or set running an adverse possession. *Whiting v. Edmunds*, 94 N. Y. 309.

In *Shepley v. Lytle*, 6 Watts, 500, a tenant disclaimed the tenancy before the expiration of the term, but the court held that the statute could not be considered to have commenced to run before the expiration of the term.

The disclaimer of the tenant during the term cannot affect the right of the lessor or his assignee, so as to render the possession of the former adverse to the right of the latter, until he has notice of it and acquiesces in it. *Ibid.*

A tenant's possession while the term continues is never adverse to the title of the lessor unless made so by some act of disclaiming to which the lessor assents. Where a stranger gets into possession during the term of the lease the presumption is that he acquires it from the tenant, and so its character in subordination to the landlord's title remains unchanged; and there is no difference, so far as the question of adverse possession is concerned, between a voluntary transfer of possession by the tenant and a transfer by virtue of a judgment, afterwards reversed, against the tenant alone, which denies the validity of his lease. However possession is obtained from the lessee the owners of the reversion cannot sue to recover it until the expiration of the lease. The outstanding lease would be a complete defense in the hands of the occupant, whatever it might be against any possessory action instituted on behalf of the owner's reversion. *Sutton v. Casselleggi*, 15 Mo. App. 111, Reversed on other ground in 77 Mo. 897.

A tenant cannot, during the term of the lease, originate a hostile or adverse possession nor continue an adverse possession commenced prior to the lease. *Corning v. Troy Iron & Nail Factory*, 34 Barb. 485, 22 How. Pr. 212.

A tenant that has never attempted to surrender his rights during the existence of the term, or committed any act which authorized a re-entry thereunder, can acquire no right during that time by adverse possession as against the landlord. *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L. R. A. 629, 19 N. E. 800.

A landlord is not obliged to enter upon land for the forfeiture of the tenant under penalty of having the subsequent possession of the tenant

deemed adverse to her title. *Doe ex dem. Cook v. Danvers*, 7 East, 290, 3 Smith, 291.

A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. *Doe ex dem. Graves v. Wells*, 10 Ad. & El. 427, 2 Perry & D. 396, 3 Jur. 820. This case was cited and relied on in *De Lancey v. Ganong*, 9 N. Y. 9, *supra*.

But a lessee of an easement may dislodge the lessor during the continuance of the term by taking exclusive possession of the land against the will of the lessor. *Tyler v. Hammond*, 11 Pick. 193.

In none of the cases cited in division IV., except those in this subdivision, is the question as to the right of a tenant to initiate adverse possession before the expiration of the term necessarily involved. In the other cases, either the tenancy involved was one at will, by sufferance, or from year to year, or else the decision was adverse to the claim of adverse possession on grounds not affecting the power of a tenant to initiate adverse possession before the expiration of the term.

### c. How initiated.

#### 1. Requisites generally; kind and amount of proof necessary.

The requisites of the initiation of an adverse possession by the tenant are stated in various forms by the cases, but, speaking generally, they may be said to include, first, a disclaimer of the landlord's title and an intention to hold adversely to it, and, second, notice to the landlord of such disclaimer and intention.

Where the original possession by the holder of land is in privity with the title of the rightful owner, in order to enable such holder to avail himself of the statute of limitations, nothing short of an explicit disavowal and disclaimer of a holding under that title and assertion of title in himself, brought home to the other party, will satisfy the law. *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979; *Mitchell v. Murphy*, 43 Fed. 425; *Gordon v. Fann*, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370.

The statute of limitations does not begin to operate against a landlord and in favor of a tenant until the latter's possession becomes tortious and wrongful by his disloyal acts, which must be open, continued, and notorious so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner. *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979.

Before the statute of limitations can commence to run against the landlord there must be a clear, positive, and continued disclaimer and disavowal of his title and assertion of an adverse right, brought home to the knowledge of the landlord. *Morris v. Wheat*, 11 App. D. C. 201.

The whole doctrine of adverse possession rests upon the presumed acquiescence of the party immediately affected by such possession. Therefore, it is, that when possession of property is originally held and acquired in subordination to the title of the true owner, to constitute the continued possession adverse there must be a disclaimer of the title of him from whom the possession was acquired, and an actual hostile possession of which he has notice, or which is so open and notorious as to raise a presumption of notice. *Dothard v. Denson*, 72 Ala. 541.

To put the statute of limitations in operation against the landlord the tenant's assertion of an independent hostile claim must be brought to the knowledge of the landlord. *Jones v. Pelham*, 84 Ala. 208, 4 So. 22.

To establish a title by adverse possession as against the landlord one who entered as a tenant must show a disclaimer of the landlord's title and the setting up of an actual hostile possession of which the true owner had notice. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

There can be no adverse possession by the tenant during the term by the mere intention so to hold, and without the doing of some act indicating that the possession is hostile to the landlord's title. *Abbey Homestead Asso. v. Willard*, 48 Cal. 614.

To put the statute of limitations in operation against the landlord and in favor of the tenant there must be a clear, positive disclaimer and disavowal of the landlord's title, and an assertion of an adverse right brought home to the latter by clear, positive, and distinct notice. *Wilkins v. Pensacola City Co.* 36 Fla. 36, 18 So. 20.

Nothing but a clear, unequivocal, and notorious disclaimer and disavowal of the landlord's title will render the possession of the tenant, however long continued, adverse. *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462.

There must be at least some proof of an actual ouster to rebut the presumption that the possession is in accordance with the title, and proof that does not come up to this is not evidence of adverse possession. *Campbell v. Shipley*, 41 Md. 81.

To make the tenant's possession adverse to the landlord there must be proof of an open, notorious disclaimer of all holding under the landlord's title, and an adverse claim set up that would amount to a disclaimer; and proof that does not show this is not evidence of adverse possession that will affect the landlord. *Myers v. Silljacks*, 35 Md. 319.

Where the title is claimed under an adverse possession originally obtained through a fiduciary relation existing between the tenant and the owner of the land, the change in the possession from a friendly to an adverse one must in some way be brought to the knowledge of the real owner. *Hamilton v. Boggess*, 63 Mo. 233.

A tenant who has not made an open disclaimer of his tenancy, and given notice thereof to his landlord, cannot acquire title against his landlord by operation of the statute of limitations. The statute does not run in favor of a tenant against the landlord until there has been an assertion of hostile claim or title by the tenant brought home to the knowledge of the landlord. Even after the term has expired, a tenant in possession cannot dispute his landlord's title without first surrendering possession by giving notice to the landlord that he claims under another title. *Holman v. Bonner*, 63 Miss. 181.

Where the owners of adjoining lots, in ignorance of the location of the true dividing line, build a division fence about 2 feet from the true line, and the owner of the lot within which the 2 feet are so included takes a lease of the other lot, his possession of the strip in question during the lease cannot be deemed adverse, in the absence of actual notice to the other owner that he occupied and claimed the strip as its owner. *Wilson v. Lerche*, 90 Mo. 473, 2 S. W. 799.

The possession of one who enters as a tenant cannot be converted into one of hostility of the landlord's title by a meremental intention. Some notice or act indicative of an intention to disavow is necessary. *Comstock v. Eastwood*, 108 Mo. 41, 18 S. W. 39.

Where one enters into possession of premises, either under a lease or a contract for the sale of property, he will be estopped from denying the title of his landlord or vendor, in an action for ejectment, until he has surrendered the possession, or given notice that he does not in-

tend to hold in subordination to the legal title under which he entered. *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576.

To convert a possession which, in its inception, was with the permission of the owner of the legal title, into an adverse possession, there must be a claim of right with notice of such claim brought home to the owner. *Smith v. Hitchcock*, 38 Neb. 104, 56 N. W. 791.

One who takes possession of real estate as tenant of another cannot hold such real estate adversely to his lessor without first having actually or constructively surrendered the premises to him. *Perkins v. Potts*, 52 Neb. 110, 71 N. W. 1017.

A tenant remaining in possession of the demised property after the expiration of a term, without any open or express repudiation of the relation created by the lease, is not, in contemplation of law, holding adversely to the owner, whatever may be his secret intention. *Carson v. Broady*, 56 Neb. 648, 77 N. W. 80.

Where one enters land as another's tenant there can be no adverse possession by him where there has been no abandonment of title by the landlord, or act of disloyalty on the part of the tenant. *Jackson ex dem. Van Schaick v. Davis*, 5 Cow. 123, 15 Am. Dec. 451.

When a tenant claims to hold adversely he must show that his intention to hold adversely was made known to the landlord. *Lepout v. Todd*, 32 N. J. L. 124.

Where tenancy is once shown to exist, in order to set the statute running in favor of the tenant desiring to avail himself of it to acquire title by adverse possession he must openly and explicitly disclaim and disavow any and all holding under his former landlord, and he must unreservedly and steadily assert that he himself is the owner of the true title; all of which must be brought home to the knowledge of the rightful owner. *Nessley v. Ladd*, 29 Or. 354, 45 Pac. 904.

The possession of the tenant is the possession of the landlord, and this relation, when once established, cannot be destroyed during the occupancy of the former without express notice to the landlord. *McGinnis v. Porter*, 20 Pa. 80.

When one has entered expressly or legally in subservience to the title of another, the statute does not begin to run in favor of such occupant until the privity existing between him and the owner is severed by some unequivocal act. Until such act his possession does not become adverse. Mere declaration of an intention is insufficient. *Brandon v. Bannon*, 38 Pa. 63; *Cadwalader v. App*, 81 Pa. 194.

Before a tenant can occupy an adverse position entitling him to claim by adverse possession he must disclaim his tenancy and give notice of that fact to his landlord. A secret disclaimer, unknown to the landlord, will not do. The statute cannot run until the knowledge of the disclaimer is brought home to the landlord. *Whaley v. Whaley*, 1 Speers, L. 225, 40 Am. Dec. 594.

Where possession is permissive the tenant's declaration to a third person that he will claim the title under the statute of limitations will not, without notice to the landlord, convert his permissive possession into an adverse possession. *Wadsworthville Poor School v. Meetze*, 4 Mich. L. 50.

If a tenant claims to hold adversely, he must show when that intention was made known to the landlord. *Whaley v. Whaley*, 1 Speers, L. 225, 40 Am. Dec. 594.

When a disclaimer by the tenant is known to the landlord, or when the landlord is actually ousted by the tenant, the possession of the tenant will become adverse; and if the landlord permits him to hold possession for seven years



from that time his right of entry will be barred by the statute of limitations. A demand of possession, and a refusal by the tenant on the ground that he claims title or holds adversely, are evidence of an actual ouster. *Lea v. Nether-ton*, 9 Yerg. 315.

The entry upon land under or by consent of the owner or of one of several tenants in common creates a tenancy, and to make the possession of the tenant adverse disclaimer of the landlord's title must be brought home to the latter. *Word v. Drouthett*, 44 Tex. 366.

Where one is permitted by a town to fence up a street and occupy the same he becomes a tenant of the town, and his possession does not become adverse without some open, hostile act clearly showing an intention to claim adversely to the town. *Carter v. La Grange*, 60 Tex. 636.

It is well settled that before a tenant can dispute the title of his landlord, and invoke the statute of limitations in his own favor as against that title, he must repudiate his tenancy and notify his landlord of the fact, and then the statute will run from the time of such notice. *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786.

When one goes into possession of property as a tenant, a trust relation is established between him and his landlord, and his possession does not become adverse without some open hostile act inconsistent with such relation, indicating clearly and unequivocally an intention to hold adversely. *Hintze v. Krabbenschmidt* (Tex. Civ. App.) 44 S. W. 38.

No prescriptive right can come to a tenant until he has repudiated his tenancy and given distinct notice of the same to his landlord. The secret declaration of the tenant, privately in his own family, that he is in possession in his own right and adversely to his landlord, cannot affect the latter title, nor change the character of the possession. *Stacy v. Bostwick*, 48 Vt. 182.

If a tenant may, by disclaimer of the landlord's title, initiate an adverse possession without surrender of the possession and a re-entry, knowledge of the disclaimer must be brought home to the party whose title is disclaimed. *Emerick v. Tavener*, 9 Gratt. 220, 58 Am. Dec. 217; *Creigh v. Henson*, 10 Gratt. 231; *Allen v. Paul*, 24 Gratt. 332.

A tenant cannot make his possession adverse, except by a disclaimer and the assertion of an adverse title, brought home to the knowledge of the landlord. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

One who enters land in subordination to the title of the owner cannot make his possession a hostile holding without a repudiation of the title under which he enters, evidenced by acts or declarations thoroughly manifesting that intention. *Davis v. Hurst* (Tex.) 14 S. W. 610.

So long as one who goes into the occupancy and possession of land as another's tenant remains in the possession thereof, his possession is the possession of the landlord, unless he expressly repudiates his tenancy under the landlord, and gives the latter notice of such repudiation. *Reichstetter v. Reese* (Tex. Civ. App.) 39 S. W. 597.

Before a tenant can initiate an adverse possession as against his landlord he must either yield possession or else distinctly repudiate the relation created by the lease, and bring home to the lessor knowledge of the fact that the tenancy has been terminated. *Ross v. McManigal* (Neb.) 84 N. W. 610.

The attempt of a tenant to shelter himself under an adversary claim acquired during the tenancy cannot convert his possession, otherwise adverse to the landlord, into a friendly possession; and if, after the expiration of his lease, if his lease was for a specific term, he has held 53 L. R. A.

adversely for twenty years or more, it would seem that his landlord or quasi landlord, or those claiming under him, would be barred of their right of entry. *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78.

One who takes possession under a contract of purchase which provides that in the event of a default in payment he shall have the rights of a tenant at will, which includes the right of a thirty days' notice to quit, cannot be deemed to hold adversely until after the service of such notice upon him. *Austin v. Wilson*, 46 Iowa, 362. It does not appear in this case that there was any assertion of adverse possession.

Where one has been in possession of land upwards of sixty years, claiming to be the owner of the premises subject to an annual rent, that possession is not available as a defense to an action of ejectment by the owner of the fee, where at the time the suit was brought the defendant admitted that he had not a lease to the premises, and only claimed to be entitled to a perpetual lease. *Van Rensselaer v. Van Wie*, 23 Wend. 531. The court said that the claim at the utmost was but an equitable right subject to a rent, and in an action of ejectment could not be regarded as more than a claim of a tenancy from year to year, and that it took away all inference through permitting improvements and previous claims of title, acts of ownership, such as giving a mortgage, etc.

#### Kind and amount of proof necessary.

The kind and amount of evidence requisite to the establishment of these two elements of disclaimer and notice necessarily vary with the varying circumstances attending the possession and the relation between the parties. The Texas supreme court, referring to this subject in *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786, says: "It has not been determined, so far as we are advised, what particular acts or declarations of the tenant will be considered as affording sufficient evidence of the repudiation of an existing tenancy; and from the nature of the relation of landlord and tenant, the situation of the parties toward each other, the extent and character of the trust reposed, and other circumstances that might be imagined, it would seem that the question of notice should depend largely on the special facts of each case, the law not having designated any particular act or acts of the tenant as sufficient to put the landlord on notice of a repudiation of the relationship between them. But when circumstantial evidence is relied on to prove a repudiation of a trust of tenancy, the circumstances should be inconsistent with the terms of the trust or tenancy, and should be of a cogent and convincing character, and such that the landlord, in the exercise of ordinary prudence and diligence, would have discovered. Good faith between contracting parties demands this much."

An actual ouster may be inferred from circumstances, which circumstances are matter of evidence to be left to the jury. But where the length of time does not furnish evidence of an ouster, actual knowledge for the statutory period must be distinctly proved on the lessor, that the tenant claimed for himself. *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462.

A demand of possession and a refusal on the ground that the tenant held adversely are sufficient evidence of an actual ouster. But this information must be given the landlord, or his agent authorized to enter upon the premises or sue for them by reason of the forfeiture. *Ibid*.

To put the statute of limitations against an action to recover possession of land in operation against a landlord, the latter's knowledge of the repudiation of the relationship need not be actual or such as would be imputed by express

noticed, but it may be a knowledge imputed impliedly by collateral facts of such a nature as to cast on him the legal duty of not being wilful or negligently ignorant of all proper inferences to be drawn from such facts. This is implied notice, which, strictly speaking, differs from conclusive notice in being a matter of fact rather than of law; the latter species of notice being defined to be a knowledge often conclusively imputed by the court, on presumption that the information must have been communicated. *Wells v. Sheerer*, 78 Ala. 142.

No definite rule can be laid down as to the proof requisite to establish notice to the landlord that the tenant has disclaimed his title and his holding adversely. It depends upon the situation of the parties and the character of the acts of the tenant which place in him a hostile attitude toward the title of the landlord. *Farrow v. Edmundson*, 4 B. Mon. 605, 41 Am. Dec. 250.

The question as to what constitutes sufficient notice to the landlord that the tenant is claiming adversely depends upon the facts of the particular case. Some fact must, however, be brought to the attention of the landlord which is sufficient in its nature to suggest to a reasonably prudent person that the possession of the tenant has become adverse. The landlord cannot be supposed to be on the lookout for acts of disloyalty on the part of his tenant, and no such act will be regarded as notice to him unless it can be shown, or can be reasonably inferred, that the landlord is cognizant of it. *Hintze v. Krabbenschmidt* (Tex. Civ. App.) 44 S. W. 38.

In the absence of proof, nothing is to be presumed in favor of an adverse possession, and more particularly so when commenced rightfully and with the consent of the owner. *Gwynn v. Jones*, 2 Gill & J. 173.

Where a tenant at will openly and publicly claims and treats the land as his own, alienating portions of it in fee and delivering over the possession, and continuing such actions for more than twenty years, a presumption of notice to the landlord from the time the tenant thus placed himself in an attitude of hostility will be justified. *Farrow v. Edmundson*, 4 B. Mon. 605, 41 Am. Dec. 250.

In *Doherty v. Matsell*, 119 N. Y. 646, 23 N. E. 994, it was held that the evidence was sufficient to justify a finding that there was no claim of adverse possession by one who entered upon land under a tax lease, notwithstanding that in the interval between his entry and the time he finally conveyed the property to the defendant, he conveyed the same by a quitclaim deed to a third person, at the same time assigning the tax lease to the latter, and subsequently again resumed possession without any reconveyance or reassignment of the lease.

The subsequent possession of a grantor in a deed of trust is that of a tenant by sufferance, and the possession of one to whom he executes a title bond for part of the land is of the same character: and notice of the disclaimer of the title conveyed by the deed of trust cannot be inferred, either as a matter of law, or as a matter of fact, by the continuance of the possession for a period of thirty-two years. *Creigh v. Henson*, 10 Gratt. 231.

In *Roe ex dem. Pellatt v. Ferrars*, 2 Bos. & P. 542, the court refused to disturb a finding of a jury that the possession of the tenant was not adverse under the following circumstances: The lord of a manor demised certain lands to the rector of the parish for forty years at a certain rent, the rector granting to the lessor the tithe of oats of the parish. The rector remained in possession for more than twenty years without paying rent after the expiration of the term; 53 L. R. A.

but the heirs of the lessor continued during that time to take the tithe of oats. The finding was sustained upon the theory that the circumstances favored the inference of an agreement between the lessee and the owner of the reversion that if the heirs were permitted to receive the tithe as before, the lessee should be permitted to retain the land demised.

That a tenant by sufferance, who has a full and free use and enjoyment of the premises, has paid the taxes thereon, does not charge the owner with notice that her possession is adverse. *Mitchell v. Murphy*, 43 Fed. 425.

In *Hintze v. Krabbenschmidt* (Tex. Civ. App.) 44 S. W. 38, it was held that an instruction that the fact that the tenant ceased to pay taxes in the landlord's name, and paid them or rendered them in his own name, was a circumstance which might be considered, but did not alone, as a matter of law, constitute such a repudiation of the landlord's title as would make the tenant's subsequent possession adverse,—was not obnoxious to the objection that it was upon the weight of the evidence.

A declaration to the owner of the fee by one who was in occupation of the premises under his father, who had gone into possession under an agreement to pay rent, that he intended to claim the property as his own because he did not believe that the other had any title, and that his father would pay no more rent, even if authorized by the father, is insufficient to require the submission of the question of adverse possession to the jury as it was a mere declaration accompanied by no act. *Cadwalader v. App*, 81 Pa. 194.

Where, after the death of a tenant who was holding over after the expiration of his term, his father stated to the lessor that he was going to hold the land for his grandchildren, such statement is not a repudiation of the landlord's title, which will dissolve the relation of landlord and tenant, where there was no offer by the grantor, or by any of the grandchildren, to surrender possession of the property, and it does not appear that the grandfather had any authority to dissolve relationship. *Huntington v. Mattfield* (Tex. Civ. App.) 56 S. W. 361.

One employed by the landlord to deliver a message to the tenant that the latter must call upon the landlord and make arrangements about the rent is not such an agent that the declarations of the tenant to him, repudiating the landlord's title and asserting an adverse claim, can be regarded as constructive notice to the landlord. *Hall v. Dewey*, 10 Vt. 593. The court said it would have been otherwise if the agent had been commissioned to receive the rent, to treat with the tenant respecting the rent of the land, or to transact business with him on the subject requiring a report to be made by him to the landlord.

The statements of a tenant as to his own title are not admissible in support of his claim of title by adverse possession, unless there is evidence that they were brought home to the notice of the landlord. *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

The complaint and pleas in a former ejectment suit by a landlord against his tenant may be admissible in a subsequent ejectment suit between the same parties for the purpose of showing a repudiation of the landlord's title by the tenant and the assertion of a hostile possession by the latter. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

The law not only presumes that the tenant holds possession of the demised premises in allegiance to his landlord until the reverse appears, but it also demands very plain proof of

the fact that the tenant disclaims such allegations. *Leport v. Todd*, 32 N. J. L. 124.

*South v. Marcum*, 22 Ky. L. Rep. 641, 58 S. W. 527. It was held that a defense of adverse possession by a tenant was sufficiently pleaded where it was alleged that the tenant was induced to accept the lease by fraud; that it was without consideration; that it was shortly afterwards totally disregarded and disclaimed by him, and the land openly and notoriously held adversely, that the tenant was in possession of the land claiming it as his own under patent from the commonwealth when the lease was made; that, after renouncing the lease, he rented out the land and collected and converted the rents; that during a period of nineteen years he sold various portions of the premises and placed his vendee in possession, and collected and used the purchase money; that during the same period he and those claiming under him cultivated the land and cut and removed the timber from it, clearing up portions of it, and otherwise using it notoriously and openly as their own, that of all this the landlord had notice during all of said time, but set up no claim; and that the tenant and those claiming under him remained in possession until the filing of the suit.

## 2. Holding over; presumption as to tenant's possession.

A tenant continuing in possession after the expiration of his term cannot acquire title as against his landlord by the lapse of time, unless he has openly disclaimed tenancy to the knowledge of his landlord; but after the formal cancellation of the lease by the agreement of the parties during the term the possession may be deemed adverse. *Meridian Land & Industrial Co. v. Ball*, 68 Miss. 135, 8 So. 316.

The holding over after the expiration of the term, without more, will not have the effect of making a tenant hold adversely to his landlord until he surrenders possession of the premises under his lease, or by some unequivocal act notifies the landlord that he no longer holds possession under the lease, but claims adversely. *Schields v. Ilorbach*, 49 Neb. 262, 68 N. W. 524; *Meridian Land & Industrial Co. v. Ball*, 68 Miss. 135, 8 So. 316; *Gwynn v. Jones*, 2 Gill & J. 173.

Where a tenant, after the expiration of the term, but while in possession, disclaims his landlord's title, and holds adversely for seven years, the statute of limitations will not protect him unless his disclaimer is known to the landlord, and possession held afterwards for seven years. *Watson v. Smith*, 10 Yerg. 476.

Mere holding over after the expiration of the term is not evidence of an adverse possession, and the possessor must be deemed a tenant at will of the landlord unless he can show that since the expiration of the lease he has held forcibly, or has acquired a title paramount to that under which the possession was originally taken. Something more than an intimation of hostility is necessary in such a case. *Gwynn v. Jones*, 2 Gill & J. 173.

Where a tenant holds over after the term his possession is deemed that of the landlord, although he refuses either to take a new lease, to pay rent, or to surrender the possession. The landlord may elect to consider him a disseisor for the purpose of proceeding against him for the recovery of the rent, or he may treat him as a tenant still, and hold him liable for the rent. But the tenant cannot constitute himself a disseisor or change his relation so long as he continues to hold the possession derived from him, unless his possession has been continued such a length of time and under such circumstances as will enable him to bar the lessor's right by operation of the statute of limitations. *Vance v. Johnson*, 10 Humph. 214.

But the holding over by a quasi tenant after the expiration of the term, accompanied by open acts of renunciation of the landlord's title, including a conveyance of the premises by deed in fee simple, will constitute such an adverse possession as will authorize the person so holding to rely upon twenty years' continuance thereof as an absolute statutory bar of the landlord's subsequent entry, where, from the circumstances, there is a presumption that the landlord knew of the hostile acts. *Morton v. Lawson*, 1 E. Mon. 45.

The possession of a tenant is the possession of his landlord, and his continuing in possession after the expiration of his term creates an implied tenancy, and is no disseisin of the landlord. *Emerick v. Tavenor*, 9 Gratt. 220, 58 Am. Dec. 217.

In *Zeller v. Eckert*, 4 How. 289, 11 L. ed. 979, the court held that it was a question for the jury upon the evidence whether the possession of a widow who entered upon land under the direction of her husband's will that she should have possession until his son, to whom the land was devised, should arrive at the age of fifteen, was adverse after her right to retain possession under the will expired.

The continuance of a tenant in possession after a judgment in ejectment under Rev. Stat. pt. 3, chap. 8, title 9, §§ 32-34 (2 Rev. Stat. 505, 506), awarding the possession to the owner of the fee, is not necessarily hostile to the rights of the latter, and does not of itself initiate adverse possession, where no execution was issued on the judgment or possession obtained under it. *Church v. Wright*, 4 App. Div. 312, 38 N. Y. Supp. 701, 39 N. Y. Supp. 989.

Section 373 of the New York Code of Civil Procedure provides that, "where the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of twenty years after the termination of the tenancy, or, where there has been no written lease, until the expiration of twenty years after the last payment of rent." Under this section the possession of the tenant in subordination to the title of the landlord not only continues during the running of the term, but it is presumed to be such and to remain unchanged until twenty years after the end of the term, and notwithstanding any claim by the tenant or his successors of a hostile title. *Whiting v. Edmunds*, 94 N. Y. 309; *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L. R. A. 629, 19 N. E. 800.

"The effect of this section is to prevent the running of a claim to an adverse possession in favor of a tenant for the period prescribed, whether he has acquired another title, or whether he has claimed to hold adversely. *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357.

Under § 373 of the Code of Civil Procedure, presumptively, adverse possession does not commence to run until twenty years after the expiration of the tenancy. *Church v. Wright*, 4 App. Div. 312, 38 N. Y. Supp. 701, 39 N. Y. Supp. 989.

The presumption, under § 373, that the tenant's possession is in subordination to the landlord's title for twenty years after the end of the term, may be rebutted, but to do so effectively and initiate an adverse holding, the tenant must surrender the possession to the landlord or do something equivalent to that, and bring home to him knowledge of the adverse claim. *Whiting v. Edmunds*, 94 N. Y. 309; *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L. R. A. 629, 19 N. E. 800; *Church v.*

Wright, 4 App. Div. 312, 38 N. Y. Supp. 701, 39 N. Y. Supp. 989.

A judgment debtor who remains in possession of land after a sale thereof by the sheriff or executor will, in the absence of explanation, be deemed a tenant at will of the purchaser for twenty years after the date of the deed, and the adverse possession may commence after that period. *Hlasbrouck v. Burhana*, 42 Hun, 376.

*Bartlett v. Secor*, 56 Wis. 520, 14 N. W. 714, held that under a statute substantially to the same effect, except that it substituted ten years in the place of twenty, a tenant by holding possession under an adverse claim for twenty years after the expiration of the ten-year period would defeat his landlord's right to recover possession.

A holding over by a tenant continues the tenancy, and the tenant cannot hold adversely to the title of the landlord without open repudiation thereof. *Mattfeld v. Huntington*, 17 Tex. Civ. App. 710, 43 S. W. 53.

### 3. Nondemand and nonpayment of rent.

When the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord, the mere nondemand and nonpayment of rent are not sufficient to bar the landlord's title, whatever effect they may have, if longer continued, upon his right to recover the rent. *Campbell v. Shipley*, 41 Md. 81.

The failure of a tenant to pay rent does not, even in the absence of a demand, make the possession adverse; it does not raise a presumption that the tenant has renounced the title under which his tenure commenced. *Ross v. McManigal* (Neb.), 54 N. W. 610.

The mere failure to pay rent to the landlord is not sufficient to initiate an adverse possession by the tenant, though perhaps possession by the tenant for a long period after the expiration of his lease without the payment of rent, or other act recognizing the title of his landlord, might justify a jury in presuming an actual ouster and adverse holding. *Chambers v. Pleak*, 6 Dana, 426, 32 Am. Dec. 78.

The mere nondemand and nonpayment of rent from the time a tenant takes possession do not of themselves render his possession adverse. *Leport v. Todd*, 32 N. J. L. 124.

The fact that the landlord has not demanded the rent for twenty years does not raise a presumption that he has extinguished his right to it by a conveyance of the interest in remainder or reversion to his tenant. *Jackson ex dem. Van Schaick v. Davis*, 5 Cow. 123, 15 Am. Dec. 451.

That the circumstances are such as to warrant the presumption of the extinguishment of the entire rent shortly after the commencement of the term does not justify a presumption of the dissolution of the relation of landlord and tenant so as to let in an adverse possession during the continuance of the lease. *Falling v. Schenck*, 3 Hill, 344.

In *Whaley v. Whaley*, 1 Speers, L. 225, 40 Am. Dec. 504, a son-in-law entered with his wife as a tenant at will, or by sufferance, upon the property of his father-in-law. Three years later the wife died and he married again and continued to live on the property ten years longer without paying rent, when he died. There was no evidence that he ever gave the owner to understand that he had thrown off his tenancy. The court held that the jury could not presume that the owner had notice of the tenant's intention to claim the property as his own.

In *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462, it was held that the refusal of the tenant to pay rent to an agent of the landlord authorized to collect rent, but not to enter upon the land or sue for it in the landlord's name, was not 53 I. R. A.

evidence of an "actual ouster" of the landlord which would start adverse possession.

The mere nonpayment of rent for twenty years during the continuance of the term does not bar the lessor under 3 & 4 Wm. IV., chap. 27, providing that, "when the estate or interest claimed shall have been an estate or interest in remainder or reversion, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession." *Doe ex dem. Davy v. Oxenham*, 7 Mees. & W. 131, 1 Hurlst. & W. 4, 10 L. J. Exch. N. S. 6, 4 Jur. 1016; *Grant v. Ellis*, 9 Mees. & W. 113.

### 4. Acquisition of outstanding title or interest by tenant.

While a tenant cannot defend an action by the landlord, by virtue of any title or interest, inconsistent with that of the landlord at the commencement of the tenancy, acquired during the tenancy, yet the fact that he has acquired such a title or interest may, under some circumstances, as where the tenant takes a deed of the fee from a third person, be regarded as in itself a disclaimer of the landlord's title and the assertion of an adverse claim; but, even in such a case, notice of the deed must be brought home to the landlord before possession will become adverse.

While the possession of a tenant entering under a lease for years from the government cannot be adverse to the government during the continuance of the lease, it may become adverse after a grant of the reversion of the state to the tenant notwithstanding the reservation of an annual quit rent. *People v. Trinity Church*, 22 N. Y. 44. This decision was upon the assumption that the grant was invalid.

A tenant at will may at any time abandon his tenancy and take a title from a third person and hold adversely to the landlord, notwithstanding that the latter is absent from the state. *Hudson v. Wheeler*, 34 Tex. 356. In this case the action was brought about twenty-five years after the tenant took the deed. The landlord claimed that because of his absence he could not know of the condition of his property. The court said, however, that there was shadow of suspicion of at least gross carelessness, if not direct and positive fraud, in the inception and prosecution of the cause. It appears from the amended petition that the tenant temporarily left the premises before obtaining the deed, and afterwards moved back and reoccupied them. This was, however, alleged to be part of a fraudulent scheme to deprive the landlord of his title. It is not clear whether the court took the view that there had been an abandonment of the premises, or whether it put the decision upon the ground that there was merely a disclaimer of the landlord's title without an abandonment of possession.

The law requires all parties to be watchful in guarding, and diligent and prompt in prosecuting, their interest, and if they fail to diligently protect their property and rights, they should not be heard to complain, especially after long lapse of years, if by their supineness others have acquired rights which come in conflict with their own. *Ibid.*

A purchase of an adverse title by a tenant, or any other disclaimer of tenure, with the knowledge of the landlord, is a forfeiture of the term, and the tenant's possession becomes so far adverse that the act of limitations will begin to run in his favor from the time of such forfeiture. If the landlord under such circum-

stances suffers the time prescribed by the statute of limitations to run out without making an entry or bringing suit, each party may stand upon his right, but until then the possession of the tenant is the possession of the landlord. *Lane v. Osment*, 9 Yerg. 86. In this case the lease was for a term of years, and the tenant acquired an outstanding title during the term. The action was ejectment, and the tenant failed, apparently because the statutory period had not expired.

But the mere fact that a tenant took a deed from a third person, and gave back a mortgage, is not sufficient to initiate an adverse possession, since they may have been secret conveyances. *Sharpe v. Kelley*, 5 Denio, 431.

And a landlord is not chargeable with notice of the disclaimer of his title and adverse claim by the tenant by the taking of a deed from a third person by the tenant and the recording of such deed. *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786.

Where one was in possession of land at the time of the owner's death, and subsequently remained in possession in the right of his wife as one of the heirs of the deceased owner, and during his possession acquired the interest of some of the other heirs, his possession cannot be deemed adverse to the remaining heirs, notwithstanding he appropriated to himself the exclusive rents and profits, made slight repairs and improvements, and paid taxes. *Busch v. Huston*, 75 Ill. 343.

Where the heirs of a party in possession of land as a licensee institute partition proceedings *inter se*, to which the owner is not a party, and those proceedings are followed by a sale to one of the heirs and continued exclusive possession by him, such possession cannot be deemed adverse to the true owner. *Budd v. Collins*, 69 Mo. 129.

That at the time of a parol gift of land the donee was in possession thereof as a tenant does not disprove that he subsequently held possession in pursuance of the gift, where he ceased to pay rent, had the property assessed in his own name, and made improvements with the knowledge of the donor, who encouraged him to proceed and promised to make him a deed. *Aurand v. Wilt*, 9 Pa. 54.

##### 5. Successors of tenant.

As a general rule the relation of landlord and tenant attaches to all who may succeed to the possession through or under the tenant, immediately or remotely, either before or after the expiration of the term, and they are subject to the same conditions as the original tenant with respect to acquiring title adversely to the landlord. *Gwynn v. Jones*, 2 Gill. & J. 173; *Campbell v. Shipley*, 41 Md. 81; *Ehrman v. Mayer*, 57 Md. 612; *Jackson ex dem. Webber v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517; *Brandt ex dem. Kitch v. Marshall*, 1 Cal. 394; *Jackson ex dem. Vandusen v. Scissam*, 3 Johns. 499; *Tompkins v. Snow*, 63 Barb. 525; *Whiting v. Edmunds*, 94 N. Y. 309; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357; *Church v. Shultes*, 4 App. Div. 378, 88 N. Y. Supp. 842.

While a tenant at will cannot, against the will of the landlord, transfer any of his rights to an assignee or a transferee, and while a person coming in under such an attempted transfer is a trespasser if the landlord so chooses to regard him, the landlord may, nevertheless, acquiesce in the transfer and in the entry thereunder, and thereby constitute the transferee a tenant at will whose possession is in subordination to his title. *Landon v. Townshend*, 129 N. Y. 166, 29 N. E. 71.

The rule that one who enters under a tenant must be regarded as a tenant applies, even where 53 L. R. A.

he enters under a deed in fee from the tenant in ignorance of the fact that his grantor stood in the relation of tenant. *Jackson ex dem. Vandusen v. Scissam*, 3 Johns. 499; *Jackson ex dem. Van Schaick v. Davis*, 5 Cow. 123, 15 Am. Dec. 451; *Jackson ex dem. Webber v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517; *Whiting v. Edmunds*, 94 N. Y. 309; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357; *Emerick v. Tavener*, 9 Gratt. 220, 58 Am. Dec. 217; *Creigh v. Henson*, 10 Gratt. 231.

It has been held, however, that the rule only applies to the conventional relation of landlord and tenant, where some rent or return is in fact reserved for the former, and does not apply to a relation arising from mere operation of law; as where one makes a grant, and by the omission of the technical word "held" an estate for life only passes. In such case after the death of the tenant for life an adverse possession may commence running in favor of those who enter and claim in fee under him, which, after twenty-five years, will bar all the claim of the reversioner and his heirs. *Jackson ex dem. Webber v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517.

And so, it has been held not to apply to an assessment or tax lease, i. e., a lease by the government or one of its agencies upon the non-payment of an assessment or tax. Thus:

The possession of one who enters and claims title under a grant of the fee from one who entered under an assessment lease is adverse to the title of the reversioner so as to make a conveyance from the latter to a third person void for champerty. *Sands v. Hughes*, 53 N. Y. 287.

While the possession of the holder of a tax lease cannot be adverse to the owner in fee, the possession of a grantee in fee from the tax tenant may be adverse. *Sanders v. Riedinger*, 30 App. Div. 277, 51 N. Y. Supp. 937.

A finding by the jury that the possession of a grantee in a quitclaim deed from a tax tenant was not as tax tenant, but adverse to the owner in fee, is supported by evidence that the agreement was for the purchase of the whole premises, and that he entered thereon believing that he was the owner in fee, and that he always claimed them. *Ibid.* The court distinguished *Doherty v. Matsell* upon the ground that there the question before the court was whether the evidence was sufficient to support a finding of the fact that the possession was under the tax lease, and was not adverse, while in the case at bar the question was whether there was any evidence to authorize a finding that the possession was adverse. The tax lease purported to grant a term of one thousand years.

But where one enters into possession under a deed conveying the premises for and during the residue of the term of an assessment lease for 1,500 years, his possession is not adverse to the owner of the fee. *Bedell v. Shaw*, 59 N. Y. 46. This case is distinguished from *Sands v. Hughes*, 53 N. Y. 287, upon the ground that in that case the defendants began and kept up their possession for over twenty years with a claim to the entire fee. The court says the quality and extent of the right acquired by possession depend upon the claim which goes with it. To the extent of this claim will the presumption of the law go in favor of the claimant, and no further.

But, even when the rule applies, and the grantee of the tenant must be regarded as a tenant and subject to the same disqualifications as the original tenant, the fact of the conveyance may be material upon the question as to the existence of the requisites to the initiation of an adverse possession, viz., disclaimer of landlord's title, intention to hold adversely, and no

tice to landlord of such disclaimer and intention. Thus:

The fact that a warranty deed from a tenant was executed before the expiration of twenty years from the last payment of rent, during which time the tenant's possession was, under § 373 of the Code of Civil Procedure, presumed to be in subordination to the landlord's title, does not prevent it from being the basis of a claim of adverse possession after the expiration of that period; and a deed from the owner of the reversion, executed after that period and while the party in possession under the former deed was claiming adversely, is void for champerty. *Church v. Schoonmaker*, 115 N. Y. 570, 22 N. E. 575.

The purchaser at an execution sale of the lessee's interest under a perpetual lease acquires only the rights of the tenant, and is subject to § 373 of the Code of Civil Procedure, and her possession, therefore, does not become adverse until the expiration of twenty years after her entry. *Church v. Shultes*, 4 N. Y. App. Div. 378, 38 N. Y. Supp. 842.

In *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891, the court took the view that a deed in fee simple by the tenant before the expiration of the term, if brought to the notice of the landlord, would initiate an adverse possession, and the court regarded the fact that the deed was placed upon record in the office of the register of mesne conveyances in the proper county more than forty years before the action as entitled to great weight on the question of notice, though the record did not operate as constructive notice as a matter of law.

Where A enters as a tenant at will of B, and conveys to C by deed purporting to be in fee, under which C enters and holds possession openly and notoriously for himself for seven years either by himself or his tenants, the statute confirms the title of C. (*obiter*). *Doak v. Donelson*, 2 Yerg. 249, 24 Am. Dec. 485.

Where a tenant assumes to convey the premises to a third person by a warranty deed in fee simple with the usual covenants to secure the title, and the grantee accepts it and assumes to hold under it, there is, in effect, a repudiation of the tenancy. *Society for Propagation of Gospel v. Sharon*, 28 Vt. 613. The court apparently concedes that the statute of limitations would not run until the landlord had notice of the conveyance.

Those succeeding a tenant in possession of the premises under or through him may show that the relation has been dissolved, or set up an actual ouster of the landlord and adverse holding thereafter; but possession in such case is presumed to be in accordance with the title, and such presumption will hold until some notorious

and unequivocal act of exclusion shall have occurred. *Campbell v. Shipley*, 41 Md. 81.

Assertions of claim of title in themselves, by persons who succeed to the possession of a tenant, are not evidence of adverse possession as against the landlord, unless brought home to the knowledge of the latter. *Ibid.*

A purchase of a tax title by one who succeeded the original tenant under such circumstances as to make him a tenant also will not enable him to plead the statute of limitations applicable to actual occupancy under tax deeds, where such purchase operated merely as a redemption of the property. *Lyebrook v. Hall*, 73 Miss. 509, 19 So. 348.

Where a tenant accepts a deed from a third person purporting to convey the land to him in fee, and the later conveys it in fee to another, and both he and his alienee claim the land in their own right under such conveyances, and the landlord knows of such assertion of adverse title, the possession will be made adverse, and will eventually ripen into title. *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423.

Where one procures a tax deed, and, by fraud and collusion with a tenant of the owner, obtains possession of the property, his possession is the possession of the former owner; as a tenant will not be permitted to deny the title of his landlord, nor to claim that he holds possession under some title hostile to the latter, until he has restored the possession or done that which is equivalent to it. *Pulford v. Whicher*, 76 Wis. 555, 45 N. W. 418.

Where one entered into possession of land under a contract to purchase, by the terms of which he was to be deemed a tenant until the payment of the purchase price, and subsequently assigned his right to another, who performed the terms of the contract, the latter may disclaim the title of the vendor and hold adversely to him. *Catlin v. Decker*, 38 Conn. 262.

Possession of a tenant or his heirs cannot be deemed adverse until allegiance to the landlord has been renounced. *Miller v. South*, 12 Ky. L. Rep. 351, 14 S. W. 361.

Where one was in possession of land at the time of his father's death, as the tenant of the latter, his subsequent possession must be regarded as having been for the benefit of himself and his brothers and sisters as joint owners, unless it is proved that he held adversely. *Blake-ney v. Ferguson*, 20 Ark. 547.

Where one enters land as the tenant of another an official survey, at the tenant's instance, of a portion of the leased premises upon a warrant in his name will not place him in the attitude of an adverse holder in the absence of notice to the landlord. *McGinnis v. Porter*, 20 Pa. 80.

G. H. P.

## UTAH SUPREME COURT.

*Re David EVANS et al.*

(22 Utah, 366.)

\*1. A stipulation, in a contract between attorneys and client, for the payment by the attorneys of the costs of the litigation, is against public policy, champertous, illegal, and void.

\*Headnotes by BASKIN, J.

NOTE.—For cases in this series on disbarment of attorney generally, see *Fairfield County Bar ex rel. Fessenden v. Taylor* (Conn.) 13 L. R. A. 767, and *note*; *People ex rel. Atty. Gen. v. MacCabe* (Colo.) 19 L. R. A. 231; *Re Kirby* (S. D.) 63 L. R. A.

2. While it is permissible for a near kinsman of a poor suitor, out of charity, to assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture, based upon a contract to share in the proceeds in case the suitor should recover.

3. Champerty renders an attorney amenable to the summary jurisdiction of the court, notwithstanding it may be effectual as a defense to the enforcement of a contract.

39 L. R. A. 856; and *Re Lentz* (N. J. L.) 50 L. R. A. 415.

As to necessity of bad or fraudulent motive to justify disbarment, see *State ex rel. Fowler v. Finley* (Fla.) 18 L. R. A. 401, and *note*.

4. An attorney who, in the pursuit of his profession, makes an agreement which is against public policy, is guilty of a flagrant breach of professional duty.
5. A party employed to act as agent in securing the services of attorneys cannot contract to receive a portion of the fees himself as assistant attorney. He cannot be both principal and agent, for such a transaction is against public policy and void.
6. In an action by an administrator for damages for the death of his decedent, his duties as assistant attorney are within the scope of his duties as administrator, and he may not make a contract with his attorneys for additional compensation as assistant attorney in the case.
7. The impropriety of attorneys, respondents in disbarment proceedings on a charge of champerty, appearing before this court and confessing that they induced this court to render final judgment in their favor, in a previous action, on the ground of their having been guilty of champerty, and afterwards, when confronted with disbarment proceedings, claiming they were innocent, is indefensible.
8. The relation of attorney and client is confidential. The attorney by his obligation is bound to discharge his duties to his client with the strictest fidelity, and he is amenable to the summary jurisdiction of the court for dereliction of duty.
9. The summary proceeding of disbarment is civil, not criminal, but requires more than a preponderance of the evidence. The guilt of the attorney must be clearly established.

(September 15, 1900.)

**A**PPPLICATION for the disbarment of respondents. *Denied on conditions.*

Statement by **Baskin, J.:**

Hon. P. L. Williams, an attorney at law, having filed and presented an information, verified by the oath of Thomas Nelson, charging David Evans and Lindsay R. Rogers, attorneys of this court, and partners in the practice of law, with having violated their duties as counselors and attorneys of this court, and moved that the said Evans & Rogers be cited to appear to show cause why they should not be disbarred, and their names stricken from the roll of attorneys, or be otherwise punished according to law, this court on May 23, 1900, granted said motion. Evans & Rogers, in obedience to the citation, appeared and interposed a general demurrer, which was overruled. They also filed an answer. Though the information of Thomas Nelson is in the form of an affidavit, it contains all of the elements and meets all the requirements of an information, as prescribed by §§ 122-124, Rev. Stat. The matter was referred to D. H. Twomey, Esq., an attorney and counselor of this court, to take and report the testimony, with findings of fact, which he accordingly did. The facts found by him are as follows:

**Findings of Fact.** (1) That on and prior to January, 1892, David Evans and Lindsay R. Rogers were copartners in the practice of law at Ogden, Utah, and continued as 53 L. R. A.

such copartners from said time until long after entering into the contract of date December 2, 1893, which is attached to the information herein, and marked "Exhibit A."

(2) That on or about January 21, 1892, one Charles A. Nelson was killed while traveling on the Southern Pacific Railway, at Truckee, California. (3) That the said Charles A. Nelson left surviving him his widow, Nellie Nelson, and two minor children. He also left two brothers, Alfred H. Nelson and Thomas Nelson, surviving him; the latter being a partner in business with the said Charles A. Nelson at the time of his death. (4) That after the death of the said Charles A. Nelson his widow, Nellie Nelson, placed in the hands of said Alfred H. Nelson, who was a practising attorney at Ogden, Utah, for prosecution, her claim for damages against the Southern Pacific Railway Company for causing the death of her husband, with authority to employ counsel to prosecute said claim. (5) That the said Alfred H. Nelson employed Evans & Rogers to prosecute said claim against said railway company, and the said Evans & Rogers and Alfred H. Nelson agreed to prosecute an action against the Southern Pacific Railway Company to recover damages from it on account of the death of Charles A. Nelson, for a contingent fee of one half of the amount recovered. (6) That Evans & Rogers and Alfred H. Nelson entered into a contract, by the terms of which Evans & Rogers were to receive and retain two thirds of the one half of the amount recovered against the Southern Pacific Railway Company, and the said Alfred H. Nelson was to receive the one third of the one half of the amount recovered of said company, which amount Evans & Rogers agreed to pay him for his services in said case, including the production of witnesses for the prosecution. (7) That thereafter, Alfred H. Nelson, in contemplation of bringing suit against said railway company, was appointed administrator of the estate of Charles A. Nelson, deceased. (8) That afterwards the contract bearing date December 2, 1893, marked "Exhibit A," which is in words and figures as follows: "Ogden, Utah, Dec. 2nd, 1893. We, the undersigned, agree to give Thomas Nelson one third of one half of any amounts which may be collected, whether on compromise or otherwise, in the case of *Alfred H. Nelson, as Administrator of the Estate of Chas. A. Nelson, Deceased, v. Southern Pacific Ry. Co.*, in consideration of said Thomas Nelson furnishing witnesses necessary to prosecute said case. Evans & Rogers,"—was entered into by and between Evans & Rogers and Thomas Nelson, which was substituted for the prior contract between Evans & Rogers and Alfred H. Nelson; that, at the time of entering into said contract, most of the witnesses, and the facts to which they would testify, were known to the attorneys. (9) That Thomas Nelson attended as a witness at the trial of the case of *Alfred H. Nelson, Administrator of the Estate of Charles A. Nelson, Deceased, v. The Southern Pacific Railway Company*, and procured the attendance of one Pascall

at one of the trials of said cause, and also the attendance of one Saunders, who was plaintiff in a case against the same company in an action for damages for injuries growing out of the same accident in which Charles A. Nelson lost his life. (10) That a judgment was recovered by Alfred H. Nelson, Administrator, against the Southern Pacific Railway Company, for the sum of \$10,000, with accrued interest, the amount of which was paid to Evans & Rogers as attorneys for said plaintiff, one half of which was paid to the widow of Charles A. Nelson; the said Evans & Rogers retaining the other half. (11) That after the Southern Pacific Railway Company paid the amount of said judgment, with interest and costs, to Evans & Rogers, Thomas Nelson demanded from Evans & Rogers, under the contract Exhibit A, one third of the one half of the amount of said judgment, which the said Evans & Rogers refused to pay on the ground that the said Thomas Nelson had not performed his part of the contract. (12) That, after Evans & Rogers refused to pay Thomas Nelson the portion of the fee mentioned in Exhibit A. Nelson employed Mr. Parley L. Williams, an attorney of this court, to bring an action in his favor against Evans & Rogers on said contract, Exhibit A, for one third of one half of the amount recovered from the Southern Pacific Railway Company in favor of Alfred H. Nelson, administrator of the estate of Charles A. Nelson, deceased; that the said Williams, in pursuance of said employment, commenced said action against Evans & Rogers. (13) That Evans & Rogers employed one A. G. Horne, an attorney at law residing and practising in Ogden, Utah, to represent them in said action. That Horne interposed a demurrer to the plaintiff's complaint therein, on the ground that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. The plaintiff, Thomas Nelson, then filed an amended complaint, to which Mr. Horne, as attorney for Evans & Rogers, the defendants, interposed a general demurrer, which was sustained. (14) There was no allegation in either the original or amended complaint in the case of *Thomas Nelson v. Evans & Rogers* that the said Thomas Nelson was a brother of Charles A. Nelson, deceased. (15) That shortly after the demurrer to the amended complaint in the case of *Thomas Nelson v. Evans & Rogers* was sustained by the district court, and before an appeal was taken to the supreme court of this state [see 21 Utah, 202, 60 Pac. 557]. Mr. Rogers proposed to Mr. Williams, plaintiff's attorney, that the judgment on the demurrer should be vacated, and defendant would withdraw and answer on the merits. This was followed by a stipulation in writing signed by Mr. Rogers and delivered to Mr. Williams, which stipulation was introduced in evidence, and marked "Defendants' Exhibit 2." Evans desired to unite in the stipulation. (16) I further find from the evidence that at the time the contract between Evans & Rogers and Thomas Nelson, marked "Exhibit A," was entered 53 L. R. A.

into, the parties thereto did not regard it unprofessional or contrary to public policy or immoral. (17) That these disbarment proceedings were instituted by Thomas Nelson in the hope that he, by so doing, would force Evans & Rogers to pay him the money which he claims to be due him under the contract "Exhibit A."

Respectfully submitted,

D. H. Twomey, Special Master.

Dated June 20, 1900.

These findings are within the issues, and are all supported by the evidence, except the sixteenth, but do not cover the whole ground.

The following additional facts appear from the record in evidence: (1) That while the ground of the demurrer to the complaint in the action of Thomas Nelson against Evans & Rogers, to recover on the contract set out in the eighth finding as Exhibit A, was that the complaint did not state a cause of action, both in the court below and on the appeal in this court, the only reason assigned at the hearing upon the demurrer was that said contract was champertous and illegal, as between the parties thereto, and that this court sustained the demurrer and affirmed the judgment solely on that ground. (2) As testified to by David Evans, one of the respondents, the \$10,000 recovered from the railroad company was not paid to the administrator of Charles A. Nelson, deceased, but to Evans & Rogers, and was afterwards distributed, in the absence of the administrator from the state, under an order of the second judicial district court, made in the matter of the estate of Charles A. Nelson, deceased, one half to the widow of Charles A. Nelson and the two minor children, and one half to Evans & Rogers, as a fee. (3) It also appears from the testimony of the respondent David Evans that, while Evans & Rogers advanced to the widow a portion of the costs (the amount does not clearly appear), they did so under an agreement with her that she should repay to them the same, and that, after receiving her money from the railway company, she paid to them every dollar so advanced. (4) It is alleged in the answer that, by reason of the alleged failure of Thomas Nelson "to advance or pay out any money whatever to secure the attendance of witnesses, it became and was necessary for the widow of the deceased, Charles H. Nelson, to secure and advance money for their attendance." (5) The record discloses the fact that the widow paid all the expenses of the litigation, so far as Evans & Rogers are concerned. (6) That the abstract of the record on the appeal to this court in the case of Thomas Nelson against Evans & Rogers, a copy of the brief signed by A. G. Horne, as attorney for the respondents, Evans & Rogers, and a copy of the decision of this court on the appeal, were attached to the information in the matter now under consideration, and made a part thereof. (7) The abstract of said record contained a copy of the complaint, which, among other things, alleged that the railway



company on the 28th day of December, 1898, paid said judgment of \$10,000, and interest thereon, amounting to \$760, and that thereupon, in pursuance of said contract of Evans & Rogers with said administrator, Evans & Rogers were paid and received one half thereof, to wit, the sum of \$5,380. This allegation was admitted by the demurrer to said complaint, and is not denied by the respondents in their answer to the information. (8) The complaint also alleged that, in the contract with Alfred H. Nelson, Evans & Rogers "undertook and agreed to prosecute the said cause [against the railway company] to final judgment, and also to pay and discharge all the taxable costs incurred, and also the costs incident to procuring the attendance of witnesses, and all other costs that might be incurred in the prosecution of the cause." These allegations were admitted by the demurrer to said complaint, and are not denied by respondents in their answer to the information, or contradicted by the evidence. (9) Respondents, in their answer, which was verified by their oaths, made the following allegations: "Fifth. Respondents further state that in the year 1893 the said cause of Alfred H. Nelson against the Southern Pacific Company was set for trial at the city of Ogden aforesaid, at which time Thomas Nelson attended said cause as a witness, and in the interest of his sister-in-law, whose husband had been killed, and had with him at the time an assignment of all the interest in the contract which was made between said Alfred H. Nelson and said respondents, and demanded recognition for the same by a cancellation of said contract, and the execution of a new one in favor of said Thomas Nelson. . . . And said Thomas Nelson further stated that while said Alfred H. Nelson could not render the services agreed upon, as an attorney,—that he, the said Alfred H. Nelson, was a poor man, having been financially ruined in speculations in real estate at Ogden,—that he desired and requested that nevertheless the said Thomas Nelson should receive the part of the fee agreed upon, in order to aid him in his straitened circumstances, and that, the said Alfred H. Nelson being then and there in financial difficulties, he wished the contract made in the name of said Thomas Nelson in order to protect him therein, and that the said Thomas Nelson would secure the attendance of the necessary witnesses to prosecute said action; and in view of the fact that the witnesses were beyond the jurisdiction of the court, and could not be secured by its process. And believing that said widow and children, by the administrator, had a meritorious cause against said Southern Pacific Company, respondents entered into the contract with said Thomas Nelson set out as an exhibit to the petition and affidavit filed herein." Exhibit A is the one here referred to. Bearing upon these allegations, the following occurred in the examination of David Evans:

"Q. One more question: Has A. H. Nelson L. R. A.

son, the real beneficiary, ever made a demand upon Evans & Rogers, or either of you, for anything under his contract in trust for him, in Exhibit A, that is offered in evidence?

A. He did not.

Q. Did he make any complaint?

A. No, sir.

Q. Now, at the time this contract was entered into with Thomas Nelson, it was understood that it was being made in and for the benefit of A. H. Nelson, was it?

A. It was simply a recognition of the contract in Thomas Nelson's name which the three of us had entered into prior to that time. That was the intention of it. There was no other intention.

On the same subject L. R. Rogers testified: "I remember of saying to Thomas Nelson: 'You are not a lawyer, and this contract is with A. H. Nelson, and he was to render services in the case as a lawyer. I feel very friendly to A. H., and regret his personal situation—his financial condition,—but I do not think we ought to divide our fee with you.' He replied, of course he understood that the court work and the actual trial of the case would have to be done by Evans & Rogers, even if A. H. Nelson was present. He said he recognized the fact and understood fully that Evans & Rogers were better trial lawyers than his brother. He said: 'My brother would simply assist you in getting witnesses from Nevada, and he would be benefited through me. He is really going to have the benefit out of this contract, as I got it in my own name, and he is afraid that some of his creditors might make some trouble about his interest (his financial interest) in the event of recovery,'—and that he is going to have an accounting with A. H. about it afterwards.

Q. Did he say anything that he wanted a new contract made in his own name to protect his brother?

A. Yes, sir; and I told Mr. Evans I did not think we ought to do it, and Nelson and I had some private talk about it in the absence of Mr. Evans. He was called out of the room, and he said it would be all right; he would protect A. H. in it. Owing to the fact that I was connected with A. H. in many lawsuits, and being an old friend of his, I thought I ought to do it for A. H., saying that Evans & Rogers would do it if I said so."

**Messrs. A. C. Bishop, Attorney General, W. A. Lee, F. S. Richards, and A. Howat, for the State:**

Proceedings for the disbarment of attorneys are not criminal in their character.

*Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646; *Bar Asso. v. Randel*, 158 N. Y. 216, 52 N. E. 1106; *State v. Clarke*, 46 Iowa, 155.

Such proceedings are not for the purpose of punishment, but are entertained for the protection of the court, the proper administration of justice, the dignity and purity of the profession, the public good, and the protection of clients.

*Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; *State ex rel. State Bar Assn. v. Finn*, 32 Or. 519, 52 Pac. 756; 30 Chicago Legal News, 322.

Nor is it necessary that the conduct complained of should be criminal in its character; it is sufficient if it is of such a character as is inconsistent with the proper appreciation and discharge of his duties by an attorney as an officer of the court.

*Re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558; *State ex rel. State Bar Assn. v. Finn*, 32 Or. 519, 52 Pac. 756; *People ex rel. Maupin v. McCabe*, 18 Colo. 186, 19 L. R. A. 231, 32 Pac. 280; *People ex rel. Moses v. Goodrich*, 79 Ill. 148; 1 Bouvier, Law Dict. Rawle's ed. 576.

But it is not essential that there should be moral turpitude or a consciousness of wrongdoing; the absence of wrongful intent does not relieve the conduct complained of, if the nature and tendency are such as to show unfitness of the attorney to be an officer of the court in the administration of the law.

*Re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558; *State ex rel. State Bar Assn. v. Finn*, 32 Or. 519, 52 Pac. 756; *People ex rel. Maupin v. McCabe*, 18 Colo. 186, 19 L. R. A. 231, 32 Pac. 280; *People ex rel. Moses v. Goodrich*, 79 Ill. 148.

A contract in which an attorney is to pay the court costs in a suit is a champertous contract.

*Croco v. Oregon Short Line R. Co.* 18 Utah, 321, 44 L. R. A. 285, 54 Pac. 985.

The making of such a contract would constitute a sufficient ground for the disbarment or suspension of respondents.

*Croco v. Oregon Short Line R. Co.* 18 Utah, 322, 44 L. R. A. 285, 54 Pac. 985; *Gilman v. Jones*, 87 Ala. 698, 4 L. R. A. 113, 5 So. 785, 7 So. 48.

Notwithstanding the fact that many of the things that were regarded as champertous at common law are not now held to be champertous, champerty has always been held to be, not only *malum prohibitum*, but also *malum in se*.

See 5 Am. & Eng. Enc. Law, 2d ed. p. 819; *Wallis v. Portland*, 3 Ves. Jr. 494; *Holloway v. Lowe*, 7 Port. (Ala.) 490; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Thurston v. Percival*, 1 Pick. 415; *Backus v. Byron*, 4 Mich. 536; *Key v. Vattier*, 1 Ohio, 147.

The Federal circuit court will strike an attorney's name from the rolls for malpractice, although the offense is not indictable.

*United States v. Porter*, 2 Cranch, C. C. 60, Fed. Cas. No. 16,072.

An attorney may be suspended or disbarred for any act proved showing him unfit to practise as one of the officers of the court, such as a bad moral character, or the commission of specific criminal acts, or acts inconsistent with his office.

*Ex parte Cole*, 1 McCrary, 405; Fed. Cas. No. 2,973; *Re Wall*, 13 Fed. 814; *People v. Spencer*, 61 Cal. 128; *Baker v. Com.* 10 Bush, 592; *People ex rel. Maupin v. McCabe*, 18 Colo. 186, 19 L. R. A. 231, 32 Pac. 53 L. R. A.

280; *People ex rel. Moses v. Goodrich*, 79 Ill. 148; *Re Naphtaly*, 14 Cent. L. J. 96; *Jeffries v. Laurie*, 23 Fed. 786; *Re Treadwell*, 67 Cal. 353, 7 Pac. 724; *Re Ashton*, 4 Pa. Dist. R. 425; *State v. Chitty*, 1 Bail. L. 379; *Dumont v. Defore*, 27 Ind. 263.

**Messrs. O. W. Powers and Charles C. Dey**, for respondents:

At the time of this contract we had in Utah no statute—no decisions—upon the question of champerty. In California it had been by the supreme court five times repudiated.

*Mathewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal. 483; *Mahoney v. Bergin*, 41 Cal. 423.

In Oregon it is not considered illegal on the grounds of champerty as now generally understood, or because opposed to public policy, for a third person to make a bona fide agreement to supply funds to carry on a suit, and receive therefor a portion of the proceeds of said suit.

*Brown v. Bigne*, 21 Or. 260, 14 L. R. A. 745, 28 Pac. 11.

Everywhere in this country the ancient doctrine of champerty had been either relaxed or repudiated as not applicable to the conditions existing here.

*Reece v. Kyle*, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 748; *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024.

From the foregoing the respondents cannot be charged, as lawyers, with making the Thomas Nelson contract in 1892 in bad faith. While the contract is against public policy, and therefore void, yet the making of such a contract is neither *malum prohibitum* nor *malum in se*.

*Davis v. Webber*, 66 Ark. 190, 45 L. R. A. 196, 49 S. W. 822.

With the showing of relationship and interest, the contract was not champertous.

*Thalhimer v. Brinckerhoff*, 3 Cow. 623, 15 Am. Dec. 309; *Perine v. Dunn*, 3 Johns. Ch. 508; *Beard v. Puett*, 105 Ind. 68, 4 N. E. 671; *Lewis v. Bell*, 17 How. 616, 15 L. ed. 203; *Wright v. Cain*, 93 N. C. 296; *Sayles v. Tibbitts*, 5 R. I. 79.

An attorney does not forfeit even his right to full compensation, nor the client his rights to the fruits of the litigation after paying the attorney what his services are reasonably worth, by reason of there being a champertous agreement between them.

*Stearns v. Felker*, 28 Wis. 594; *Thurston v. Percival*, 1 Pick. 415; *Rust v. Larue*, 4 Litt. (Ky.) 425, 14 Am. Dec. 172; *Merritt v. Lambert*, 10 Paige. 352; *Wallis v. Loubat*, 2 Denio. 607; *Berrien v. McLane*, Hoffm. Ch. 421; *Cardwell v. Sprigg*, 1 B. Mon. 389.

No such penalty ever attached to a lawyer for refusing to pay one not a client. No such penalty ever attached to a lawyer as a suitor for the acts and conduct of the lawyer he employed to defend his cause.

*Reece v. Kyle*, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747; *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024.

Before an attorney may be disbarred, the court must be satisfied that the evidence

clearly shows such a lack of character upon his part, or such conduct, that he is unfit to practise law.

*Re Houghton*, 67 Cal. 511, 8 Pac. 52; *Re Stephens*, 84 Cal. 77, 24 Pac. 46; *Re Eldridge*, 82 N. Y. 167, 37 Am. Rep. 558.

If Nelson failed to carry out his contract, the accused had the right to avail themselves of any defense known to the law. There was nothing unlawful in pleading the invalidity of the contract. It was a matter of good taste. Lawyers have the same rights as other citizens. The illegality when pleaded was without the actual knowledge of the accused. They were no longer in partnership, and had removed from Ogden. Mr. Horn was employed to represent them, and, without consultation with his clients, he interposed a demurrer.

A bad or fraudulent motive must be shown to justify the disbarment of an attorney, although the acts charged against him are proved to have been committed.

*State ex rel. Fowler v. Finley*, 30 Fla. 325, 18 L. R. A. 401, 11 So. 674; *Re Luoe*, 83 Cal. 303, 23 Pac. 350; *Re Attorney*, 1 Hun, 321.

The power to disbar an attorney should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession.

*Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Ex parte Burr*, 9 Wheat. 529, 6 L. ed. 152.

**Baskin, J.**, delivered the opinion of the court:

The facts disclosed by the record show, in several respects, a violation of professional ethics on the part of the respondents. It is stated in their brief that: "Evans & Rogers did not employ Alfred H. Nelson. The latter employed the former on behalf of the widow and minor children of his deceased brother." If it be conceded that the widow, for herself and minor children, had the right to authorize Alfred H. Nelson to employ Evans & Rogers as attorneys, when so authorized he could not, under that agency, legally make a contract with them for the payment of a fee, one third of which he was to receive as assistant attorney in the case. No contract for his compensation as attorney could be legally made, except with his clients. No one can be both principal and agent in making a contract. A transaction of that kind is against public policy. *Wilbur v. Lynde*, 49 Cal. 290, 19 Am. Rep. 645; *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 113. The stipulation in said contract for the payment of the costs of the litigation by Evans & Rogers was against public policy, and rendered the contract champertous, illegal, and void. An attorney who, in the pursuit of his profession, makes an agreement which is so against public policy as the contract herein is guilty of a flagrant breach of professional duty. When Alfred

H. Nelson was appointed administrator, his duties as assistant attorney were within the scope of his duties as administrator; and, after his appointment as such, he was only entitled to such compensation for his services in the case as the court issuing the letters of administration to him might, upon a proper showing, allow. Yet, notwithstanding this fact, after he had become involved, and left the state, and ceased to act as assistant attorney in the case, the contract between Thomas Nelson and Evans & Rogers was entered into, not for the benefit of Thomas Nelson, but for the express purpose of securing to Alfred H. Nelson his share of the fee provided for in his contract with Evans & Rogers. At the date of the former contract Alfred H. Nelson had not performed the stipulations of his contract, and did not propose to do so. It does not appear that either the widow of Charles A. Nelson, or anyone legally authorized to act for the minor children, ever knew of the existence of the contract with Thomas Nelson. Evans & Rogers state in their answer that, when Thomas Nelson failed to perform his contract, "it became and was necessary for the widow of the deceased, Charles A. Nelson, to secure and advance money for their attendance." Evans & Rogers did not, as they had contracted to do with Alfred H. Nelson, pay the costs of the litigation. For what they contracted to do in the premises they were to receive only two thirds of one half of the amount which might be recovered from the railroad; yet, notwithstanding they failed to do all they promised, on the distribution of the funds, they not only put into their own pockets the whole of the fee which they, under the contract, were to receive, but also the fee which Alfred H. Nelson was, under the agreement, to receive through Thomas Nelson, amounting to \$1,793.33, although the services for which one third of one half of the recovery was to be paid were never rendered. Certainly Evans & Rogers were not entitled to more than the amount of the fee which they, by the contract, were to receive. They were not entitled to more than that sum on a *quantum meruit*, as in an action to recover on a *quantum meruit*, notwithstanding their said contracts were void as against public policy, and also void for champerty, their recovery would have been limited to the valuation which they themselves attached to their services in said contracts. Weeks, *Attorneys at Law*, p. 702, note 1. Neither Alfred H. Nelson nor Thomas Nelson was entitled to receive any part or the amount recovered under said contract; therefore as under the provisions of § 2912, Rev. Stat., the widow and minor children of Charles A. Nelson were the beneficiaries of the action against the railroad company, they were entitled to the sum of \$1,793.33 which Evans & Rogers received as an addition to their legitimate fee. This fact is now conceded in the following language of respondents' brief, to wit: "If Thomas Nelson did not perform the consideration he promised, viz., secure the attendance of the nonresident witnesses, then

Evans & Rogers, who by that contract were made trustees of one third of one half of the recovery, would have been grossly derelict in duty,—violating the rights of their clients, the real beneficiaries,—had they paid said Thomas." It appears from the record that Alfred H. Nelson, the administrator, was absent from the state when the order of distribution was made, and, while it does not in express terms appear that Evans & Rogers obtained the order of distribution, it is inferable that they did. Whether they did or did not procure that order, they knew its provisions, and received one half of the recovery, with full knowledge of all the facts in the case. Neither does it appear that the widow, or anyone legally qualified to act for the minor children, appeared or was represented in the proceeding in which said order was granted, or that Evans & Rogers advised the widow, or any representative of the minor children, that the widow and minor children were entitled to \$1,793.33 more than allowed them in the order of distribution.

In support of the demurrer to the complaint in the case of Thomas Nelson against Evans & Rogers on the appeal in this court, A. G. Horne, at attorney of David Evans, presented on the argument a brief in which were cited, among other cases, *Croco v. Oregon Short Line R. Co.* 18 Utah, 321, 44 L. R. A. 285, 54 Pac. 985, and *Lyon v. Hussey*, 63 N. Y. S. R. 531, 31 N. Y. Supp. 281. In the former case this court decided that "under § 3683 [Comp. Laws], it was competent for an attorney and client to agree upon the attorney's compensation, and such compensation may be made contingent upon success, and payable by percentage or otherwise, out of the proceeds of the litigation. But it was not competent for the attorney, in consideration thereof, to agree to pay the advance fees and costs of suit thereafter to be commenced." The contract upon which this decision was based was one made by Evans & Rogers, in which they had agreed, in consideration of receiving 40 per cent of the recovery in that case, to render their services as attorneys, and in addition thereto to pay the costs required to be advanced to the clerk, and to the sheriff for serving the summons, and whatever might be necessary to pay the fares of witnesses from Idaho to the place of trial. By this citation this court's attention was directly called to the fact that the present instance is not the only one in which the respondents have made champertous contracts in the pursuit of their profession as attorneys. In the last-mentioned case of *Lyon v. Hussey*, 63 N. Y. S. R. 532, 31 N. Y. Supp. 281, Mr. Justice O'Brien, in his opinion at special term, said: "It is true that champerty and maintenance are abolished in this state, except so far as preserved by the Revised Statutes, and what remains would not literally touch an agreement such as is here sought to be enforced. Apart, however, from any statutory prohibition, there can be no question but that such an agreement would have been void at common law; and, in addition

to the illegality under the early statutes in this state relating to maintenance and champerty, such an agreement was made a crime. The penalty with the offense having been repealed, and no express statute existing which in terms decrees that an agreement of the character alleged is illegal, it yet remains to be determined whether such an agreement can be enforced. Having in mind the fact that it is void at common law, I do not see upon what ground its legality can be placed, unless some express sanction or authority can be found in some statute or decision which would give it support. Such agreements directly tend to promote litigation, to disturb the peace of individuals, and are directed to subverting the settled policy of this state, when, as shown by the history of the enactments on the subject, more particularly those applicable to attorneys (Code §§ 73, 74), has sought to prevent the stirring up of strife and litigation. Here, concededly, an entire stranger to the transaction obtruded himself into it, and not only instigated a suit, but agreed to procure counsel and maintain the suit, the fruits of which, if successful, he was to share; and, more than this, he undertook to furnish the evidence upon which the recovery was to be assured. Such an agreement is repugnant to every instinct of propriety and justice, and the portion of it which provides for pay as a consideration for procuring evidence should be regarded as immoral, illegal, and void." And Mr. Justice Van Brunt, on the appeal of the case from the special term, said: "It may not be necessary to add anything to the opinion which was handed down upon the decision of the demurrer in the court below, but it may be proper to call attention to the fact that part of the contract, damages for breach of which this action was brought to recover, was to furnish evidence to establish the claim of the defendant in a litigation to be commenced. It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract should never be recognized in any court of justice. The judgment should be affirmed, with costs." In the above case the champertous contract was made by a layman with the plaintiff. Such contracts, when made by an attorney at law in the pursuit of his profession, are still more obnoxious. On the authority of the two cases, thus cited, and others of the same import cited in said brief, we sustained the demurrer. If the respondents had refused to pay the claim made by Thomas Nelson and defeated a recovery for the purpose of protecting the interests of the widow and minor children, it would have been a strong mitigating circumstance in their favor. But such was not their intention. The facts in

the case conclusively show that they resisted the claim of Thomas Nelson in order that they might retain for themselves the amount sought to be recovered. In respondents' answer they failed to state that it was their intention to protect their clients, or that even now they intend to pay to them the amount withheld from them in the disbursement heretofore mentioned. The declaration in the respondents' brief that they were made trustees of that amount for their clients, the real beneficiaries, was evidently an afterthought. At the argument before us, when the attention of respondents' counsel was called to that declaration, one of them, in the presence of one of the respondents, and in the face of the patent facts disclosed in the case, and notwithstanding his name was attached, as an attorney, to said brief, disputed that declaration, and declared that the respondents were entitled to retain the whole sum distributed to them; and although the respondent, who was present, had personally appeared and made an argument on the demurrer to the information, he failed to interpose any objection to the claim of his attorney, or declare that it was then or ever had been his intention, or the intention of his correspondent, to pay to their clients said amount of \$1,793.33, withheld from them in the distribution of the funds.

It appears from the evidence, and the referee found, that Alfred H. Nelson and Thomas Nelson were brothers of the deceased, Charles A. Nelson. These facts were not disclosed in the case of Thomas Nelson against Evans & Rogers, but were presented to his court, for the first time, in the answer and evidence of respondents in the pending matter; and they now contend that these additional facts show that this contract with Thomas Nelson was not champertous. If this were conceded, then the respondents stand before this court, confessing that they induced this court to render a final judgment in their favor on the ground of having been guilty of champerty, when they knew they were innocent. The impropriety of such an attitude is indefensible. As a general rule, no one will be permitted to plead his own wrong in defense of an action; but, in transactions which are prohibited by law or are against public policy, such a defense, as it tends to discourage such transactions, is permissible. Such a defense, however, when sustained, does not condone the wrong, but merely leaves the parties *in statu quo*, and prevents either of the guilty parties from obtaining any relief in the courts of justice. "Champerty renders an attorney amenable to the summary jurisdiction of the court" (Weeks, Attorneys at Law, §§ 87, 88, 850), notwithstanding it may be effective as a defense to the enforcement of a contract. We are of the opinion that, notwithstanding Alfred H. Nelson and Thomas Nelson were brothers of the deceased, under the facts disclosed the contract between Thomas Nelson and Evans & Rogers is champertous. While it is permissible for a near kinsman of a poor suitor, out of charity, to

assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture, based upon an agreement to share in the proceeds of the litigation in case the suit or should recover. Both the law of maintenance and champerty forbid the meddling by any person, not a party to the suit, whatever may be his relation to the suitor, for the purpose of speculation or profit. It is clear that the contract with Thomas Nelson was entered into for the benefit of Alfred H. Nelson, the administrator. Its object was to indirectly obtain for Alfred H. Nelson a share of the fruits of the litigation, as an attorney's fee, which it was not intended that he should earn. The transaction was an attempt on the part of Alfred H. Nelson and Thomas Nelson to secure a profit from the death of their brother, to the detriment of his widow and minor children. The widow and minor children were not parties to the contract, and it does not appear that they were ever informed or knew of its existence. This contract was not only champertous, but also obnoxious because it was against the interests of the widow and minor children, and was entered into by their attorneys, whose obligations as such required them to guard the interests of their clients with strict fidelity. The respondent David Evans testified that he knew nothing about the demurrer until Mr. Rogers, or someone else, told him that it had been sustained. Mr. Rogers testified that he knew the demurrer was interposed, but supposed that "it was a time server;" that after it had been sustained he learned from Mr. Williams that the district court had sustained it on the ground that the contract on its face was champertous; that he thereupon stated to Mr. Williams that he did not want to make that defense, but would rely on the nonperformance of the contract by Thomas Nelson. It further appears from the evidence that afterwards Mr. Rogers proposed to Mr. Williams, who was the attorney for Thomas Nelson, that the judgment on the demurrer should be vacated, the demurrer withdrawn, and an answer should be made raising an issue on the merits, and that a stipulation to that effect, in which Mr. Evans was willing to join with Mr. Rogers, was drawn up and presented to Mr. Williams, who declined to enter into the proposed stipulation. When the case was reached in this court on appeal, A. G. Horne, the attorney for the respondents, at the request of Mr. Rogers withdrew his appearance for him, but not for Mr. Evans. Both of the respondents were aware that the only tenable ground of the demurrer was the champertous character of the contract, in the form in which it was set out in the complaint. The respondent Rogers must have been aware that the said withdrawal would not withdraw the question of champerty from consideration, but that that could only be done by the joint action of both respondents. Both respondents are able attorneys, and of long experience in the practice of law; and if the question of champerty presented by their attorney was contrary to their wishes, and was made in the

first instance without their knowledge, and they were still desirous of withdrawing the question from further consideration, and having the judgment set aside for the purpose of trying the case on its merits, this end could have readily been accomplished by stating to this court, either through their attorney or personally, that the contract, on account of facts not disclosed by the complaint, was not in fact champertous, and that their attorney had raised that question without their knowledge and against their wishes, and requested a reversal of the judgment. If this had been done, this court would not have hesitated to grant the request. But, even if this course had been pursued, it would not have changed either the character of the contract or the acts of the parties, which the evidence before us has fully disclosed. The relation of attorney and client is confidential. The attorney, by his obligation, is bound to discharge his duties to his client with the strictest fidelity. He is not permitted to do anything himself, or permit anything to be done in the pursuit of his employment which he is able to prevent, against the interests of his client. He is amenable to the summary jurisdiction of the court for dereliction of duty, not for the purpose of punishment, "but for the protection of the court, the proper administration of justice, the dignity and purity of the profession, the public good, and the protection of clients." *State ex rel. State Bar Asso. v. Finn*, 32 Or. 519, 52 Pac. 756; *Ex parte Wall*, 107 U. S. 273, 27 L. ed. 556, 2 Sup. Ct. Rep. 569. He is presumed to know what the duties of an attorney are, and cannot plead ignorance, or that in violating a plain duty he did not intend to commit a wrong. The summary proceeding of disbarment is civil, and not criminal. 6 Enc. Pl. & Pr. 709; *Bar Asso. v. Randel*, 158 N. Y. 219, 52 N. E. 1106; *State v. Clarke*, 46 Iowa, 155. In that proceeding, however, more than a preponderance of the evidence is required. The guilt of the attorney must be clearly established. Thomas Nelson stated, and the referee found, that he instituted these proceedings with the hope that it would force the respondents to pay his claim. While this fact might detract from or neutralize the force of his testimony, it cannot excuse the wrongful acts of the respondents. There is no conflict in the testimony regarding the facts found by the referee, except No. 16, or the additional facts enumerated and found by us. These facts conclusively show that the respondents have violated their duties in the several respects mentioned in this opinion.

In *Bradley v. Fisher*, 13 Wall. 355, 20 L. ed. 652, Mr. Justice Field, in the opinion, said: "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profes-

sion, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired."

In view of the facts thus stated, and the facts that the respondents have for a long time maintained good standing before the courts of this state, and are men of good morals, we do not think they should be absolutely disbarred, but that a judgment similar to that rendered in *Re Tyler*, 71 Cal. 358, 12 Pac. 289, 13 Pac. 169, 78 Cal. 307, 20 Pac. 674,—under a statute relating to attorneys, of which the statute of this state on that subject is a transcript, and similar to the one under which the case of *Slemmer v. Wright*, 54 Iowa, 164, 6 N. W. 181, was rendered, should be entered.

It is therefore ordered and adjudged that each of the respondents be deprived of the right to practice as attorney or counselor at law in any and all of the courts of this state until they shall have deposited, or caused to be deposited, with the clerk of this court, subject to the order of this court, the sum of \$1,793.33, with interest thereon at the rate of 8 per cent per annum from the 28th day of December, 1898, up to the date of the deposit, for the use and benefit of the widow and minor children of Charles A. Nelson, and pay the costs of this proceeding, including the special master's fee of \$175, and the stenographer's fee of \$54.40, and if they fail, within sixty days from the date of the entry hereof, to show to this court that they have made such deposit and paid the costs, that then an order be made and entered permanently disbarring each of the respondents, and directing that their names be stricken from the roll of attorneys and counselors at law.

**Miner, J.**, concurs.

**Bartch, Ch. J.**, concurring:

I concur in the judgment herein; the same, so far as it goes, being in accord with my views. I am of the opinion, however, from an examination of the brief filed on behalf of the respondents, and of the record, that the infliction of some punishment other than the mere payment of money by the respondents, which, as now appears from their brief, is admittedly due from them, would be warranted and justified. Where an attorney is guilty of deliberately violating the confidence reposed in him by the court, and his duty to his client, the punishment ought to be commensurate with his wrongdoing. The dignity of the court, the purity of the profession, the peace of individuals, the protection of clients, and the public good alike demand this.

# RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1901, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

## I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

A statutory limitation of the use of low-test petroleum products for illuminating purposes to the apparatus of one maker, where there is other apparatus on the market which is equally safe, is held to be in violation of a constitutional prohibition against the granting to any citizen of privileges or immunities which upon the same terms shall not equally belong to all citizens. (Iowa) 763.

### *Public lands.*

The power of the state to grant land under Lake Michigan for the private use of a railroad company is denied on the ground that its title is held in trust for the whole people. (Ill.) 408.

### *Taxes.*

The imposition, for the construction of bicycle paths, of a tax of a specified amount on all bicycles, which class of property is included in the terms of a statute imposing general taxes on personal property, is held to subject such property to a burden from which other classes are exempt, in contravention of the constitutional requirement that all taxation shall be equal and uniform. (Or.) 454.

An assessment, for a local improvement, upon abutting property according to frontage, is held not to be unconstitutional as a taking of property without due process of law. (Minn.) 421.

The assessment of the capital stock of a corporation for purposes of taxation is held not to be limited to the value of its property other than patents granted by the United States, since, under the Code, the tax is levied, not upon the corporation or its stock, but upon the owners of the shares. (Md.) 417.

Exemption from ad valorem taxation is held not to include exemption from privilege taxation. (Tenn.) 921.

### *Scalping.*

A statute making the sale of a railroad ticket by other than an agent of the company a penal offense is held to be invalid. (Tex. Crim. App.) 349.

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### *Interstate commerce.*

A statute prohibiting the transportation of natural gas out of the state is held to be unconstitutional as an interference with interstate commerce. (Ind.) 134.

### *Fish.*

A statute making it unlawful to fish in any of the streams, ponds, or lakes of the state for brook, speckled, or lake trout, with intent to sell or trade fish so caught, is held not to be unconstitutional as operating to give wealthy sportsmen more than their just and equal share of fish. (N. H.) 314.

### *Police power.*

An ordinance requiring certain food commodities to be sold only in the public markets is held to be within the police power of a city. (La.) 165.

A statute requiring railroad companies to fence their right of way where the same is contiguous to private property is held to be a valid police regulation adopted for the benefit of the general public, and not for the sole benefit of adjoining or contiguous landowners. (Idaho) 744.

### *Railroad rates.*

The right to confer upon a railroad company the exclusive power to fix its rates for the transportation of passengers and freight within a certain maximum is held to be within the power of the legislature, and a subsequent attempt by the legislature to fix such rates is held to be invalid as the impairment of the obligation of a contract. (Mich.) 274.

### *Bankruptcy.*

A debt arising from the sale and collection of the proceeds of property conditionally sold to the vendor with retention of title until the payments were made as required by the contract is held not to be within the provision of the bankruptcy act excepting from the operation of the discharge debts created by fraud while acting as an officer "or in any fiduciary capacity." (Mich.) 801.

A discharge in bankruptcy is held to include liability under a judgment for future

instalments of alimony, where the state law makes the husband an ordinary debtor under such judgment for a fixed sum of money, for which his estate is liable in the same manner that it would be for a debt due upon any contract. (Ky.) 265.

Under a statute requiring debts to be fixed liabilities absolutely owing at the time of filing the petition, to be provable in bankruptcy, claims for unaccrued rent are held not to be provable, where, by the terms of the lease, the rent is to abate in case of destruction of the property, or if the lessee is deprived of its use. (C. C. A. 5th C.) 118.

#### *Poor.*

A statute imposing the duty of providing support and maintenance for indigent relatives in such manner and proportion as the court shall judge just and reasonable is held not to change the moral duty of support into an absolute legal obligation, such obligation not being complete until the court has found the necessity for the aid, the ability to aid, and prescribed to what extent aid shall be furnished. (Conn.) 696.

The constitutional provision for due process of law is held to be violated by a statute charging a town with the maintenance of a pauper upon report of a commission, the members of which are not required to take an oath, or authorized to administer oaths to witnesses appearing before them, or to render any judgment in proceedings brought before them, and whose report was acted upon by the court without independent investigation. (R. I.) 739.

#### *Municipal corporations.*

A statute for the government of cities, based upon classification, is held not to be unconstitutional as local or special, although it was intended, and the classification made, so as to apply to only a limited number of existing cities. (Pa.) 837.

A statute of the legislature providing for the establishment of a board of police commissioners in cities of a certain class, and the appointment thereby of all police officers, is held to be in violation of a constitutional provision that such officers, when not specifically provided for by the Constitution, shall be elected by the voters, or appointed by such city authorities as the legislature may designate. (Wis.) 831.

The extension of the limits of a municipality over a road on which a street-railway company's tracks have been laid under authority of the county is held to subject such road to an ordinance forbidding the tearing up of streets without consent of the municipal authorities; and no contract between the county and the railway company is thereby impaired, where the ordinance merely requires the tearing up of streets to be under reasonable police regulations. (Mo.) 442.

The power of city authorities to require the muzzling of dogs when there is danger of hydrophobia, and to authorize the killing of unmuzzled dogs by the police, is held to be conferred by Indiana statutes. (Ind.) 749.  
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The power of a city council to compel a telephone or telegraph company to put its wires underground is upheld, to the extent of exercising a reasonable discretion, but with a denial of any arbitrary power to make such a requirement unreasonable, where the overhead wires had been placed in the streets under authority of an ordinance constituting a contract. (Minn.) 175.

The use of a hack stand in a street in front of a railroad depot, when authorized by a city ordinance, is upheld against a suit by the railroad company for an injunction. (Ill.) 223.

The liability of a city for establishing a pest house within 1 mile of the city limits in violation of statute is upheld where the city was authorized to provide such an establishment in a proper location, although the statute makes the city officers civilly and criminally liable for the illegal act, but is silent as to any remedy against the city. (Ky.) 145.

A municipal corporation in whose streets a street railroad cannot be operated without its consent is held to have the right in granting the consent to limit the use of the railway to the carriage of passengers, and acceptance of the terms is held to be binding on the company, although it has charter power to carry freight also. (Mo.) 300.

#### *Bill boards.*

An ordinance limiting the height of bill boards to 6 feet unless permission to exceed that height is expressly given by the common council is held not to be unreasonable or an undue restraint on a lawful trade or business, or upon the lawful and beneficial use of private property. (N. Y.) 548.

#### *Poor.*

A private person who has relieved or supported a poor person is held to have no right of action against a municipal corporation to recover for such services, since, in the absence of statute, there is no legal obligation resting on the corporation to maintain or relieve poor persons. (Wis.) 613.

#### *Voters and elections.*

A Federal statute providing for the punishment of everyone who prevents another from exercising the right of suffrage to whom the right is guaranteed by the 15th Amendment is held to be void in its application to state elections. (C. C. A. 6th C.) 660.

#### *Intoxicating liquors.*

See also *infra*, IX.

An ordinance forbidding the keeping of any inclosure in, or connected with, any room where intoxicating liquors may be sold by a licensed dealer, which is or can, by any ingenuity, be used as a lounging or drinking place, or for any immoral purpose, is held to be reasonable and valid. (Minn.) 428.

#### *Waters.*

The right to navigate a stream is held not to include the right to use the banks in aid of navigation, and to fasten booms to trees growing thereon. (Ky.) 790.



II. CONTRACTUAL AND COMMERCIAL RELATIONS.

For Specific Performance, see *infra*, VIII.

An implied warranty against the existence of a lien on trust certificates representing shares of stock in a foreign corporation is held to arise on a sale thereof, and the giving of such certificates by a trust company as agent for the transfer of certificates for an undisclosed principal, when it knew, but the purchaser did not, of the existence of facts which put it upon inquiry as to the existence of such lien. (N. Y.) 153.

*Public policy; illegality.*

An agreement between an employer and his employees that winnings of the employees at games played with each other shall be debited and credited on the respective accounts due to such employees is held to be invalid as against public policy and the statutes forbidding gambling. (Wis.) 648.

An oral agreement between husband and wife to separate and live apart upon consideration that he supports her and her children and absolutely assigns to her insurance policies on his life is held to be void as against public policy, so that she cannot enforce the assignment of the policies. (Wis.) 650.

A stipulation in a contract between attorneys and client, for the payment by the attorneys of the costs of the litigation, is held to be against public policy, champertous, illegal, and void. (Utah) 952.

A contract between a vendor and vendee of personal property to be incorporated as a permanent improvement into the real estate of the latter, which is encumbered by a mortgage, reserving the title to the property sold to the vendor, is held to be invalid as to the mortgagee, where he is not a party to the contract. (Wis.) 603.

*Bonds.*

Failure to disclose to persons signing an agent's bond in ignorance of the fact, that he has been short in his accounts and is retained in his employment only on condition that he pays the shortage and executes a bond, is held to be such a fraud on their rights as will discharge them from all liability on the bond. (Vt.) 510.

One who has furnished to a contractor materials which have not been paid for is held to have no right of action on a contract and bond in favor of a municipal corporation conditioned to erect a plant for it and turn it over free and clear of all claims for materials, where there is neither an intent to secure his claim, nor any contract legally enforceable in his favor. (Wis.) 609.

Recovery on a bond conditioned that a postmaster shall turn over the money received in the money-order department of his office is held not to be prevented by the fact that the money was embezzled, without his fault or negligence, by a clerk holding office under the civil-service rules of the government. (C. C. A. 9th C.) 218.

*Bills, notes, and checks.*

The fact that the principal debtor does not

join in signing the note is held not sufficient to take the case out of the rule that parol evidence is admissible to show that signers of a note did so, with knowledge of the payee, as sureties. (Or.) 908.

A sale of a note held as collateral to another, without notice to the maker of the principal note, is held to be illegal, when made four years after the principal note has matured and has been reduced to a small part of its original amount, although the contract of pledge expressly provides that in case of default the collateral may be sold without notice. (Tenn.) 857.

Mere failure of an indorsee to present a check for payment for eleven months, during which time the maker paid the amount to the payee on his assurance that the check was mislaid and that he would return it when found, is held not to estop him from enforcing payment, where the maker relied wholly on the word of the payee in making his payment. (C. C. A. 3d C.) 432.

*Banks.*

Suspension of a bank, followed by the appointment of a temporary receiver, is held not of itself to mature the deposit accounts, within the meaning of the statute allowing interest on accounts from the date when they become due, but demand is held to be necessary for the purpose. (Colo.) 693.

A cashier's check given to a depositor is held not to make any change in his relation to the bank, or give him any better right than he would otherwise have had as against a receiver of the bank. (Ill.) 232.

*Master and servant.*

The rule that where an employee under an entire contract wrongfully terminates it he cannot recover thereon for services rendered up to the time of such termination is held not to apply where such contract has been terminated by the employer for cause. (Wis.) 826.

*Warehousemen.*

The loss by an incendiary fire of wheat in a warehouse, under a contract calling for its redelivery, "damage by the elements excepted," is held to be no defense to the warehousemen for failure to redeliver it. (Cal.) 673.

*Brokers.*

The concealment of the identity of the purchaser from his principal by a broker is held not to affect his right to commissions where there is nothing in the facts to make the matter important to the principal. (Mass.) 241.

*Factors.*

In the absence of instructions or usage to the contrary, a factor is held to have power to sell the goods of his principal upon a reasonable credit, provided he exercises due care with respect to responsibility of the purchaser and the collection of the price. (Iowa) 775.

*Insurance.*

An insurance company is held to be liable to a husband for the amount of premiums

**RÉSUMÉ OF DECISIONS.**  
(CONTRACTUAL AND COMMERCIAL RELATIONS.)

received by it from his wife for insurance on his life, where the policy was taken without his knowledge, and the money was paid by her out of funds with which he had provided her for household expenses. (Ky.) 817.

An agent employed by an insurance company to do business in another state where the business was at that time held lawful by the authorities is held not to be precluded from recovering for breach of the contract caused by the subsequent insolvency of the company, by the fact that the courts afterwards held the business unlawful in that state. (N. J.) 449.

Under a statute giving a woman an insurable interest in her brother's life, a sister who, with her children, is living with and supported by her brother, is held to be entitled to the benefit of a statute permitting him as head of a family to expend a certain sum each year for insurance for her benefit free from the claims of his creditors. (Mo.) 438.

A provision in an insurance policy for the issuance of a paid-up policy for such an amount as the reserve will purchase "upon surrender of this policy within six months" after lapse for nonpayment of premiums is held not to make time of the essence of the contract, but, the consideration having been paid, the insured is entitled to the policy, although he does not apply therefor until nearly five years after making default. (Ky.) 378.

A policy of life insurance issued on the life of a minor is held not to be invalid as a wagering contract, although it is induced by a third person who has no insurable interest in the life of the insured, and who joins in a promise, evidenced by promissory notes, to pay the premiums, and although the policy is assigned to the company as collateral security for a loan made to such third person. (Ohio) 462.

A policy containing a clause making it incontestable after two years from date of issue is held not to be contestable after that time, even for false and fraudulent answers in the application. (R. I.) 742.

Life policies of foreign companies which do not take effect until delivered to the insured and premium paid by him are held subject to statutes regulating forfeitures in case of default after two full annual premiums have been paid, although the policies expressly provide that they shall be governed by the law of the state in which the corporation has its home office. (Mo.) 305.

Death of a woman caused by voluntary submission to an operation for abortion is held to result from a violation of criminal law within the meaning of a policy of insurance; and it is also held that the rules of public policy would prohibit insurance against such a risk. (Pa.) 327.

The existence of a disease in the applicant at the time of taking out a life insurance 53 L. R. A.

policy, of which he is entirely unconscious, is held not to avoid the policy, although in his application he denies having disease, and agrees that any untrue statement shall render the policy void. (C. C. A. 5th C.) 193.

*Carriers.*

A mere general limitation as to value, expressed in a bill of lading and amounting to no more than an "arbitrary preadjustment of the measure of damages," although the shipper assents in writing to the terms of the document, is held not to exempt a negligent carrier from liability for the true value. (Ga.) 720.

A penal statute requiring ticket offices and waiting rooms to be kept open at least thirty minutes before the departure of a passenger train from a regular passenger depot is held not to require such rooms to be kept open for night trains, when the ticket office has never been opened for them, and no extra fare charged thereon for failure to have a ticket. (Ky.) 149.

One who boards a train which he should know does not stop at the station for which he has a ticket, and who refuses to pay the additional fare to the first stopping place upon the conductor's demand, is held to be a passenger within the meaning of a statute requiring ejection of passengers at usual stopping places. (Ark.) 220.

An employee of a passenger railway company, who accepts transportation from the company as a mere gratuity, and not in consideration for his services, is held to stand like anyone else traveling on a free pass conditioned that the user shall assume risk of injury, notwithstanding the transportation would probably not be bestowed in the absence of the employment. (Wash.) 586.

*Contracts of married women.*

A promise of a married woman to indemnify a surety of her husband, though made after a statute authorizing such contracts, is held to be void for lack of consideration, where it was merely a renewal of a void promise made before such statute. (Ky.) 353.

A wife who mortgages her property for her husband's debt is held to be a mere surety who is discharged by an agreement for the extension of the debt made without her consent. (N. C.) 316.

*Definiteness of contract.*

A contract to take press reports at not more than \$300 per week is held too indefinite to sustain a recovery for anything more than nominal damages. (N. Y.) 288.

*Covenants.*

A covenant by a partnership in selling its business, binding the partners not to engage in business again within a certain distance of the old stand, is held to be broken by one partner's so engaging, so as to render him liable for the breach. (D. C. App.) 397.

### III. CORPORATIONS AND ASSOCIATIONS.

As to Assessments on Stock, see *supra*, I.  
As to Limitation of Actions, see *infra*, VIII.

A corporation organized for the production of oil and gas is held to be rightfully deprived of its franchise where it enters into an agreement with a rival company fixing the price to be charged for gas in a certain city in which their pipes are laid, and binding it to refuse to supply gas to customers supplied from the rival's pipes. (Ind.) 413.

A corporation, such as a street-railway company, buying the property and franchise of another, not intending consolidation, is held not to be responsible for the older company's liabilities. (D. C. App.) 390.

#### *Stock and stockholders.*

Holders of stock who paid for it with property at an excessive valuation are held not to be liable for the difference between the value of the property and the par value of the stock, to a creditor of the company who became such, with full knowledge of the

facts as to the payment for the stock, or to an assignee of such creditor, who purchased overdue notes of the corporation. (Iowa) 136.

A shareholder in a bank is held not to be precluded, by reason of his relation to the bank, from recovering back a deposit fraudulently taken by the bank when insolvent. (C. C. A. 5th C.) 113.

The transfer by a corporation on the signature of the trustee of stock held in trust, without any inquiry for the *cestui que trust* or for his assent to the transfer, is held to constitute actionable negligence. (C. C. A. 8th C.) 684.

Dividends on stock held in trust under a will to pay the income to life tenants are held to be properly distributed as income, although made from a sinking fund which had mostly been accumulated during the testator's lifetime for the purpose of meeting the corporation's obligation as indorser on bonds, from which it was finally relieved. (Md.) 169.

### IV. DOMESTIC RELATIONS.

As to Validity of Contract of Separation, see *supra*, II.

As to Conveyance of Real Property by Married Women, see *infra*, VII.

As to Dower Rights, see *infra*, VII.

A father is held not to be liable for services rendered in tutoring during vacation time his minor son who lives with him and is supported by him, where the father is not consulted about, and does not consent to, the employment. (R. I.) 192.

#### *Custody of infant.*

The custody of a child is held to be properly taken from its grandparent and given to its parent when the latter is of moral habits and reasonably able to insure the child from want and positive distress, although the grandparent possesses fortune, character, kindness, and affection for the child, and the child prefers to remain with the grandparent. (Ky.) 784.

### V. FIDUCIARIES AND REPRESENTATIVES.

A common-law receiver of leasehold property is held not to be liable for rents accruing while he is in possession of the property,

since he acquires no title to the property, but mere possession as an officer of the court. (N. Y.) 870.

### VI. TORTS; NEGLIGENCE; INJURIES.

One who wrongfully enters a blacksmith shop and kindles a fire in the forge is held to be liable for the consequential injuries caused by the fire spreading and destroying the building and personal property therein. (Mich.) 626.

A steamship company is held not to be liable for the nondelivery to a passenger of a telegram which the captain has taken for him, where no habit or custom is shown,—no holding of the captain out to the world as having authority to do such an act. (Me.) 239.

#### *Telegraph companies.*

An agent of a telegraph company in charge of an office at which a message is tendered for transmission is held not to be bound to know the time of closing of the terminal office so as to charge the company with negligence in case the message is received after such office is closed. (R. I.) 732.

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Transmission of a telegram at a time when a storm has made the wires work badly is held not to be gross negligence, if when it is actually sent the wires are in good working order, and the statute requires the forwarding of messages at the earliest practicable moment. (Cal.) 678.

#### *Sale of drug.*

A druggist is held not to be guilty of negligence in selling to customers proprietary medicines in the package and under the label of the proprietor or patentee, without making an analysis of the contents. (Pa.) 329.

#### *Intoxicating liquors.*

A person managing and controlling a public place of amusement to which he invites the public on payment of an admission fee, who sells intoxicating liquor to one in attendance at such place, and thereby renders him drunk and disorderly, well knowing that when in that condition he is liable to commit assaults upon others, is held to be

bound to exercise reasonable care to protect his other patrons from such assaults, and to be liable in damages for failure to do so, at the suit of one assaulted. (Minn.) 803.

*Landlord and tenant.*

A landlord, though not an insurer of the safety of premises which are about to be let, who knows that they are defective and in a dangerous condition, and does not inform the tenant of such defects, is held to be liable for an injury thereby occasioned to the tenant of a member of his family. (Kan.) 778.

A landlord who agrees with his tenant to put an automatic fire extinguisher in the leased building is held not to be able to relieve himself from liability for injury to the tenant's property caused by negligence in using apparatus the vents of which open at too low a temperature, by employing a competent independent contractor to do the work. (Mich.) 285.

*Contributory negligence.*

Contributory negligence, however slight, of a person injured by being struck by a street car, is held to preclude his recovering from the street-railway company on the ground of negligence. (Wis.) 618.

*Libel.*

The action of a priest in the discharge of his duties and office, in conducting the public functions of his calling, is held to be the proper subject of comment in the public press, for which, within proper limits, an action for libel will not lie. (Iowa.) 235.

*Loss of passenger's baggage.*

The loss of a passenger's valise entrusted to employees of a sleeping-car company while he was asleep in his berth is held to make the sleeping-car company liable unless it is shown that reasonable care was exercised by the employees for the protection of the property. (Ala.) 690.

*Fraud.*

Liability for deceit on the part of a landowner making false representations as to quantity in the tract, on which a purchaser relies to his injury, is held not to be properly predicated upon the fact that, from the means of knowledge accessible to him, he might have known the statements to be false, if he in fact believed them to be true. (Iowa.) 769.

Recovery for improvements put upon land under an oral promise of a conveyance is upheld on the ground of fraud, when the promise is repudiated after the improvements are made. (N. C.) 337.

*Injury to person in track.*

A railroad company is held to be liable for the killing of a boy by its train only in case of gross negligence, where he was trespassing on a track remote from a public highway, at a place where those in charge of the engine had no reason to expect him to be. (Mich.) 271.

A boy escorting across a railroad bridge a young girl, who falls in attempting to escape from an approaching train, is held not to be guilty of contributory negligence in remaining on the bridge and attempting to rescue her. (Ky.) 267.

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A railroad company is held to be liable for causing the death of an infant upon its track, if the direct and proximate cause of the accident was negligence in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury. (S. C.) 913.

*Injury to trespasser on train.*

A railroad company is held to have no right to eject from its train a boy ten years old who is trespassing on it, or cause him by fright or fear to leave the train, while it is in rapid motion, so as to endanger his life. (Pa.) 330.

*Injury to servants.*

A locomotive fireman who, after complaining of the absence of a shield on the glass indicating the oil supply for the cylinder, the presence of which is necessary for his safety, and receiving the engineer's promise to fix it, leaves the terminal station where the shield can be procured, and proceeds on a trip, knowing that the promise has not been and cannot be fulfilled until the return, is held to assume the risk of injury from its absence. (Wis.) 653.

A servant operating a mangle in a laundry is held not to assume, as matter of law, the risk of her hand passing under the guard rail into the rollers, where the rail is adjusted by the employer so as to afford some protection, the employee is forbidden to interfere with the adjustment, and the improper adjustment is not obvious. (Or.) 459.

Assault committed by an overseer upon an infant employee is held to render the master liable, where, by conduct extending over a period of years, the overseer has established a reputation for being high-tempered and cruel to children and other help, and therefore incompetent for the position in which he is placed. (N. C.) 852.

A contractor's employee is held not to assume the risk of the services, and not to be guilty of contributory negligence as matter of law in obeying the contractor's order to go into a narrow trench which has been run under the foundation of a chimney, where he is unacquainted with the actual perils of the situation, and no perils are visible. (N. Y.) 877.

*Injury to servant of other person.*

A railroad company is held not to be liable to an employee of an ice company, who was injured by falling from the top of a car which he was storing with ice, either because the car was left on a curve which caused it to incline sideways, or because the roof was slippery with ice, since these were not defects in the premises the duty to remedy which the railroad company owed to persons impliedly invited to its premises. (Tenn.) 474.

*Independent contractor.*

Negligence of an independent contractor employed to repair chimneys on a house is held not to be chargeable to the owner in case it results in injury to a person on the highway, caused by falling bricks. (Mass.) 172.

The reservation by a municipality in let-

ting a sewer contract of the right to change, inspect, and supervise, is held not to render it liable for negligence of the independent contractor, provided the plan is reasonably safe, the work is lawful, and there is no interference therewith by municipal officers. (N. Y.) 550.

*Electric companies.*

A new question as to the liability of a company supplying electricity to the wires of a street-railway company is decided in a case which holds that the company supplying the electricity, as well as the street-railway company, is chargeable with the duty to see that the wires are properly insulated, and liable for failure to do so. (Ky.) 147.

*Nuisance.*

The right to conduct water from a roof across a sidewalk in such a way that it freezes and renders the walk dangerous to public travel, thereby creating a public nuisance, is held not to be acquired by prescription. (Mass.) 891.

*Dangerous weapons.*

A parent who permits his child to have possession of a deadly weapon, when from youth or mental weakness by the use of intoxicants he is incompetent to be intrusted with it, and the parent knows the danger, or in the exercise of reasonable care should know it, is held to be liable for injuries inflicted upon other persons by the child's discharge of the gun. (Ky.) 789.

*State institutions.*

Injuries caused to a prison guard by a defective ladder which he was compelled to use by the officers in charge of the state's prison is held not to render the state liable, since the state's prison is a mere agent of the state in the administration of its government. (N. C.) 855.

*Defect in sidewalk.*

The building of a step in a sidewalk is held not to be of itself such negligence as will make the municipality liable for injuries to a pedestrian caused thereby. (Ky.) 791.

VII. PROPERTY RIGHTS; WILLS; LIENS.

A conveyance by a married woman of real property which was deeded to her by her husband without consideration paid from her separate estate, and in the absence of a statute changing the rule that she acquired only an equitable title by the deed, is held not to carry the covenants in the deed under which her husband acquired title. (Wis.) 644.

*Riparian rights.*

The right to take seaweed stranded on the beach below high-water mark is held to belong to the owner of the upland, and he is held to have a right of action for trespass against one who removes it without his consent. (R. I.) 333.

*Dower.*

A sale by a man of the undivided interest which he holds in common in a tract of land, followed by a partition by the tenants in common, is held not to bar the dower rights of his wife, who did not join in the deed. (S. C.) 918.

*Pictures.*

Machinery not manufactured especially for a building, but of a kind which can be purchased generally in the market, is held not to become, in favor of a mortgagee, part of the realty by being attached by bolts and screws to the building, if it is not intended to become part of the premises, and can be removed without any material injury to or alteration of the building. (Wash.) 600.

*Mines.*

In case the apex of a vein entering across the end line of a mining claim passes out across the side line the right to follow the dip of the vein is held to be limited by a vertical plane passing downward through the point where it leaves the side line, parallel with the end line of the claim. (Mont.) 491.

An underground discovery of mineral through a tunnel not claimed under the tunnel-site act of Congress on a vein the apex 53 L. R. A.

of which is calculated from its dip, but which has never been opened on the surface or shown by actual working to have its apex within the limits of the claim as staked, is held to be sufficient to sustain a surface location of a mining claim. (Colo.) 793.

*Adverse possession.*

A tenant not under any duty or obligation to pay taxes on rented land is held to have a right to purchase the land at tax sale, and thus acquire an adverse title as against his former landlord. (Kan.) 934.

A claim of title, or specific intent to make the land his own, is held not to be necessary to perfect the title of one in adverse possession of real estate for the statutory period. (Conn.) 609.

Entering into possession of a portion of a cemetery lot and erecting a substantial iron fence, so as to divide the part so claimed from the remainder of the lot is held to be, as to that peculiar character of property, an act showing adverse possession of a public nature which amounts to an actual ouster of others claiming to be tenants in common with the possessor. (Ga.) 729.

A landowner for whose benefit a railroad company has constructed and maintained a crossing over its track, who for more than fifteen years uses such crossing in passing from one part of her farm to another, is held not to acquire thereby a prescriptive right to the same, but to be a mere licensee. (Kan.) 781.

*Mortgage.*

A purchase for full value from the mortgagee who purchased at foreclosure sale under a purchase-money mortgage, made without collusion, is held to give a man a good title, to the exclusion of his minor children, to property of the equity of redemption of which his wife died seized, leaving surviving her the husband and children, where none of the survivors were able to pay the

accrued interest to avoid the sale and the value of the property did not exceed the amount of the judgment. (N. Y.) 884.

A mortgagor of chattels, who, under an agreement with the mortgagee, sells the property for the purpose of applying the proceeds in payment of the mortgage debt, is held to be the agent of the mortgagee, who is bound by his representations and warranty as to the quality and condition of the property sold. (Minn.) 174.

#### *Tradename.*

Failure, for a period of ten years, of a retail dealer to protest against the use in the wholesale business of a tradename which conflicts with the name under which his business is conducted, is held not to deprive him of the right to restrain the use of such name in a rival retail business. (Cal.) 384.

#### *Will.*

Upon the question of the procurement of a will by undue influence, evidence that, sixteen years before it was executed, proponent entered testator's family, brought about an estrangement between him and his wife which resulted in a divorce, and subsequently married him, is held not to be admissible. (Colo.) 387.

In case a trustee has power to change investments under a will establishing a fund the income of which is to be paid to one for life with remainder over, it is held to be his duty to reserve from the income a sinking fund to offset the premium on bonds purchased, and to keep the principal intact. (N. Y.) 544.

Nonexistence of remaindermen of the first class under a will leaving property in trust to one for life, with remainder to his children, with remainders over, is held not to prevent the sale of realty so as to bind such remaindermen should they come into being, if the life tenant and the living remaindermen of the other classes are before the court. (Tenn.) 477.

The vesting of title to real property of a married woman in her husband at her death because of his refusal to procure someone to draw her will, by which she wished to devise the lands to third persons, is held to be a sufficient consideration for his promise to hold it in trust for them, so that they may enforce the promise. (Ind.) 753.

### VIII. CIVIL REMEDIES.

#### *Joinder of parties.*

A joint liability against the owner of property abutting on a street and the municipality is held to exist, where he negligently suffers rainwater to be discharged from defective pipes on his roof, so that it freezes and forms a dangerous condition of the sidewalk, which is permitted to remain for an unnecessary period, until a passer-by falls and is injured. (Mo.) 805.

A municipality and an abutting property owner are held not to be properly joined as defendants in an action to recover damages for injuries caused by a defective sidewalk. (Pa.) 469.

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#### *Descent and distribution.*

In the distribution of the estate of an intestate a first cousin of the half blood on the maternal side is held to take the estate in preference to a second cousin of the whole blood. (Ga.) 723.

A statute providing that when a person shall be sentenced to imprisonment for life his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead is held not to cast the descent of his property upon his heirs, by the fact of such sentence and imprisonment. (Kan.) 141.

#### *Legacies.*

A legacy to the "Board of Managers of the Foreign Missionary Society for the Methodist Episcopal Church" for the education of girls in India, no body of that name being in existence, is held to be properly paid to the Woman's Foreign Missionary Society of said church, that being the only foreign missionary society in the Methodist church that is engaged in the particular work to which the legacy is devoted. (Md.) 711.

#### *Dead body.*

The next of kin of a deceased person is held to be entitled to the possession of the body for purposes of burial; and it is also held that one cannot by will confer any rights as to the disposition of his dead body. (Cal.) 221.

A man who has consented to the burial of the body of his deceased wife in the lot of another is held to have no right to enter upon the lot and remove the body. (Ma.) 238.

#### *Precatory trust.*

A clause in a will of a merchant expressing the desire that a certain person be retained in the employ of the firm is held to create no precatory trust which can be enforced against his widow after she has purchased the business and is carrying it on alone. (Ky.) 377.

#### *Lien.*

A grantee of a judgment debtor is held to be entirely free from the lien of the original judgment after a scire facias thereon in which a new judgment of fiat is entered, though by reason of being omitted as a party thereto the new judgment creates no lien against him. (Md.) 702.

#### *Removal of causes.*

In an action removed by defendant to a Federal court it is held that the complainant may take a voluntary nonsuit and begin another action in the state court for a less sum than will entitle defendant to removal. (Tenn.) 931.

#### *Action for death.*

The injury to a parent by the negligent killing of his son who is under contract to support him, thereby preventing performance of the contract, is held to be too remote to form a basis for recovery on behalf of the parent, in the absence of wilful intent to injure the parent. (Mo.) 811.

*New trial.*

In an action for damages the trial judge is held to have no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where the excess can be accurately ascertained. (Ga.) 210.

*Accounting.*

An undertaking by two lawyers not general partners in the practice of law to conduct litigation for a client, followed for a time by equal division of the compensation paid for the services, is held not to render them special partners so as to give equity jurisdiction of a suit for an accounting in case one of them subsequently receives and retains the greater share of such compensation. (Or.) 904.

*Damages.*

The measure of damages for furnishing an imperfect and unskillfully made cylinder for a cotton compress, on account of defects in which an accident occurs causing the loss of the use of the compress for the entire season, is held to include its rental value for the season. (Tenn.) 482.

The purchase by the vendor, at a public auction sale, of a yacht, made after the vendee has refused to complete his contract to purchase, is held not to prevent the price at which the property was struck off from being taken as the basis for assessing the damages for the breach, where the sale was duly advertised and made upon notice to the vendee. (N. Y.) 867.

Loss of anticipated profits is held to be recoverable in a proper case for breach of contract, in addition to, and not merely as a substitute for, the recovery of expenditures and the value of time and services spent in reliance on the contract. (C. C. A. 5th C.) 33.

*Evidence.*

The act of Congress of 1898 providing that certain written instruments shall not be received in evidence in any court unless stamped as required by the act is held to be applicable to Federal courts only, since Congress has no power to prescribe rules for a state court. (Ga.) 130.

Entries in bank books, not made by the cashier, are held to be inadmissible against sureties on his bond, when there is no proof as to who made them, that the one making them was dead or beyond the jurisdiction of the court, or that they were made in the usual course of business at the time of the transactions recorded. (N. Y.) 513.

*Garnishment.*

Money deposited by a third person with a justice of the peace as bail for one who has been committed by the justice, and which is receipted for to him, is held, until the contrary is shown, to presumably belong to such third person, and not to be subject to garnishment for the prisoner's debt after the latter's discharge. (Wash.) 597.

*Replevin.*

Right to maintain an action of replevin to recover goods obtained by fraud is denied, where, before the commencement of the action, the goods had been taken from defendant's possession on an execution in favor of a third person, and sold without any collusion on his part. (N. Y.) 565.

*Specific performance.*

Performance of services, such as superintending repairs on a building, procuring tenants, and collecting rents, is held not to be sufficient to entitle one to specific performance of an oral promise, in consideration of such services, to convey an interest in the land for which the property shall be exchanged. (N. Y.) 556.

*Writs.*

A mistake in the Christian name of a defendant who is duly served with process is held not to prevent the court from acquiring jurisdiction of him, if at the time the summons is served on him he is duly apprised that he is the person intended to be named therein, where the statutes provide for correcting mistakes in the names of parties as they appear in the summons. (N. Y.) 562.

*Limitation of actions.*

That money is obtained by fraud is held not to prevent the running of the statute of limitations against an action to recover it back, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer. (Pa.) 849.

The suit by a private individual for private injuries inflicted upon him by the maintenance of a public nuisance is held to be barred by lapse of time. (Wis.) 895.

A statute of limitations against the liability of a stockholder to creditors of the corporation on his unpaid stock subscription is held to begin to run at the time the corporation becomes insolvent as shown by an assignment for the benefit of creditors. (Pa.) 471.

IX. CRIMINAL LAW AND PRACTICE.

The sending of the original indictment forward to the circuit court upon remission of a cause into it from the district court under the provisions of U. S. Rev. Stat. § 1037, is held not to be such an irregularity as will defeat the jurisdiction of the former court. (C. C. A. 1st C.) 568.

*Evidence.*

Evidence of the finding of money at a place named in a confession is held inadmissible against an accused person, where the confession itself was inadmissible because it was not voluntary. (Miss.) 402.

*Conspiracy.*

One who engages in a conspiracy to commit an unlawful act, but not one requiring a depraved, wicked, or malignant spirit, is held not to be guilty of murder, where in carrying out the common design a conspirator kills a person, unless his will assented thereto. (Ky.) 245.

*Malicious prosecution.*

A termination of a prosecution for obtaining money by false pretenses, in favor of defendant, which will support an action for malicious prosecution, is held not to be effected by his discharge secured by an agreement by which defendant, who insists on a postponement, which is objected to by plaintiff, agrees to pay the amount found due by his accounts, and half the costs. (Del.) 715.

*Insane persons.*

A trial of the question of the sanity or insanity of a person sentenced to death, on a claim that he has become insane after sentence, is held to be in the discretion of the court, which is not subject to review. (Wash.) 584.

Sanity of an accused being presumed, it is held that he has the burden, in the first  
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instance, to offer proof sufficient to raise a reasonable doubt on the question, and thereupon the prosecution must establish his sanity beyond a reasonable doubt. (Okla.) 814.

*Libel.*

Naming a person with whom plaintiff has committed adultery, in a cross bill in a divorce proceeding before a court having jurisdiction of the parties and subject-matter, is held to be absolutely privileged. (Mo.) 445.

*Intoxicating liquors.*

Forfeiture of a liquor-tax certificate for criminal acts is held not to be legally authorized, by legislation, upon failure of the holder to deny under oath the allegations of the petition, without any proof of the commission of the acts constituting the offense. (N. Y.) 888.



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1. Where both the parties to a case move for a new trial, the granting of either motion leaves the case pending in the lower court, and while it so remains a judgment overruling the other motion cannot be lawfully brought to the supreme court for review. Central of Ga. R. Co. v. Murphey & Hunt (Ga.) 720

#### Decisions reviewable.

2. An order entered upon motion, setting aside a judgment entered upon the verdict of a jury, and granting a new trial unless the party in whose favor the judgment was entered submits to a specified reduction 53 L. R. A.

thereof, is an intermediate order which is reviewable without any exceptions thereto, under Ky. Rev. Stat. 1898, § 3070, on appeal from a judgment which is entered in accordance with the order, with his consent, for the reduced amount. Hildebrand v. American Fine Art Co. (Wis.) 826

3. The discretion of the trial judge in denying a motion to set aside the report of physicians to the effect that the condition of a person sentenced to death was the same as at the time of the trial, and refusing to submit the question of his sanity or insanity for determination by a tribunal before which the convict might be represented by counsel and produce witnesses, is not subject to review by appeal. State v. Nordstrom (Wash.) 584

#### Record and case in appellate court.

4. A motion for judgment on the pleadings is not part of the record, and can only be made part of the record, so as to be considered on appeal, by a bill of exceptions. Sternberg v. Levy (Mo.) 438

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5. A motion for a new trial is not necessary to preserve the right to have a review in the appellate court of the action of the trial court in striking out on motion a portion of a pleading. Id.

6. A statement by the clerk in the transcript, that motions were filed for judgment on the pleadings, is not sufficient to bring the motions before the appellate court for consideration, if they do not appear in the transcript and were not made part of the record. Id.

7. The appellate court will not review a discrepancy between an indictment charging misapplication of funds on September 1, 1893, and proof showing the transaction to have been on November 1, 1894, where no exception was taken with reference to it, and there is nothing to show that any practical injustice was done by it in the trial of the cause. Jewett v. United States (C. C. A. 1st C.) 568

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8. The granting of a preliminary injunction in an action to enjoin the abstraction of ore in alleged violation of plaintiff's mining claim is so largely a matter of discretion that it will be sustained upon appeal, where there has been a reasonable showing made in support of the application in the court below. Parrot Silver & C. Co. v. Heinze (Mont.) 491

9. Error in refusing to allow the cross-examination of a witness may be cured by subsequently permitting such cross-examination. Mason v. Southern R. Co. (S. C.) 913

10. If a party accept a privilege granted to take judgment, upon the theory that all facts warranting a more favorable judgment are established against him, he cannot thereafter change his attitude as to the

existence of such facts, for the purpose of preventing a review of any question legitimately arising thereon, on an appeal from such judgment. *Hildebrand v. American Fine Art Co. (Wis.)* 826

**Who may be heard.**

11. The question of costs allowed by the trial court will not be considered on appeal, at the instance of the party prevailing in the trial court, where no appeal was taken from the judgment upon that question. *Carney v. Hennessy (Conn.)* 699

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12. The appellate court will not interfere with the jury's adoption, as a basis for their verdict, of one of several theories as to the cause of an accident, where it is reasonably deducible from the evidence. *Livermore Foundry & M. Co. v. Union Compress & Storage Co. (Tenn.)* 482

13. That the trial court found in accordance with the testimony of one witness against that of three others is not ground for exception. *Condon v. Pomroy-Grace (Conn.)* 696

14. A finding by the trial court that certain land is overflowed with back water from a dam, which is supported by a fair preponderance of the evidence, will not be disturbed by the appellate court. *Charnley v. Shawano Water-Power & R. Improv. Co. (Wis.)* 895

15. A finding by the trial court that there is not any doubt of the sanity of the accused, upon which it refuses to impanel a jury to try that question, has the same effect on appeal as a verdict of a jury against the accused. *Maas v. Oklahoma (Okla.)* 814

16. The appellate court will not review a finding of the trial court that an agent for liquidating the affairs of an insolvent bank misapplied its funds by declaring and paying a dividend on stock belonging to himself, while he claims that it belonged to a third person, where there was persuasive evidence to go to the jury in favor of the finding, among which was the nonproduction of the check by which the money was paid, and the existence of uncollected indebtedness of the third person to the bank of more than the amount of the dividend. *Jewett v. United States (C. C. A. 1st C.)* 568

**Prejudicial errors.**

17. Refusing to allow a witness to answer a question which calls for an expression of opinion will not warrant reversal, even if erroneous, when it was harmless. *Mason v. Southern R. Co. (S. C.)* 913

18. An inapplicable illustration in an instruction to the jury is not prejudicial error, if it is not such as to mislead them. *Id.*

19. A technical error in saying that an infant sixteen months old could not be a trespasser is not prejudicial error in an instruction to the jury as to the killing of the infant by a train, when the remarks of the judge draw the attention of the jury to the distinction between the infant and an adult, and state that such an infant could not be guilty of contributory negligence, and does not know right from wrong. *Id.*

*Id.*

20. An instruction permitting one charged with conspiracy to murder to be found guilty as an accessory before the fact, whether he was present at the time of the shooting or not, is not prejudicial error where there is no evidence that accused was present. *Powers v. Com. (Ky.)* 245

21. A refusal to instruct a jury in accordance with suggestions contained in special questions presented for submission to them, or the giving of instructions in regard to a particular subject, is not reversible error, if, by the verdict rendered, it is clear that the facts necessary to the applicability of such instructions given or refused did not exist. *Teach v. Milwaukee Electric R. & Light Co. (Wis.)* 618

22. A correction of an instruction during the argument is not ground for reversal, when it merely adds what has been impliedly expressed in another instruction, although amendments should not ordinarily be made after the argument. *Henderson v. Clayton (Ky.)* 145

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23. An appeal by a purchaser of a pledged note at an invalid sale of it, from a decree allowing his claim against the estate of an indorser only for the amount which he paid for the note, and denying his right to the face value, brings up the question of his title to the note, and authorizes the court to reverse the decree, not only so far as it is against him, but also that part of it which is in his favor. *Moses v. Grainger (Tenn.)* 857

**Rehearing.**

24. A motion for a new trial for newly discovered evidence cannot be considered on a petition to rehear on appeal, even if due diligence has been shown. *Fleming v. Borden (N. C.)* 316

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See also ESTOPPEL, 1.

1. The relation of attorney and client is

confidential. The attorney by his obligation is bound to discharge his duties to his client with the strictest fidelity, and he is amenable to the summary jurisdiction of the court for dereliction of duty. *Re Evans* (Utah) 952

2. An attorney who, in the pursuit of his profession, makes an agreement which is against public policy, is guilty of a flagrant breach of professional duty. *Id.*

3. A party employed to act as agent in securing the services of attorneys cannot contract to receive a portion of the fees himself as assistant attorney. He cannot be both principal and agent, for such a transaction is against public policy and void. *Id.*

4. Champerty renders an attorney amenable to the summary jurisdiction of the court, notwithstanding it may be effectual as a defense to the enforcement of a contract. *Id.*

5. The summary proceeding of disbarment is civil, not criminal, but requires more than a preponderance of the evidence. The guilt of the attorney must be clearly established. *Id.*

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1. A bankruptcy trustee has sufficient interest to be entitled to contest the claim of the bankrupt's landlord to a lien on the assets for rent. *Atkins v. Wilcox* (C. C. A. 5th C.) 118

2. A petition for bankruptcy filed by a tenant at a time when there is no default in payment of rent notes does not mature the notes for the remainder of the term, so as to give the landlord a lien on the bankrupt's assets for their amount, under a provision in the contract that upon failure to pay rent punctually the rent for the unexpired term shall at once become due and exigible. *Id.*

3. Under a statute requiring debts to be fixed liabilities absolutely owing at the time of filing the petition, to be provable in bankruptcy, claims for unaccrued rent are not provable, where by the terms of the lease the rent is to abate in case of destruction of the property or the lessee is deprived of its use. *Id.*

#### Discharge.

4. A discharge in bankruptcy includes liability under a judgment for future instalments of alimony, where the state law makes the husband an ordinary debtor, under such judgment, for a fixed sum of money for which 53 L. R. A.

his estate is liable, in the same manner that it would be liable for a debt due upon any contract. *Fite v. Fite* (Ky.) 266

5. A debt arising from the sale and collection of the proceeds of property conditionally sold to the vendor, with retention of title until the payments were made as required by the contract, is not within the provision of the bankruptcy act excepting from the operation of the discharge debts created by fraud, etc., while acting as an officer "or in any fiduciary capacity;" but the discharge will reach it under the other provisions of the act. *Bryant v. Kinyon* (Mich.) 801

6. A surety on a capias bond in a suit to hold the principal liable for selling and converting the proceeds of property sold to him on condition cannot be held after the principal has been discharged in bankruptcy. *Id.*

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Laches as to Deposit, see LIMITATION OF ACTIONS, 6.

1. A shareholder is not, by reason of his relation to the bank, precluded from recovering back a deposit fraudulently taken by the bank when insolvent. *Richardson v. Olivier* (C. C. A. 5th C.) 113

2. A cashier's check given to a depositor as a mere acknowledgment of indebtedness on the part of the bank to him, being in legal effect the same as a certificate of deposit or a certified check, does not amount to an assignment to him by the bank of the amount of the check, so as to give him any better right against the receiver of the bank than he would have had by reason of his original deposit. *Clark v. Chicago Title & T. Co.* (Ill.) 232

3. An agent appointed to wind up the affairs of an insolvent bank is subject to indictment under U. S. Rev. Stat. § 5209, in case he wilfully misapplies its funds, although such office was not created by statute, since it has long been recognized as permitted by law, and the word "agent" is used in the statute as descriptive of those subject to its provisions. *Jewett v. United States* (C. C. A. 1st C.) 568

4. That an agent to wind up the affairs of an insolvent bank was appointed by vote of the stockholders does not make him their individual agent, rather than the agent of



the corporation, so as to take him out of the provisions of U. S. Rev. Stat. § 5209, which provides for the punishment of agents of banks who misapply the bank funds. *Id.*

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A bicycle path constructed with the proceeds of a tax on bicycles is a highway for bicyclists and pedestrians. *Ellis v. Frazier (Or.)* 454

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1. Charter authority to license bill posters and prescribe the terms and conditions upon which any such license shall be granted includes power to regulate the height of boards erected for the purpose of bill posting, so far, at least, as such regulation is necessary to the safety or welfare of the inhabitants of the city or persons passing along the street. *Rochester v. West (N. Y.)* 548

2. Liability for erecting a billboard in excess of the height authorized by ordinance is not controlled by the fact that no injury has occurred by reason thereof, or that it is improbable that any such injury will occur therefrom. *Id.*

3. An ordinance limiting the height of billboards to 6 feet, unless permission to exceed that height is expressly given by the common council, is not unreasonable, or an undue restraint of a lawful trade or business, or a restraint upon a lawful and beneficial use of private property. *Id.*

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Effect on Surety of Principal's Discharge in Bankruptcy, see *BANKRUPTCY*, 6.

1. Failure to disclose to persons signing an agent's bond in ignorance of the fact, that he has been short in his accounts, and is retained in his employment only on condition that he pays the shortage and executes a new bond, is such a fraud on their rights as will discharge them from all liability on the bond. *Connecticut Gen. L. Ins. Co. v. Chase (Vt.)* 510

2. Recovery on a bond conditioned that a postmaster shall turn over the money received in the money order department of his office is not prevented by the fact that the money was embezzled without his fault or neglect, by a clerk holding office under the civil service rules of the government. *Bryan v. United States (C. C. A. 9th C.)* 218

3. Payment in full and acceptance of a plant by a city under a contract for its construction will release sureties on the contractor's bond from liability under a condition that materials shall be paid for, where the contract provides that before payment is made the contractor shall present receipts in full for all materials furnished. *Electric Appliance Co. v. United States Fidelity & G. Co. (Wis.)* 608

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#### BOOMS.

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#### BOUNDARY.

Evidence as to, see *EVIDENCE*, 28, 29, 34.

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#### BROKERS.

The concealment of the identity of the purchaser from his principal will not preclude a broker from recovering his commission on a sale of land, where it does not ap-

pear that there was anything in the facts or circumstances to render that fact of any importance to the seller. *Veasey v. Carson* (Mass.) 241

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Presumption of Negligence, see EVIDENCE, 4.

Special Privilege of Hacks, see HACKS; INJUNCTION, 2.

Servant as Passenger, see MASTER AND SERVANT, 4.

1. A steamship company is not liable for the nondelivery to a passenger of a telegram which the captain has taken for him, where no habit or custom is shown,—no holding out to the world of the captain as having authority to do such an act. *Davies v. Eastern Steamboat Co.* (Me.) 239

2. An employee of a passenger railway company, who accepts transportation from the company as a mere gratuity, and not in consideration for his services, stands like anyone else traveling on a free pass conditioned that the user shall assume risk of injury, notwithstanding the transportation would probably not be bestowed in the absence of the employment. *Peterson v. Seattle Traction Co.* (Wash.) 586

3. One who boards a train which he should know does not stop at the station for which he has a ticket, in the hope that it will do so and so afford him an opportunity of reaching his destination, and who refuses to pay the additional fare to the first stopping place upon the conductor's demand, is a passenger within the meaning of a statute requiring the ejection of passengers at usual stopping places. *St. Louis S. W. R. Co. v. Harper* (Ark.) 220

4. A railroad company cannot eject from its train a boy ten years old who is trespassing on it, or cause him, by fright or fear, to leave the train while it is in rapid motion so as to endanger his life. *Enright v. Pittsburgh Junction R. Co.* (Pa.) 330  
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5. Mich. Pub. Acts 1891, act No. 90, providing for the issuance of family mileage tickets, cannot be deemed an exercise of the power of amendment reserved in the charter of the Michigan Central Railroad Company, as it does not purport to be an amendment of the charter, and contains no provision for compensating the company for the loss of its exclusive right, under the charter, to fix its fares. *Pingree v. Michigan C. R. Co.* (Mich.) 274

#### Baggage.

Measure of Damages as to, see DAMAGES, 7.

6. A sleeping-car company through whose negligence a satchel of a passenger is lost is liable for mileage tickets, which it is usual for such persons to carry, for opera glasses, compass, razor and accoutrements, and nasal syringe, with accompaniments, which were in the satchel, but not for a pistol. *Cooney v. Pullman Palace-Car Co.* (Ala.) 690

7. The reasonable exercise of care to protect the baggage of a sleeping passenger is not shown by a sleeping-car company which allows a number of passengers to leave the car at a station, with baggage in their hands, without paying any attention as to whose it is, where an employee is present who knows the baggage of the sleeping passenger, and by attention might prevent its removal from the car by a stranger. Id.

#### Freight.

8. A carrier failing to comply with the requirements of Ga. Civ. Code, § 2317, as to tracing "freight" which has been lost, damaged, or destroyed, and giving information with respect thereto, becomes liable under § 2318 for the negligence of a connecting carrier. *Central of Ga. R. Co. v. Murphey & Hunt* (Ga.) 720

9. A railway company in its capacity as a common carrier may, as the basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the "agreed valuation." But a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an "arbitrary preadjustment of the measure of damages," will not, though the shipper assents in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value. Id.

#### Fixing rates.

10. The legislature has the power to fix the maximum passenger and freight rates which railroad companies may charge. *Pingree v. Michigan C. R. Co.* (Mich.) 274

11. The exclusive right to fix freight and passenger rates within the maximum limit, conferred upon the Michigan Central Railroad Company by § 15 of its charter, has not been lost or surrendered by the company's acceptance of additional privileges under acts professedly or impliedly amenda-

tory of its charter, and under the general railroad law, or by its absorption of the property and franchises of other railroad corporations. *Id.*

12. The exclusive power to fix passenger and freight rates, within the maximum limit, which could not be impaired by subsequent legislation attempting to fix such rates, was conferred upon the Michigan Central Railroad Company by § 15 of its charter, providing that it shall be lawful for the company to fix the tolls and charges for the transportation of property and persons, subject only to a limitation as to passengers of 3 cents a mile; and such power is not limited by §§ 11, 30, authorizing the company to charge such tolls as shall be lawfully established by by-laws, and to pass such by-laws as shall be necessary to carry into execution the powers vested in it, provided they are not contrary to the laws or Constitution of the United States or of the state. *Id.*

#### Keeping ticket office open.

See also COURTS, 4.

13. The duty to keep ticket offices and waiting rooms open at least thirty minutes before the departure of a passenger train from a "regular passenger depot" from which such trains start or at which they regularly stop, imposed by Ky. Stat. § 784, does not extend to the opening of such rooms for night trains for the sale of tickets for which the railroad company had never kept such rooms open or charged passengers getting on them more than ticket rates. *Louisville & N. R. Co. v. Com. (Ky.)* 149

14. The opening of ticket offices at depots during intervals when they are not regularly used as such is not required by Ky. Stat. § 784, requiring ticket offices and waiting rooms to be kept open thirty minutes before the departure of a regular passenger train "from every regular passenger depot from which such trains start or at which they regularly stop." *Id.*

#### Ticket brokers.

See also CONSTITUTIONAL LAW, 4.

15. Railroad tickets in the hands of passengers are not property within the constitutional meaning of that term. *Jannin v. State (Tex.)* 349

16. Confining the sale of railroad tickets to the company's agents is not the grant of a monopoly. *Id.*

17. The sale of passage tickets on railroads may be confined by statute to agents of the railroad company, and a penalty imposed upon the sale by other persons. *Id.*

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One who wrongfully enters a blacksmith shop and kindles a fire in the forge is liable in case for consequential injuries caused by the fire spreading and destroying the building and personal property therein. *Wyant v. Crouse (Mich.)* 626

#### CASHIER'S CHECK.

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#### CEMETERIES.

Adverse Possession of, see ADVERSE POSSESSION, 2.

Damage for Trespassing on, see DAMAGES, 8.

Injunction against Interference with, see INJUNCTION, 4.

1. Municipal authorities cannot grant to a private corporation land granted by the United States to the city in trust for "public uses" and which has been set apart by ordinance ratified by the legislature, as a cemetery, to be "absolutely dedicated as such," although the grantee intends to use it as such and to bury there at its expense bodies of its members who, if not members of it, would be buried at the expense of the city. *La Societa Italiana Di Mutua Beneficenza v. San Francisco (Cal.)* 332

2. The statutory duty of a health officer to issue burial permits upon certain conditions does not require the issuance of such permits to bury in a cemetery the use of which has been forbidden by the municipality. *Id.*

#### NOTES AND BRIEFS.

Cemeteries; prescriptive right to maintain. 895

#### CHAMPERTY.

See also ATTORNEYS, 4.

1. A stipulation, in a contract between attorneys and client, for the payment by the attorneys of the costs of the litigation, is against public policy, champertous, illegal, and void. *Re Evans (Utah)* 952

2. While it is permissible for a near kinsman of a poor suitor, out of charity, to assist him in the maintenance of his suit, such kinsman cannot do so as a speculative venture based upon a contract to share in the proceeds in case the suitor should recover. *Id.*

#### NOTES AND BRIEFS.

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**CHECKS.**

Of Cashier, see BANKS, 2.

Mere failure of an indorsee to present a check for payment for eleven months, during which time the maker pays the amount to the payee on his assurance that the check is mislaid and that he will return it when found, will not estop him from enforcing payment, where the maker relied wholly on the word of the payee in making his payment. *Bradley v. Andrus* (C. C. A. 3d C.) 432

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**CIVIL DEATH.**

Descent of property upon heirs is not cast by the fact of such sentence and imprisonment under Kan. Gen. Stat. 1899, § 5583, which provides that, when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead. *Smith v. Becker* (Kan.) 141

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**COHABITATION.****NOTES AND BRIEFS.**

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**COLLATERAL SECURITY.**

See PLEDGE.

**COMMERCE.**

1. A railroad privilege tax "for taking up and transporting freight and passengers from one point in this state to another point in this state" does not affect interstate commerce. *Knoxville & O. R. Co. v. Harris* (Tenn.) 921

2. The prohibition of the transportation of natural gas out of the state, by Ind. act March 9, 1889, is unconstitutional because natural gas, when reduced to possession, is a commercial commodity, so that its transportation out of the state is a matter of interstate commerce. *Manufacturers' Gas & O. Co. v. Indiana Natural Gas & O. Co.* (Ind.) 134

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Requiring Telephone Company to Build, see CONSTITUTIONAL LAW, 12.

**CONFESSIONS.**

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**CONFLICT OF LAWS.**

1. An insurance policy is governed by the law of the state in which it is actually delivered to the insured and the premium paid by him to the insurer's agent, although it was issued by a foreign corporation in another state, and expressly provides that it shall be construed according to the laws of that state, where it also provides that it shall not be in force until actual payment of the premium. *Cravens v. New York L. Ins. Co.* (Mo.) 305

2. Life policies issued by foreign companies, which do not take effect until they are delivered to the insured and premium collected from him in the state, are subject to Mo. Rev. Stat. 1879, §§ 5983, 5985, providing for extensions of the policy for the full sum for such time as three fourths of the net revenue will pay for, in case of default after two full annual premiums have been paid, notwithstanding provisions for forfeiture in the policies. Id.

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**CONSPIRACY.**

Evidence of Conspirators, see EVIDENCE, 30-33.

Evidence to Establish, see EVIDENCE, 46.

Indictment for, see INDICTMENT, 2, 3.

To Murder, see TRIAL, 3.

1. To render one responsible for an act committed in furtherance of a conspiracy, his will must contribute to the thing actually done, so that if the conspiracy is to commit a wrongful act not requiring a de-

praved, wicked, or malignant spirit, a conspirator merely as such will not be guilty of murder in case, in carrying out the common design, a co-conspirator kills a person. *Powers v. Com.* (Ky.) 245

2. To render a conspirator guilty of a murder committed by a co-conspirator it must have been committed in furtherance of the conspiracy, and have been the necessary and probable result of the execution of the conspiracy. *Id.*

## CONSTITUTIONAL LAW.

Impairing Obligation of Contracts, see *CONTRACTS*, 16, 17.

See also *MUNICIPAL CORPORATIONS*, 1, 10, 11.

1. A statute providing a system of government for cities cannot be held unconstitutional for violating the spirit of the Constitution, or that general intent which preserves to the people the right of local self-government. *Com. ex rel. Elkin v. Moir* (Pa.) 837

### Delegation of power.

2. No delegation of legislative power is made by an ordinance requiring that, whenever the mayor may apprehend that there is danger of the existence or spread of hydrophobia within or near the city, he shall issue a proclamation requiring all persons possessing dogs to confine or securely muzzle them for a period of not less than thirty or more than ninety days, and providing a penalty of not less than \$3 or more than \$25 for failure to obey the proclamation, since the mayor acts merely as the agent of the common council; and the ordinance is enforceable, according to its own provisions, for the term fixed by the proclamation. *Walker v. Towle* (Ind.) 749

3. An act providing a system of government for a city is not rendered unconstitutional by the fact that, as a temporary expedient to prevent a gap in the government, the governor is given power to appoint a temporary executive, the time of whose appointment, and therefore that of the taking effect of the act, is left to his discretion. *Com. ex rel. Elkin v. Moir* (Pa.) 837

4. A statute making the sale of a railroad ticket by other than an agent of the company a penal offense, when it bears upon its face a statement that such sale is penal, is invalid under a constitutional provision forbidding the legislature to suspend laws, as giving the railroad company an option as to the creation of the offense; and it is immaterial that the statute requires the company to place such words on the ticket, if there is no penalty for refusal. *Jannin v. State* (Tex.) 349

### Equal protection and privileges.

5. A statute forbidding fishing for trout with intent to sell or trade the fish caught is a valid exercise of the legislative power to enact equal laws for the protection of the public right of fishery, and of the police power of the state. *State v. Dow* (N. H.) 314

6. The legislature cannot confine the use  
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of low-test petroleum products for illuminating purposes to apparatus of one maker, where there is other apparatus on the market designed for the same use, which is equally safe and secures the same results, and where the Constitution prohibits the grant to any citizen of privileges or immunities which upon the same terms shall not equally belong to all citizens. *State v. Santee* (Iowa) 763

### Due process of law.

Frontage Tax as Taking Property Without, see *PUBLIC IMPROVEMENTS*.

7. A corporation is a "person" within the meaning of the provision against taking property without due process of law; and it is a "man" within the provision against taking property otherwise than by "the law of the land." *Knoxville & O. R. Co. v. Harris* (Tenn.) 921

8. Classification of railroads for privilege taxation by imposing the tax on those which do not pay ad valorem taxes is not an unnatural and unreasonable classification which makes the tax a deprivation of property without due process of law, although there are but two railroads in the class. *Id.*

9. The constitutional provision for due process of law is violated by a statutory provision for charging a town with the maintenance of a pauper upon report of a commission, the members of which are not required to take an oath, or authorized to administer oaths to witnesses appearing before them, or to render any judgment in proceedings brought before them, and whose report is acted upon by the court without independent investigation. *Church v. South Kingstown* (R. I.) 739

### Police power.

See also *supra*, 5.

10. It is within the police power and legislative discretion of the city of New Orleans, under act No. 34 of 1900 of the general assembly, to require certain food commodities to be sold only in the public markets; and the fact that the ordinance in question may have the effect of compelling dealers in such commodities to go into the public markets, or else to go out of business, does not affect the validity of the ordinance. *New Orleans v. Faber* (La.) 165

11. An ordinance requiring all dogs to be securely muzzled, and declaring any dog found running at large without a muzzle to be a nuisance, and that it shall be the duty of the marshal and policemen to kill any such dog, is a valid exercise of the power to enact ordinances for the protection of life, health, and property, granted by Burns's (Ind.) Rev. Stat. 1894, §§ 3541, 3615, 3616 (Horner's Rev. Stat. 1897, §§ 3106, 3154, 3155). *Walker v. Towle* (Ind.) 749

12. Additional burdens arbitrarily imposed without necessity upon a telephone company which has made investments and expenditures in good faith and in reliance upon an ordinance authorizing the erection of poles and overhead lines in streets, such as an unreasonable requirement that the company must build conduits even through

ungraded streets and suburban parts of the city and in the open country, are clearly beyond the reasonable exercise of the police power. *Northwestern Teleph. Exch. Co. v. Minneapolis* (Minn.) 175

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By Married Woman, see HUSBAND AND WIFE.

Of Employment, see MASTER AND SERVANT, 1, 2.

Validity, see TRIAL, 2.

1. A contract to take press reports for a term of years at not more than \$300 per week, without making any other provision as to price, is too indefinite to permit a recovery of anything more than nominal damages for its breach. *United Press v. New York Press Co.* (N. Y.) 288

#### Consideration.

For Express Trust, see EVIDENCE, 19. Sufficiency of, for Release, see RELEASE. See also INSURANCE, 2.

2. Payment of notes by a surety does not constitute a new consideration which will sustain a promise made by the wife of the principal debtor to indemnify him, where 53 L. R. A.

she was not previously obligated to do so. *Trimble v. Rudy* (Ky.) 353

3. A promise by a widow to pay a surety on her husband's debt is without consideration, where it is merely the renewal of a void promise made before his death. *Id.*

4. An antenuptial agreement that at the death of the intended wife certain of her property shall go to her brothers is a sufficient consideration for a promise by the husband, when his wife is on her deathbed, to hold the property in trust for them, so that they may enforce the trust, although they are mere volunteers. *Ransdel v. Moore* (Ind.) 753

5. The vesting of the title to real property of a married woman in her husband at her death, because of his refusal to procure some one to draw her will, by which she wished to devise the land to third persons, is sufficient consideration for his promise to hold it in trust for them, so that they may enforce the promise. *Id.*

6. The general rule that where a contract is entire the consideration moving from each party to the other is entire, full performance by one being requisite to his claiming any benefit under the contract from the other, does not apply to a servant failing to complete his contract because discharged by the master, although the discharge is rightful. *Hildebrand v. American Fine Art Co.* (Wis.) 826

#### Parol contracts.

See also IMPROVEMENTS.

7. A parol grant of the right to attach booms to trees on the banks of a stream is not valid as against a subsequent grantee of the land. *Smith v. Atkins* (Ky.) 790

8. Performance of services such as superintending repairs on a building, procuring tenants, and collecting rents is not sufficient to entitle one to specific performance of an oral promise in consideration of such services to convey an interest in the land for which the property shall be exchanged, the contract being void under the statute of frauds. *Russell v. Briggs* (N. Y.) 556

#### Validity.

See also ATTORNEYS, 2-4; CHAMPERTY; INSURANCE, 2.

9. A covenant not to engage in a particular business will not invalidate the contract of which it is part, if such contract has otherwise a legal consideration. *Rosenbaum v. United States Credit System Co.* (N. J. Err. & App.) 449

10. An agreement between an employer and his employees, that winnings of the employees at card games played with each other shall be debited and credited on the respective accounts due the employees, is invalid as against public policy and the statutes forbidding gambling, so that the employer cannot refuse to pay wages earned, on the ground that the amount has already been paid to another employee to whom it has been credited because of his winnings from claimant. *Olson v. Sawyer-Goodman Co.* (Wis.) 648

11. An oral agreement between husband and wife to separate and live apart, upon consideration that he supports her and the children and absolutely assigns to her insurance policies on his life, is void as against public policy, so that she cannot enforce the assignment of the policies. *Baum v. Baum* (Wis.) 650

12. A decision of the courts of a state holding unlawful the business of indemnifying against losses on credits does not preclude recovery for breach of a contract, caused by the insolvency of the company, to act as agent in the state for a foreign insurance company engaged in such business, where at the time the contract was made the business was held lawful by the state insurance commissioner. *Rosenbaum v. United States Credit System Co.* (N. J. Err. & App.) 440

**Performance; breach.**

See also ACTION OR SUIT, 8.

13. A covenant by a partnership in selling its business, binding the partners not to engage in business again within a certain distance of the old stand, is broken by one partner's so engaging, so as to render him liable for the breach. *Love v. Stidham* (D. C. App.) 397

14. Under a contract for the sale of the crop of a certain orchard, stating the minimum quantity of fruit to be delivered, the seller cannot be made liable in damages for failure to deliver the specified quantity because of failure of crops due to unusual climatic conditions; nor can he be compelled to substitute other fruit for that contemplated in the contract. *Ontario Deciduous F. G. Asso. v. Cutting Fruit Packing Co.* (Cal.) 681

15. A buyer of fruit growing on trees, under a contract fixing a minimum quantity to be delivered, cannot, after inspecting the orchards and ascertaining that it will be impossible to deliver the amount called for, receive what is available, and refuse to pay for it because of failure to deliver the quantity required by the contract. *Id.*

**Impairment of obligations.**

See also HIGHWAYS, 2.

16. The legislature may confer upon a railroad company the exclusive power to fix its rates for the transportation of passengers and freight within a certain maximum; and a subsequent attempt by the legislature to fix such rates is invalid as the impairment of the obligation of a contract. *Pingree v. Michigan C. R. Co.* (Mich.) 274

17. An ordinance of a municipal corporation granting a telephone company the right to use its streets for the erection of poles and overhead lines, under conditions as to permits and directions where the same shall be placed, when accepted and acted upon by the company, is a contract which the municipality cannot unreasonably or arbitrarily repeal or amend so as to impair rights acquired under it. *Northwestern Teleph. Exch. Co. v. Minneapolis* (Minn.) 175  
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Special Laws as to, see STATUTES, 10.

Tax against, see TAXES, 2, 10.

1. A corporation organized for the production of oil and gas may be deprived of its franchises in case it enters into an agreement with a rival company, fixing the price to be charged for gas in a certain city in which their pipes are laid, and binding it to refuse to supply gas to customers supplied from the rival's pipes. *State ex rel. Snyder v. Portland Natural Gas & O. Co. (Ind.)* 413

### Consolidation.

2. A street-railway corporation which purchases the property and franchises of another under statutory authority, when no consolidation is intended or sought to be effected, is not charged with the liabilities of a predecessor in the franchise. *Capital Traction Co. v. Offutt (D. C. App.)* 390

3. A covenant by a corporation purchasing the property and franchise of another, to "assume, discharge, and perform all the obligations" of the prior company, "and all its liabilities of what kind soever," does not make the purchaser directly responsible to a third party for a liability of the older company. *Id.*

### Transfer of stock.

4. A corporate record and certificate of ownership of stock by A. B., trustee, is notice to the corporation that he holds it, without the power of disposition, for some *cestui que trust*. *Geyser-Marion Gold Min. Co. v. Stark (C. C. A. 8th C.)* 684

5. It is actionable negligence for a corporation to cancel a certificate and transfer stock on the signature of a trustee to the assignment, without any inquiry for the *cestui que trust*, or for his assent to the transfer. *Id.*

6. It is the duty of every corporation to 53 L. R. A.

use reasonable diligence in each case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make transfers so authorized, and to prevent those unauthorized; and for every breach of this duty it is liable to the injured party for the damage it inflicts. *Id.*

### Liability of stockholders.

See also DAMAGES, 5; EVIDENCE, 36; LIMITATION OF ACTIONS, 5.

7. An owner of stock in a corporation, issued in consideration of a transfer of property, the valuation of which was wholly speculative, visionary, and imaginary, is liable to creditors of the corporation for the difference between the value of his stock and the real value of the property. *State Trust Co. v. Turner (Iowa)* 136

8. A creditor of a corporation who becomes such with full knowledge as to the payment for stock by property at an excessive valuation cannot claim that the holders of such stock are liable as stockholders for the difference between the actual value of the property and the par value of the stock which was issued for it. *Id.*

9. An assignee of overdue notes of a corporation cannot hold a stockholder who paid for his stock only by a transfer of property at a grossly excessive valuation liable for the deficiency in payment, where his assignor could not have done so because he became a creditor of the company with full knowledge of all the facts relating to the issuance of and payment for the stock. *Id.*

### NOTES AND BRIEFS.

See also CUSTOM; NOTICE; TAXES.

Corporations; unrecorded transfer of stock; liability of corporation for improper transfer. 685

Consolidation, what is; right to confer power by statute; liability of new company. 391

Lien on stock for debts; restrictions on right to sell stock. 159

Dividends on stock; rights of life tenant and remaindermen. 169

Stockholder's liability; suit of assignees of corporation. 471

Liability of stockholder transferring property for stock; true-value rule; knowledge of creditor as defense. 136

## CORPSE.

1. One cannot by will confer any rights as to the disposition of his dead body. *Enos v. Snyder (Cal.)* 221

2. An executor or administrator as such has no right to the possession of the body of the testator or intestate for purposes of burial. *Id.*

3. The fact that a statutory provision imposing, under penalty, the duty of burying a dead body upon the next of kin of decedent, and giving him the right of possession for that purpose, is found in the Penal Code, does not prevent its having force in a civil



action to establish the rights of such next of kin to possession of the body for purposes of burial. **Id.**

4. A man who has consented to the burial of the body of his deceased wife in the lot of another cannot, without the consent of the lotowner, enter upon the lot and remove the body. *Pulsifer v. Douglass* (Ma.) 238

#### NOTES AND BRIEFS.

Corpse; right to remove after burial; interment in another's lot. 238

#### COSTS.

Review of Question of, see **APPEAL AND ERROR**, 11.

1. A statute giving a right to costs in any civil action will include a proceeding by the poor authorities under the provisions of a statute, to compel a child to support its indigent parent. *Condon v. Pomroy-Grace* (Conn.) 696

2. An extra allowance as part of the costs of the action may be made under N. Y. Code Civ. Proc. § 3253, in the discretion of the court, to a defendant against whom nominal damages only are recovered. *United Press v. New York Press Co.* (N. Y.) 288

#### COTENANCY.

Adverse Possession by Cotenant, see **ADVERSE POSSESSION**, 2.

#### COUNTERCLAIM.

See **SET-OFF**, ETC.

#### COURTS.

Question Reviewed by, on Expulsion of Pupil, see **SCHOOLS**.

See also **INTERNAL REVENUE**; **MUNICIPAL CORPORATIONS**, 1; **REMOVAL OF CAUSES**.

1. In determining the question of the validity of a statute for the government of cities, the courts have nothing to do with its wisdom, propriety, or justice, or with the motives which are supposed to have inspired its passage. *Com. ex rel. Elkin v. Moir* (Pa.) 837

2. Courts have no power to declare an ordinance void because it is unreasonable, unless its unreasonableness is so clear as to indicate a mere arbitrary exercise of the power vested in the council. *State v. Barge* (Minn.) 428

3. The good faith of the legislature in imposing a privilege tax on railroad companies that have charter exemptions from ad valorem taxation, or the motive to deprive them of that exemption, cannot be inquired into by the courts. *Knoxville & O. R. Co. v. Harris* (Tenn.) 921

4. Causes of action for fines for failure to keep a ticket office and waiting room open at a depot cannot be joined to give the circuit court jurisdiction under Ky. Stat. § 1093, giving justices exclusive jurisdiction in penal actions where the fine recoverable does not exceed \$20. *Louisville & N. R. Co. v. Com.* (Ky.) 149  
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#### NOTES AND BRIEFS.

See also **REMOVAL OF CAUSES**.

Courts; consideration of reasonableness or unreasonableness of ordinance. 382

#### COVENANT.

Effect of Invalidity of, see **CONTRACTS**, 9.

See also **CORPORATIONS**, 3.

A conveyance of real estate by one who has acquired no title and has never been in possession, to another who does not take possession, will not carry the covenants in the deeds from remote grantors to subsequent purchasers from such grantees. *Wallace v. Perales* (Wis.) 644

#### NOTES AND BRIEFS.

See also **CONTRACTS**.

Covenants; real, run with legal, not equitable, title; title not essential to recovery for breach; privity of estate to carry covenant of warranty. 645

#### CRIMINAL LAW.

Review of Judge's Decision as to Sanity, see **APPEAL AND ERROR**, 3.

Effect of Imprisonment on Descent of Property, see **CIVIL DEATH**.

See also **HOMICIDE**.

1. No pleading is necessary to support the production of a pardon in a criminal case. *Powers v. Com.* (Ky.) 245

2. A person who is insane or of unsound mind must be also incapable of knowing the wrongfulness of his act, in order to be held incapable of crime under Okla. Stat. 1893, § 1852, which declares that all persons are capable of committing crime except "lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness," since the final clause applies to all the classes of persons mentioned. *Maas v. Oklahoma* (Okla.) 814

3. The trial of the question of the sanity or insanity of a person who has been sentenced to death, on a claim that he has become insane since the sentence, is not a matter of absolute right, if the court is satisfied of his sanity, but the investigation of the matter is in the discretion of the court. *State v. Nordstrom* (Wash.) 584

#### NOTES AND BRIEFS.

See also **INDICTMENT**; **INTOXICATING LIQUORS**.

Criminal law; mental capacity as affecting responsibility. 814

#### CROPS.

See **DAMAGES**, **NOTES AND BRIEFS**.

#### CROSS-EXAMINATION.

See **WITNESSES**, 2-4.

**CUSTOM.**

A local custom of dealers in a place where a sale is made, which violates a well-established principle of law, and changes the nature and obligations of the relation of two parties to each other, is inoperative unless known and assented to by both. *Geyser-Marion Gold Min. Co. v. Stark* (C. C. A. 8th C.) 684

**NOTES AND BRIEFS.**

Custom; validity; local; effect on non-resident of placing "trustee" after name in stock. 686

**DAMAGES.**

For Consequential Injuries by Trespasser, see *CASE*.

Only Nominal, for Breach of Indefinite Contract, see *CONTRACTS*, 1.

From Construction of Dam, see *DAMS*. Evidence as to, see *EVIDENCE*, 41, 42.

1. The purchase by the vendor, at a public auction sale, of a yacht, made after the vendee has refused to comply with his contract to purchase, will not prevent the price at which the property is struck off from being taken as the basis for assessing the damages for the breach, where the sale is duly advertised and made upon notice to the vendee. *Ackerman v. Rubens* (N. Y.) 867

2. In an action to recover, for part performance of a contract, from the party who has rightfully terminated the same, prima facie the amount recoverable is the contract rate for services rendered up to the time of the discharge; and that will prevail in the absence of a claim for damages, properly pleaded as a counterclaim and established on the trial. *Hildebrand v. American Fine Art Co.* (Wis.) 826

3. A stipulation for a certain sum as damages for failure to comply with a contract to remove a building by a certain time will be construed as a penalty and the recovery limited to the damages actually suffered, although the bond expressly provides that the sum named shall be liquidated damages, and not a penalty, where it would not be difficult or impossible to assess the actual damages from the testimony given,—especially under a statute providing that, in suits to recover a forfeiture which appears by default or confession or upon demurrer, the court shall render judgment for so much as is due according to equity. *Chicago House-Wrecking Co. v. United States* (C. C. A. 7th C.) 122

4. Proof of damages is not necessary to sustain a recovery for the death of a child, under S. C. Rev. Stat. § 2316, providing that "the jury may give such damages as they think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought." *Mason v. Southern R. Co.* (S. C.) 913

5. The measure of damages for false representations by stockholders as to the 53 L. R. A.

amount of corporate property, made for the purpose of effecting a sale of the stock, and which are relied upon by the purchaser, is the difference between the actual value of the stock and what it would have been worth had the representations been true. *Boddy v. Henry* (Iowa) 769

6. Twenty-five dollars is not excessive damages for ejecting a passenger a mile or two from a station in the night, when a slight rain is falling and he is suffering some from fever. *St. Louis S. W. R. Co. v. Harper* (Ark.) 220

7. The measure of damages for loss, through the negligence of a sleeping-car company, of personal effects of a passenger, which have no market value, is their value to him; that is, the actual loss in money which he would sustain by being deprived of them. *Cooney v. Pullman Palace-Car Co.* (Ala.) 690

8. Damages for unlawfully entering upon a woman's burial lot and removing therefrom the body of her deceased sister, at the instance of the latter's former husband, will be measured by the injuries done to the lot, where the proceeding is with due propriety and decency. *Pulsifer v. Douglass* (Me.) 238

9. A verdict for \$2,775 damages on account of the communication of smallpox to the plaintiff and her family is not so large as to justify the court in setting it aside on appeal, considering the loathsomeness of the disease and the anxiety and suffering it must have entailed. *Henderson v. Clayton* (Ky.) 145

**Loss of profits.**

Opinion Evidence as to, see *EVIDENCE*, 24.

10. Loss of anticipated profits may be recovered in a proper case for breach of contract, in addition to, and not merely as an alternative remedy for, a recovery of the amount of outlay and expenditures and the value of the time and services spent in reliance on the contract. *Wells v. National Life Asso.* (C. C. A. 5th C.) 33

11. Loss of profits that would have been realized by a general agent of an insurance company in carrying out his contract, which gave him an exclusive agency for a certain territory, may be included in the damages recoverable for breach of the contract by the company in putting other agents into his territory. *Id.*

12. In estimating the loss of profits which may be recovered by a general insurance agent who had an exclusive agency for a certain territory, with a right to a percentage on all first and renewal premiums on policies taken by himself or his agents, and who was himself required to bear all the expenses of the business, the jury may consider the renewals from year to year during the life of the contract on all policies written by him or his agents, and the first premiums and probable renewals on all policies written by the company after breach of the contract in that territory, deducting therefrom the current expenses and the value of

the personal services which the business would have cost him if he had done it, since the standard for measuring his interest in the contract is fixed by its terms. Id.

13. The measure of damages for furnishing an imperfect and unskillfully made cylinder for a cotton compress, on account of the defects of which an accident occurred which caused the loss of the use of the compress for the entire season, is its rental value,—that is, the value of its use,—during that season, where the cylinder was furnished under a contract to have the compress ready for use at a certain date, which the contractor understood was necessary in order to have it ready for compressing that season's crop of cotton. *Livermore Foundry & M. Co. v. Union Compress & Storage Co.* (Tenn.) 482

#### NOTES AND BRIEFS.

See also **CONTRACTS**.

Damages; for nondelivery of telegram sent after office hours. 732

For delay in delivery of telegram; unexplained message; lost profits. 734

Loss of profits as an element of damages for breach of contract:—(I.) Scope; (II.) general rules applicable to breach of all kinds of contracts: (a) allowance of profits lost generally; (b) right of action for; (c) effect of remoteness; (d) effect of speculativeness or contingency; (e) effect of uncertainty in amount; (f) requirement that profits should have been within contemplation of parties; (g) distinction between direct and collateral profits; (h) loss of sub-contracts and special bargains; (i) general effect of preventing performance; (j) what amounts to prevention of performance; (III.) contracts for services: (a) breach by contractor or employee: (1) general rules; (2) particular contracts: (a) for construction or repair of ways, bridges, public works, etc.; (b) for construction or repair of buildings, vessels, etc.; (c) logging and lumber contracts; (d) for general service or labor; (e) for services as agent or attorney; (b) breach by employer or owner: (1) general rules; (2) effect of preventing performance; (3) what constitutes prevention of performance; (4) particular contracts: (a) for railway construction; (b) elevator and storage contracts; (c) for construction of buildings; (d) for construction or repair of bridges, roads, or streets; (e) for grading, excavation, dredging, etc.; (f) logging and lumber contracts; (g) for mechanical work; (h) for services or labor generally; (i) for real estate, insurance, and loan agencies; (j) contracts with salesmen and for other agencies; (k) between attorney and client; (l) for compensation based on share of profits; (IV.) partnership contracts; (V.) contracts for sale or purchase; (VI.) contracts for carriage: (a) breach by shipper; (b) breach by carrier: (1) measure of damages generally; (2) remoteness, contingency, and uncertainty, and their effect; (3) notice of sale and its effect; (4) notice of use and its effect; (VII.) contracts 53 L. R. A.

for transmission of telegrams: (a) rule as to message in cipher, or not showing meaning; (b) rule when message is in plain terms: (1) the general right to recover; (2) remoteness, contingency, and uncertainty, and their effect; (c) real when altered message is sent; (VIII.) contracts with relation to railroad and station construction; (IX.) agreements not to compete; (X.) leases and contracts and covenants with reference to: (a) general rules; (b) breach of covenant to lease or renew; (c) breach of covenant to give possession; (d) breach of covenant for peaceable possession; (e) breach of covenant to repair or rebuild; (f) eviction; (g) tenancy on shares; (h) breaches by tenant; (XI.) the charter or rental of vessels; (XII.) miscellaneous contracts; (XIII.) duty to prevent or reduce damages; (XIV.) deduction for release from responsibility; (XV.) effect of illegality in contract; (XVI.) conclusion. 33

Extent of trespasser's liability for consequential injuries resulting from the trespass:—(I.) In general; (II.) consequential injuries to property: (a) in general; (b) from removal of fence: (1) in general; (2) loss of stock; (3) injuries to crops; (c) caused by third persons; (III.) consequential injuries to the person: (a) in general; health; (b) mental suffering; (c) flight and its consequences; (d) injury to reputation; (IV.) conclusion. 626

Measure of, for fraudulent representations as to property. 770

For breach of contract; for delay in delivery of machinery; rental value; loss of profits in case of injury to business. 482

Recovery for loss of support by wrongful killing. 812

Liquidated damages or penalty. 124

#### DAMS.

Injuries by, When Barred, see **LIMITATION OF ACTIONS**, 4.

One called upon to pay damages for overflowing land under authority of the legislature to erect a dam for the purpose of manufacturing and improving navigation cannot defeat liability by insisting that more land has been overflowed than is absolutely necessary to carry out such purposes. *Charnley v. Shawano Water-Power & R. Improv. Co.* (Wis.) 895

#### DANGEROUS AGENCIES.

##### NOTES AND BRIEFS.

See also **NEGLIGENCE**.

Dangerous agencies; firearms as; liability for explosion; liability to third person of one furnishing to infant. 789

#### DEATH.

Election of Remedies for Causing, see **ACTION OR SUIT**, 7.

Damages for Causing, see **DAMAGES**, 4.  
See also **DAMAGES**, **NOTES AND BRIEFS**.

1. The prevention of the performance of a contract by a man to support his parents,

by negligently causing his death, gives them no right of action at common law. *Brink v. Wabash R. Co. (Mo.)* 811

2. The injury to a parent by the negligent killing of his son who is under contract to support him, thereby preventing performance of the contract, is too remote to form a basis for recovery on behalf of the parent, in the absence of wilful intent to injure the parent. *Id.*

## DEEDS.

### NOTES AND BRIEFS.

See also HUSBAND AND WIFE.

Deeds; by disseised owner. 699

## DEFINITIONS.

Person, see CONSTITUTIONAL LAW, 7.

The word "stream" does not include the waters of a great lake like Lake Michigan. *Illinois C. R. Co. v. Chicago (Ill.)* 408

### NOTES AND BRIEFS.

Definition; elements. 673

## DELEGATION OF POWER.

See CONSTITUTIONAL LAW, 2-4.

## DEPOSIT.

In Bank, see BANKS.

## DESCENT AND DISTRIBUTION.

Effect of Life Imprisonment on, see CIVIL DEATH.

In the distribution of the estate of an intestate in Georgia, a first cousin of the half blood on the maternal side will take the estate in preference to a second cousin of the whole blood. *Ector v. Grant (Ga.)* 723

### NOTES AND BRIEFS.

See also PARDON.

Descent; civil death on imprisonment as affecting. 142

To kindred of the half blood. 723

## DIRECTING VERDICT.

See TRIAL, 14.

## DISBARMENT.

Of Attorney, see ATTORNEYS; ESTOPPEL, 1.

## DISCHARGE.

Of Bankrupt, see BANKRUPTCY, 4-6.

Of Mortgage, see MORTGAGE, 1.

## DISSEISIN.

See ADVERSE POSSESSION, DEEDS, NOTES AND BRIEFS.

## DIVIDENDS.

On Stock, see LIFE TENANTS, 1.

## DOCUMENTARY EVIDENCE.

See EVIDENCE, 11, 12.

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## DOGS.

Provision for Muzzling, see CONSTITUTIONAL LAW, 2, 11.

See also ANIMALS; MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

## DOWER.

1. A sale by a man of the undivided interest which he holds in common in a tract of land, followed by a partition by the tenants in common in kind, will not bar the dower rights of his wife, who did not join in the deed. *Gaffney v. Jefferies (S. C.)* 918

2. The dower rights of a woman whose husband was seized of an undivided interest in common in a tract of land, which he conveyed by deed in which she did not join, will, after voluntary partition in kind among the tenants in common, attach to the parcel allotted to her husband's grantee, and will not extend to his former interest in the whole tract. *Id.*

### NOTES AND BRIEFS.

Dower; in undivided interest in common; transfer and partition to defeat. 919

## DRAINS AND SEWERS.

1. A plan for the construction of a sewer is not shown to be defective by the fact that the city engineers expect that there will be some injury to sidewalks and stoops from its erection. *Uppington v. New York (N. Y.)* 550

2. A municipality is not, in the construction of a sewer, obliged at its peril to select the best possible route, or to adopt the best possible plan, provided the route selected and the plan adopted are reasonably safe. *Id.*

### NOTES AND BRIEFS.

Drains and sewers; municipal liability for consequential damages. 552

## DRUGGISTS.

A druggist is not guilty of negligence in selling to customers proprietary medicines in the package and under the label of the proprietor or patentee, without making an analysis of the contents. *West v. Emanuel (Pa.)* 329

### NOTES AND BRIEFS.

Druggists; liability for negligence. 330

## DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 7-9.

## DURESS.

A plaintiff cannot impeach, as procured by duress, an agreement which he insisted upon making a part of his case, and stated was material thereto. *Craig v. Ginn (Del.)* 716

### NOTES AND BRIEFS.

See also CONTRACTS.

Duress; by arrest.

716

**EASEMENTS.**

1. A grantee not entitled to a way of necessity from one part of land to another, when it is divided by a strip that has been previously taken in fee by a railroad company in condemnation proceedings. *Atchison, T. & S. F. R. Co. v. Conlon* (Kan.) 781

2. A railroad company which constructed a crossing over its track and ties, and put gates in its fences, for the benefit of the owner of land so situated, by whom the same were used in passing from one part of her farm to the other for more than fifteen years, during which the company maintained said crossing and gates, thereby made the landowner only a mere licensee who could not, by use of the crossing for the time stated, obtain a prescriptive right to the same. *Id.*

**NOTES AND BRIEFS.**

Easements; farm crossing over railroad; way of necessity; prescriptive right; permissive use; gate across right of way. 782

**EJECTMENT.**

Ejectment against one who claims under tax deeds obtained while he was a tenant of another person cannot be maintained by the landlord on account of any defects in the tax proceedings, where the landlord never had any title except by possession, and had lost possession before the suit. *Smith v. Newman* (Kan.) 934

**ELECTION OF REMEDIES.**

See ACTION OR SUIT, 4-8.

**ELECTRICAL USES AND APPLICATIONS.**

See also HIGHWAYS, NOTES AND BRIEFS.

A corporation which generates and sends electricity into the wires of a street-railway company is chargeable with the duty to see that such wires are properly insulated; and it, as well as the street-railway company, is liable for failure to perform that duty, if a person is killed because the wires are not properly insulated. *Thomas v. Maysville Gas Co.* (Ky.) 147

**ELEMENTS.**

See CONTRACTS, NOTES AND BRIEFS.

**ELEVATORS.****NOTES AND BRIEFS.**

Elevators; loss of profits as element of damages in case of. 65

**EMBEZZLEMENT.**

By Agent for Insolvent Bank, see BANKS, 3, 4.

Of Clerk, Postmaster's Liability for, see BONDS, 2.

Indictment for, see INDICTMENT, 4, 5.

An indictment under U. S. Rev. Stat. § 5209, for wilfully misapplying bank funds, is not unsupported by the evidence because the funds are shown to be in his possession; 53 L. R. A.

which makes the offense embezzlement, and the statute provides for the punishment of embezzlement or wilful misapplication of funds, since the term "wilful misapplication" covers embezzlement, and it is not necessary to construe the generic term so peculiarly as to exclude the narrower word preceding it. *Jewett v. United States* (C. C. A. 1st C.) 568

**NOTES AND BRIEFS.**

Embezzlement; misapplication of funds. 572, 574

**EQUAL PROTECTION OF THE LAWS.**

See CONSTITUTIONAL LAW, 5, 6.

**EQUITY.**

Enforcement of Trust in, see TRUSTS.

1. An undertaking by two lawyers, not general partners in the practice of the law, to conduct litigation for a client, followed for a time by equal division of the compensation paid for the services, does not render them special partners so as to give equity jurisdiction of a suit for an accounting in case one of them subsequently receives and retains the greater share of such compensation. *Willis v. Crawford* (Or.) 904

2. One of two lawyers who have undertaken to conduct litigation for a client has a plain, adequate, and complete remedy at law in an action for money had and received to his use, which will preclude a resort to equity in case the other receives and retains an undue proportion of the compensation paid for the services. *Id.*

**NOTES AND BRIEFS.**

See also ACTION OR SUIT.

Remedy at law as affecting relief in equity; great injury, without corresponding benefit, from relief. 224

Remedy in, for fraud or mistake in contract. 159

**ESTOPPEL.**

See also DURESS.

1. The impropriety of attorneys, respondents in disbarment proceedings on a charge of champerty, appearing before the court and confessing that they induced the court to render final judgment in their favor, in a previous action, on the ground of their having been guilty of champerty, and afterwards, when confronted with disbarment proceedings, claiming they were innocent, is indefensible. *Re Evans* (Utah) 952

2. Infant children of a woman who has mortgaged her property as security for her husband's debt are not estopped from asserting their title in case the property is sold after her obligation is discharged and she is dead, as against a purchaser in good faith of the title secured at the mortgagee's sale, where they had no knowledge of the facts so as to make them guilty of fraud in permitting the mortgage to remain uncancelled. *Fleming v. Borden* (N. C.) 316

2. Making a general claim for the pro-

ceeds of a check fraudulently received on deposit by a bank when insolvent does not estop the depositor from demanding a return of the full amount, where the receiver knew of the circumstances under which the check was received and collected, and his representations induced the making of the original claim, which could not possibly give the claimant more than he would obtain by a return of the deposit. *Richardson v. Olivier* (C. C. A. 5th C.) 113

#### NOTES AND BRIEFS.

See also **LICENSE**.

Estoppel; as to character of property as fixture; to rescind sale by election to affirm. 604

Equitable; what constitutes. 801

#### EVICTION.

Judgment of, as Evidence, see **EVIDENCE**, 3.

#### EVIDENCE.

Burden of Proof of Forfeiture of Liquor Tax Certificate, see **INTOXICATING LIQUORS**, 2.

#### Presumptions and burden of proof.

As to Ownership of Money Deposited as Bail, see **GARNISHMENT**.

1. The burden of showing the nature and extent of the claimed right is upon the one setting up a prescriptive right to flow lands. *Charnley v. Shawano Water-Power & R. Improv. Co.* (Wis.) 895

2. The legal presumption is that a trustee has no power to sell or transfer the subject of his trust. *Geyser-Marion Gold Min. Co. v. Stark* (C. C. A. 8th C.) 684

3. A judgment of eviction against a grantee in a suit of which a remote grantor has no notice is not prima facie evidence that the eviction was under a paramount title, in a suit against such grantor on the covenants in his deed. *Wallace v. Pereles* (Wis.) 644

4. The meeting of two cars in a head-end collision on a single-track railway is proof of negligence on the part of those in charge of the cars, in the absence of any evidence to the contrary, for the consequences of which their employer is responsible. *Peterson v. Seattle Traction Co.* (Wash.) 586

5. The authority of the captain of a steamship to receive a telegram for delivery to a passenger, so as to charge the steamship company in case of its nondelivery, must be established by the evidence and found by the jury. *Davies v. Eastern Steamboat Co.* (Me.) 239

6. One who has been ousted from possession of his real estate by an open, visible, and exclusive possession in another, which has continued uninterruptedly for the limitation period, will be presumed to have had knowledge of it. *Carney v. Hennessey* (Conn.) 699

7. Undue influence resulting in a favorable will cannot be inferred alone from motive or opportunity, but there must also be

some testimony, either direct or circumstantial, to show that undue influence not only existed, but that it was exercised with respect to the making of the will itself. *Re Shell's Estate* (Colo.) 387

8. Sanity of the accused being presumed, he has the burden in the first instance to offer proof sufficient to raise a reasonable doubt on the question, and thereupon the prosecution must establish his sanity beyond a reasonable doubt. *Maas v. Oklahoma* (Okla.) 814

9. The burden of showing that an article published in a newspaper over the signature of defendant in an action for libel is identical with the article furnished by the latter is upon plaintiff, and he is not entitled to have the article actually contributed set out in the answer. *Klos v. Zahorik* (Iowa) 235

10. Recovery for the publication of a libel cannot be denied because the plaintiff fails to prove the falsity of the publication, since the burden of proving the truth by way of defense is on defendant. Id.

#### Documentary evidence.

Instrument without Revenue Stamp, see **INTERNAL REVENUE**.

See also *supra*, 3.

11. Computations by an expert, made solely from the books of a bank, are not admissible in evidence when the contents of the books themselves are not admissible. *State Bank v. Brown* (N. Y.) 513

12. Entries in the books of a bank, not made by the cashier, are not admissible against his sureties in an action on his bond, in the absence of proof as to who made them, that the one making them is dead or without the jurisdiction of the court, or that they were made in the usual course of business in accordance with a uniform practice to make them when and precisely as the transactions occurred, where the books were not referred to in the bond and the sureties had no right of access to them. Id.

#### Photographs.

13. Photographs of wrecked machinery, taken immediately after an accident, are admissible as evidence, with an explanation of them by the witness who took them, in order to show the condition of the wreck. *Livermore Foundry & M. Co. v. Union Compress & Storage Co.* (Tenn.) 483

#### Parol evidence as to writing.

14. The fact that the principal debtor does not join in signing the note will not take the case out of the rule that parol evidence is admissible to show that signers of a note did so, to the knowledge of the payee, as sureties. *Hoffman v. Habighorst* (Or.) 908

15. Testimony by the parties as to what they believed and intended and relied upon is admissible in an action for false representations in effecting a sale of property. *Boddy v. Henry* (Iowa) 769

16. Oral evidence is admissible to show that improvements were made upon land under an oral contract that the land should

be conveyed to the party making them. *Luton v. Badham* (N. C.) 337

17. Parol evidence is admissible to show that at the time of making a written contract for the sale of the fruit growing in certain orchards, which specifies a minimum amount to be delivered, it was agreed that the seller should not be bound to deliver the quantity named unless it was grown in the orchards embraced in the contract. *Ontario Deciduous F. G. Asso. v. Cutting Fruit Packing Co.* (Cal.) 681

18. Parol evidence is admissible to explain the meaning of the words "sundry orchards," in a contract for the sale of the fruit growing in them. *Id.*

19. The consideration for an express trust need not be set forth in the writings, but may be proven by parol. *Ransdel v. Moore* (Ind.) 753

#### Opinions.

See also **APPEAL AND ERROR**, 17.

20. Persons not experts having knowledge of the facts may testify as to the conduct of a person injured by a railway collision soon after the accident, and as to the state of his health since, as compared with what it was before the accident. *Peterson v. Seattle Traction Co.* (Wash.) 586

21. An expert may give his opinion upon a hypothetical case, based upon the facts in evidence, as to the propriety of a method of supporting a chimney along which a trench was being excavated, and as to how the work should have been done for the safety of the workmen, in an action by an employee for injuries caused by earth falling upon him while carrying out the contractor's orders in constructing such support. *Finn v. Cassidy* (N. Y.) 877

22. Upon the question of falsity of representations as to the quantity of land in a ranch owned by a corporation, made by stockholders for the purpose of effecting a sale of their stock, witnesses may testify as to whether or not the lands embraced by the ranch were all embraced by documents in possession of the parties, and as to whether land once owned had been sold by the corporation; but conclusions of witnesses as to the quantity of land in the ranch, based on the documents, are not admissible. *Boddy v. Henry* (Iowa) 769

23. Upon the measure of damages for making false representations as to the amount of property owned by a corporation for the purpose of effecting a sale of its stock, opinion evidence is not admissible as to how much less the property is worth than it would have been if it had been as represented. *Id.*

24. Testimony of persons who have had actual experience in the transaction of insurance business, as to particulars and results of such business, may be received in an action seeking lost profits for breach of a contract for employment as general insurance agent. *Wells v. National Life Asso.* (C. C. A. 5th C.) 33

#### Confessions.

25. A confession made by one accused of 53 L. R. A.

murder, under threats that he would be delivered back to a mob unless he confessed, is incompetent and should not be admitted in evidence. *Whitley v. State* (Miss.) 402

26. A confession made the day following a prior confession which was induced by threats cannot be received in evidence, unless it is shown that the influence which induced the first confession had been entirely destroyed. *Id.*

27. Proof of the finding of a sack of money at the place designated by one who, under threats of being delivered back to a mob, confessed to having committed a murder and to having hidden at a certain place a sack of money taken from the body, is inadmissible where neither money nor sack was identified as belonging to the murdered man. *Id.*

#### Admissions.

28. Admissions as to boundary by a general agent in possession of real estate for the purpose of caring for it, made within the scope of his authority, are binding on his principal, whether known to the latter or not. *Carney v. Hennessey* (Conn.) 699

#### Declarations.

29. Evidence of declarations of the remote grantor of two parcels of real estate, as to where he intended to draw the line between them, is not admissible upon the question of the division line. *Id.*

30. Evidence of statements by one of conspirators to murder, that the killing had been determined upon and pardons prepared in advance, is admissible against co-conspirators. *Powers v. Com.* (Ky.) 245

31. Evidence of statements made at a meeting in a public place, indicating violent and improper intentions, is admissible upon trial of an indictment for conspiracy to murder, as tending to show the existence of the conspiracy. *Id.*

32. One on trial for conspiracy to murder, against whom evidence has been introduced of statements by members of an assemblage tending to show the conspiracy, has a right to introduce evidence of all that was done at the meeting. *Id.*

33. Upon trial of an indictment for criminal conspiracy to murder, evidence is admissible of threats by an unknown person who was subsequently seen among guards under control of the alleged conspirators, but not of statements by persons in no wise identified as members of the conspiracy. *Id.*

#### Relevancy and materiality.

34. One occupying real estate at a certain time may testify as to who made use of adjoining land up to the division fence, as tending to show adverse possession in him, and that the owner of the land occupied by witness was only in possession as far as the fence when he conveyed the property to a third person, and as to the construction which had been put by the adjoining owners upon their title deeds. *Carney v. Hennessey* (Conn.) 699

35. Upon the question of the procurement

of a will by undue influence, evidence is not admissible that some sixteen years before it was executed proponent entered testator's family, brought about an estrangement between him and his wife which resulted in a divorce, and subsequently married him,—especially when it is not connected with evidence tending to prove that undue influence existed and was exercised at or near the time the will was made. *Re Shell's Estate* (Colo.) 387

36. Stockholders of a corporation charged with making false statements as to the corporate property in effecting a sale of their stock may testify as to the circumstances of their acquisition of the stock, and their knowledge or want of knowledge of the company's business, and as to the custody of the documents from which true information might have been obtained. *Boddy v. Henry* (Iowa) 769

37. Evidence that a witness for the prosecution had said that that hundred thousand dollars could be taken and Jesus Christ and the twelve apostles convicted does not show that he was bribed, and is properly excluded. *Powers v. Com.* (Ky.) 245

38. Upon the question of the terms of the contract under which an employee of a railroad company is being transported to and from his work, evidence of his signing an agreement to assume the risk is admissible, although it is not conclusive of such assumption, where he testifies that when he was given his ticket book he was told to sign his name at a designated place, which he did without reading the words above it, and no authority is shown on the part of the one giving the direction to modify any contract the employee may have had with the company. *Peterson v. Seattle Traction Co.* (Wash.) 586

39. Evidence of failure to ring the bell or blow the whistle for a railroad crossing a mile from the scene of an accident by which an infant upon the track was killed is admissible, where the complaint charges gross negligence and recklessness in running the train, and the answer sets up contributory negligence on the part of the infant's parents, while the complaint alleges that the mother of the child was accustomed, when she heard the signals given for that crossing, to look out upon the track to see if any of the children were in danger. *Mason v. Southern R. Co.* (S. C.) 913

40. Exclusion of questions with reference to prior ailments of the plaintiff in an action for personal injuries is within the discretion of the court, where a physician who has treated the plaintiff has testified that he does not think there was any connection between prior ailments and the condition after the accident, although it might be possible that other physicians, if examined, would have a different opinion. *Boomer v. Wilbur* (Mass.) 172

41. Upon the measure of damages for personal injuries, evidence is admissible of the wages plaintiff could have earned in a business which he understood and which 53 L. R. A.

was open to him but for the injuries, although he had not engaged in it for three years before the injury, and had made no claim of intention to return to that calling. *Peterson v. Seattle Traction Co.* (Wash.) 586

42. In an action for the homicide of a railroad employee, proof of his usual earnings as such employee within a reasonable period of time prior to his death is admissible. There is no arbitrary rule which confines the proof upon this point to what he was actually earning at the very time of his death. *Central of Ga. R. Co. v. Perkinson* (Ga.) 210

43. A denial, by an employer, of an alleged agreement to furnish an employee injured while traveling on its cars transportation to and from work, will admit evidence of any material matter to defeat the alleged contract or to show a different contract. *Peterson v. Seattle Traction Co.* (Wash.) 586

**Weight; sufficiency.**

See also *supra*, 38; ATTORNEYS, 5.

44. The right to recover for the publication of a libelous article in a foreign language cannot be made to depend upon the absolute accuracy of the translation introduced in evidence. *Klos v. Zahorik* (Iowa) 235

45. As between the alleged partners themselves, the fact of partnership cannot be established by proof of independent facts from which the principal fact is inferable, in the absence of direct evidence of a purpose to form a partnership. *Willis v. Crawford* (Or.) 904

46. A conspirator cannot be convicted upon the testimony of an accomplice or accomplices, unless such testimony is corroborated by other evidence tending to connect him with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. *Powers v. Com.* (Ky.) 245

#### NOTES AND BRIEFS.

Evidence; use of person's books of account as evidence upon issues between other parties:—(I.) Scope; (II.) the general rule; (III.) exceptions—enumerated; (IV.) entries against interest: (a) the general rule; (b) application to particular classes of cases: (1) entries as to receipt of rent; (2) receipted charges for services; (3) other miscellaneous entries; (V.) entries constituting part of the *res gesta*: (a) the general rule; (b) application to particular cases; (VI.) entries required by legal or particular duty: (a) the general rule; (b) application to official entries; (c) application to entries or memoranda of notice of dishonor; (VII.) entries in the course of business: (a) the general rule; (b) application to entries by an agent: (1) in his own books; (2) in the books of his principal or employer; (3) entries by an attorney; (c) application to bank books; (d) application to books by carriers; (e) application to other miscel-



laneous entries; (VIII.) ancient books; (IX.) use of, to contradict, corroborate, or explain other evidence; (X.) entries treated as admissions or as creating an estoppel: (a) the general rule; (b) application to books of debtor to show fraud; (c) application to corporate books generally; (d) application to bank books; (e) to establish personal liability of a stockholder or director; (f) application to partnership books of account; (g) application to other miscellaneous entries; (h) necessity of knowledge of, or consent to, entry; (XI.) necessity of authentication and proof of death or absence; (XII.) variation of rules by statutory and constitutional provisions; (XIII.) conclusion. 513

Admissibility of evidence obtained by aid of an involuntary or inadmissible confession:—(I.) In general; (II.) necessity of identifying things found. 402

Occurrence of accident as evidence of negligence. 627

Presumption as to possession by owner of property. 700

Presumption as to service of summons to give jurisdiction. 563

Presumption as to sanity. 814

Burden of proof as to failure of agent to pay over money. 515

Burden of proof as to power of trustee to sell. 687

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Explanation of books of accounts by bookkeeper. 516

Presumption as to continuance of policy in force. 50

Parol; to explain contract. 682

Parol; to identify beneficiary. 711

Parol; as to parties to negotiable instrument; want of consideration. 909

Parol; contradictory of written instrument. 508

Declarations of railroad agents; *res gestæ*. 914

## EXECUTION.

Execution upon an original judgment cannot be had after a judgment of fiat in a scire facias thereon. *Wright v. Ryland* (Md.) 702

### NOTES AND BRIEFS.

Execution; after scire facias. 703

## EXECUTORS AND ADMINISTRATORS.

Right to Testator's Body, see CORPSE, 2.

In an action by an administrator for damages for the death of his decedent, his duties as assistant attorney are within the scope of his duties as administrator, and he may not make a contract with his attorneys for additional compensation as assistant attorney in the case. *Re Evans* (Utah) 952  
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## EXEMPTION.

From Levy, see LEVY AND SEIZURE.

From Tax, see TAXES, 6-10.

## EXPERTS.

Evidence of, see EVIDENCE, 20-24.

## EXTRA ALLOWANCE.

See COSTS, 2.

## FACTORS.

1. A factor has, in the absence of instructions or usage to the contrary, power to sell the goods of his principal upon a reasonable credit, provided he exercises due care with respect to the responsibility of the purchaser and in collection of the price. *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* (Iowa) 775

2. A factor cannot, after learning of a sale of the property by his principal, proceed to sell it himself, although he has made advances or incurred liabilities on account of the property, unless the sale is necessary to protect his interests. *Id.*

3. Only such of those who participated in the conversion of property consigned to a factor for sale, as are in possession of it when suit is brought, can be held liable for its return. *Id.*

4. In case the consignor sells property which he has consigned to a factor for sale, the purchaser may recover it or its value without deductions, if the lien for advances or charges has been waived; but if such lien has not been waived he can only recover any balance which remained or should have remained in the factor's hands after a prudent disposal of the property. *Id.*

### NOTES AND BRIEFS.

Factors; sale for reimbursement; absence of instructions; right to sell on credit. 775

## FALSE REPRESENTATIONS.

See FRAUD AND FRAUDULENT CONVEYANCES.

## FEDERAL COURT.

See REMOVAL OF CAUSES, NOTES AND BRIEFS.

## FEEES.

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## FELLOW SERVANT.

See MASTER AND SERVANT, 4.

## FENCES.

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See also DAMAGES.

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## FIRE.

See WAREHOUSEMEN.

**FISHERIES.**

Police Power as to, see **CONSTITUTIONAL LAW**, 5.

A statute making it unlawful to fish in any of the streams, ponds, or lakes of the state for brook, speckled, or lake trout, with intent to sell or trade fish so caught, is not unconstitutional as operating to give wealthy sportsmen more than their just and equal share of the fish. *State v. Dow* (N. H.) 314

**NOTES AND BRIEFS.**

Fisheries; legislative regulation. 315

**FIXTURES.**

1. Machinery not manufactured especially for a building, but of a kind which can be purchased generally in the market, does not become, in favor of a mortgagee, part of the realty by being attached by bolts and screws to the building for the purpose of steadying it while in use, if it is not intended to become part of the premises, and can be removed without any material injury to or alteration of the building. *Neufelder v. Third Street & S. R. Co.* (Wash.) 600

2. The vendor of personal property sold to be, and in fact, attached to real estate by the owner thereof, or with his consent, as a permanent improvement, may by contract with such owner preserve the chattel character of the accession. *Fuller-Warren Co. v. Harter* (Wis.) 603

3. The character of the accession of personality as a permanent improvement to realty cannot be preserved by contract between the vendor and vendee of the personality, as against the owner of a mortgage of the realty existing when the accession is made, who is not a party to such contract. *Id.*

**NOTES AND BRIEFS.**

Fixtures; what are; machinery; fastened to building; as between mortgagor and mortgagee. 601

Intention; annexation to building; furnaces; removal. 604

**FOOD.**

Requiring Sale of, in Public Market, see **CONSTITUTIONAL LAW**, 10.

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**FRAUD AND FRAUDULENT CONVEYANCES.**

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Parol Evidence as to, see **EVIDENCE**, 15.  
Opinion Evidence as to, see **EVIDENCE**, 22, 23.

Evidence of, see **EVIDENCE**, 36.

Contesting Insurance Policy for, see **INSURANCE**, 1.

Notice of, see **NOTICE**.

See also **LIMITATION OF ACTIONS**, 1.

1. Liability for deceit on the part of a  
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landowner making false representations as to the quantity in the tract, on which a purchaser relies to his injury, cannot be predicated upon the fact that from the means of knowledge accessible to him he might have known the statements to be false, if he in fact believed them to be true. *Boddy v. Henry* (Iowa) 769

2. Officers of a corporation, who are its principal stockholders, and who contemplate trading their stock for other property, owe no duty to the other party to the transaction, which will take their representations as to the corporate property out of the general rule that knowledge of falsity of representations is necessary to support an action of deceit for making them. *Id.*

3. Stockholders of a corporation are not liable for false representations as to the amount of the corporate property by an agent of the corporation in charge of the property with power to sell it, upon which reliance is placed by a third person in purchasing the interest of such stockholders. *Id.*

4. The right of one who trades property for corporate stock to recover for false representations by the owners of the stock as to the amount of the corporate property is not affected by the fact that some of the stock is taken in the names of various members of his family, and does not stand in his own name. *Id.*

5. A recovery of the value of improvements made on land under an oral contract for its conveyance to the party making them, which is broken by refusal to convey after the improvements are made, may be had on the ground that they have been obtained by fraud. *Luton v. Badham* (N. C.) 337

**NOTES AND BRIEFS.**

See also **LIMITATION OF ACTIONS**.

Fraudulent representations; concealment; intent to deceive; knowledge; good faith; investigation by vendee as affecting; quantity of land. 769

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**GAMING.**

See also **CONTRACTS**, 10.

**NOTES AND BRIEFS.**

Gaming; recovery of money loaned for gaming purposes; knowledge; recovery by principal of money lost by agent. 649

**GARNISHMENT.**

Money deposited by a third person with a justice of the peace as bail for one who has been committed by the justice, and which is receipted for to him, is, until the contrary is shown, presumed to belong to such third person, and is not subject to garnishment for the prisoner's debt after the latter's discharge. *McAlmond v. Bevington* (Wash.)

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**NOTES AND BRIEFS.**

Garnishment; of money deposited in lieu of bail.

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**GAS.**

As Subject of Commerce, see **COMMERCE**, 2.

See also **CORPORATIONS**, 1.

**GOODWILL.****NOTES AND BRIEFS.**

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Breach of contract of sale of.

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**GUARDIAN AND WARD.****NOTES AND BRIEFS.**

Guardian and ward; purchase by guardian in socage from mortgagee after foreclosure.

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**HACKS.**

Rights in Highway, see **INJUNCTION**, 1, 2.

A railroad company which has leased a hack stand on its own property cannot grant the lessee special privileges beyond the limits of its own land by preventing others from occupying hack stands in the street. *Pennsylvania Co. v. Chicago* (Ill.)

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**HEALTH.****NOTES AND BRIEFS.**

Health; regulations to preserve.

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*Respondent superior* as between board of health and city.

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**HIGHWAYS.**

Bicycle Path as, see **BICYCLES**.

Requiring Conduits for Telephone Wires in, see **CONSTITUTIONAL LAW**, 12; **CONTRACTS**, 17.

Right of Hack in, see **HACKS**; **INJUNCTION**, 2.

1. The city council or governing body of a municipality has the undoubted right, in the exercise of the police power, to order the placing of telegraph and telephone wires under ground whenever, in the exercise of a fair discretion, it decides that public interests require it to be done; but it cannot act arbitrarily in the premises. *Northwestern Teleph. Exch. Co. v. Minneapolis* (Minn.)

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2. The extension of the limits of a municipality over a road on which street-railway tracks have been laid under authority of the county will make such road subject to an existing ordinance forbidding the tearing up of streets without consent of the municipal authorities, and no contract between the county and the railway company is thereby impaired so far as the ordinance merely requires the tearing up of streets to be under reasonable police restrictions. *Westport v. Mulholland* (Mo.)

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**Defects in.**

Defects in; Joint Suit against City and Abutting Owner, see **ACTION OR SUIT**, 1. Question for Jury as to, see **TRIAL**, 4-6. See also **NOTICE**.

3. The building of a step in a sidewalk is not of itself such negligence as will make the municipality liable for injuries to a pedestrian from a fall caused by the step, if the plan adopted is not palpably unsafe, and from the nature of the grade the municipal authorities deem the step necessary and proper. *Teagar v. Flemingsburg* (Ky.)

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4. A joint liability against the owner of property abutting on a street, and the municipality, exists where he negligently suffers rainwater to be discharged from defective pipes on his roof, so that it freezes and forms a dangerous condition of the sidewalk, which is permitted to remain for an unnecessary period, until a passer-by falls and is injured. *Reedy v. St. Louis Brewing Asso.* (Mo.)

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5. An owner of property abutting on a street is not liable to a passer-by injured by falling upon ice on the sidewalk formed by water from a burst pipe leading to a storage tank, when the break is not caused by any defect in the pipe, or by his negligence, although the water may have reached the sidewalk because the pipes designed to carry rainwater were insufficient to carry it. *Id.*

6. Where a sidewalk is in fact rendered dangerous by ice formed from accidental or incidental discharge of water thereon, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice, or by the exercise of reasonable care can discover the condition. *Id.*

7. The rule requiring notice to a purchaser of property containing a nuisance, requesting its removal, before he is liable to an action for injuries caused by it, does not apply in favor of the purchaser of a house so constructed as to cast water from its conductor pipes upon the sidewalk in such a way as to freeze and render the sidewalk unsafe for pedestrians. *Leahan v. Cochrane* (Mass.)

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Damages for Breach of Contract as to, see **DAMAGES**.

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**HOMESTEAD.**

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**HOMICIDE.**

Conspiracy to Commit, see **CONSPIRACY; TRIAL**, 3.

Indictment for Conspiracy to Commit, see **INDICTMENT**, 2, 3.

1. It is not sufficient to charge one with murder that the killing was in pursuance of his advice, counsel, or encouragement, unless it was induced thereby. *Powers v. Com.* (Ky.) 245

2. One who advises and counsels the killing of members of the legislature is guilty of murder without any reference to the question whether he engages in a conspiracy to do or procure the doing of some other unlawful act, if in pursuance of such advice and counsel, and induced thereby, a member is killed. *Id.*

**HUSBAND AND WIFE.**

Consideration for Contract of, see **CONTRACTS**, 2-5.

Oral Separation Agreement, see **CONTRACTS**, 11.

Wife as Surety for Husband, see **ESTOPPEL**, 2; **MORTGAGE**, 1, 2.

Wife's Right to Insure Husband's Life, see **INSURANCE**, 6.

1. A contract by a mother for the disposition of her child, made during coverture, is void. *Stapleton v. Poynter* (Ky.) 784

2. A wife who executes a mortgage on her separate property to secure her husband's debt occupies the position of a surety, and is discharged from liability by an agreement for extension of payment, made without her knowledge or consent, notwithstanding the contract of forbearance is based upon a usurious consideration. *Fleming v. Borden* (N. C.) 316

3. A conveyance by a married woman of real property which was deeded to her by her husband without consideration paid from her separate estate, and in the absence of statute changing the rule that she acquired only an equitable title by the deed, will not carry the covenants in the deed under which her husband acquired title. *Wallace v. Pereles* (Wis.) 644

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See **CONTRACTS**, 16, 17.

**IMPROVEMENTS.**

Recovery for, see **FRAUD, ETC.**, 5.

Continued possession by the purchaser of land under a parol contract is not necessary to enable him to recover the value of improvements placed by him upon the property on the faith of the contract, which has been repudiated by the vendor. *Luton v. Badham* (N. C.) 337

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Improvements; subsequent promise to pay for. 375

Rights in respect to compensation for improvements on land, made in good faith, under an oral contract or gift:—(I.) Introductory; (II.) when vendee entitled to recover for: (a) under parol contract; (b) under parol gift; (III.) when vendor unable to make title; (IV.) particular and peculiar cases. 337

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**INDEPENDENT CONTRACTOR.**

Liability for Negligence of, see **LANDLORD AND TENANT**, 2.

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Independent contractor; liability for acts of; supervision and inspection; work intrinsically dangerous. 552

Liability of owner; injury to passing traveler on highway. 172

*Respondeat superior* as between owner and servant of contractor. 475

**INDICTMENT.**

1. The principal need not be named in the indictment, to justify conviction of an accessory before the fact to the crime of murder. *Powers v. Com.* (Ky.) 245

2. An indictment for conspiracy to procure a murder will not be adjudged insufficient because of lack of grammatical construction, if its meaning is plain and a person of ordinary intelligence could not be misled as to the nature of the charge. *Id.*

3. Failure to charge in an indictment for conspiracy to murder, that the killing was done in pursuance to and in furtherance of the conspiracy, is not fatal if defendant is directly charged with counseling, aiding, and procuring the killing, and that, having been so counseled, aided, and procured, the co-conspirators did commit the offense. *Id.*

4. One indicted for misapplying the assets of an insolvent bank, under U. S. Rev. Stat. § 5209, may be declared against as president, director, and agent. *Jewett v. United States* (C. C. A. 1st C.) 568

5. The insertion, in a count of an indictment for misapplication of its funds by the agent of an insolvent bank, of the allegation that the conversation was done by some means and in some manner to the jurors unknown, will not render the count demurrable if it alleges that accused did unlawfully, fraudulently, and wilfully misapply and convert to his own use the assets of the bank, with intent then and thereby to injure and defraud the association. *Id.*

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Insurance on Life of, see **INSURANCE**, 3.

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Negligence Of, or Towards, see **RAILROADS**, 3-6.

1. Courts of equity will overrule the claims of nature, or substitute their discretion as to a child's welfare for the responsibilities imposed by God upon the parent, only in cases where the parent asks the court to change the child's possession, basing the claim upon a naked legal right. *Stapleton v. Poynter* (Ky.) 784

2. The custody of a child will be taken from its grandparent and given to its parent, when the latter is of moral habits, free from contagious or infectious disease, and sufficiently industrious to reasonably insure the child from want and positive distress, although the grandparent possesses fortune, character, kindness, and affection for the child, and the child prefers to remain with the grandparent. *Id.*

3. A father is not liable for services rendered in tutoring during vacation time his 53 L. R. A.

minor son who lives with and is supported by him, where the father is not consulted about and does not consent to the employment. *Peacock v. Linton* (R. I.) 192

**NOTES AND BRIEFS.**

See also **MASTER AND SERVANT**; **NEGLIGENCE**.

Infants; new promise after majority. 365

Custody; mother's right to, on death of father; welfare of child; validity of transfer of parental authority. 784

**INJUNCTION.**

Review of Order Granting, see **APPEAL AND ERROR**, 8.

To Restrain Use of Tradename, see **TRADENAME**, 5, 6.

1. The use of a street or highway as a stand for hacks or other vehicles, with the consent or acquiescence of the municipal authorities, cannot be enjoined at the suit of an abutting property owner. *Pennsylvania Co. v. Chicago* (Ill.) 223

2. A hack stand in front of a railroad depot, which does not prevent access to or egress therefrom, cannot of itself interfere with passenger or freight traffic so as to entitle the railroad company to an injunction. *Id.*

3. The vendor of land who retains title thereto for the purpose of securing the payment of the purchase money cannot by injunction prevent the vendee from clearing the land and cutting the timber thereon, unless such acts impair the value of the vendor's security. *Small v. Slocumb* (Ga.) 130

4. That a private corporation to whom municipal authorities have granted land set apart for a public burying ground has entered into contract and bond to make improvements thereon, in accordance with which it has expended money, will give it no right to enjoin interference by the municipality with its enjoyment of the property, if the grant was made without authority. *La Societa Italiana Di Mutua Beneficenza v. San Francisco* (Cal.) 382

**NOTES AND BRIEFS.**

Injunction; to restrain use of one's name as trademark; unfair competition; deception of public. 385

By abutting owner against use of highway. 224

**INSANE PERSONS.**

See **INCOMPETENT PERSONS**.

**INSOLVENCY.**

Of Banks, see **BANKS**.

See also **LIMITATION OF ACTIONS**, 5, 6.

**NOTES AND BRIEFS.**

See also **BANKS**.

Insolvency; new promise after discharge of debtor. 363

**INSTRUCTIONS.**

Prejudicial Error in Giving, see **APPEAL AND ERROR**, 18-22.

See also **TRIAL**, 10-13.

**INSURANCE.**

Conflict of Laws as to, see **CONFLICT OF LAWS**.

Credit Insurance, see **CONTRACTS**, 12.

Assignment of Policy to Wife, see **CONTRACTS**, 11.

Loss of Profits of Agent as Damages, see **DAMAGES**, 11, 12; **EVIDENCE**, 24.

Fraud in Taking Policy, see **LEVY**, 2.

See also **TRIAL**, 12.

1. A policy containing a clause making it incontestable after two years from date of issue cannot be contested after that time, even for false and fraudulent answers in the application, since the clause merely provides a short statute of limitations, within the limited period of which the fraud must be discovered, if at all. *Murray v. State Mut. L. Assur. Co. (R. I.)* 742

2. The obligation on the part of a life insurance company to pay the amount of the policy on the happening of the event contemplated furnishes a sufficient consideration to support the promise to pay premiums, whether such promise is made by the insured alone or by another jointly with him. And such insurance contract is not invalid as a wagering contract, though it is induced by one who has no insurable interest in the life of the insured, and who joins in a promise, evidenced by promissory notes, to pay premiums. *Union Cent. L. Ins. Co. v. Hilliard (Ohio)* 462

3. A policy of life insurance issued on the life of a minor, payable to him if living at maturity, and to his executors, administrators, or assigns in case of death before maturity, is not absolutely void; nor are notes given by him for premiums void, although the insured has power to elect to avoid both on arriving at majority; nor is his written assignment of such policy during minority necessarily void. *Id.*

4. The existence of a disease in applicant at the time of taking out a life insurance policy, which is so undeveloped that he is entirely unconscious of its existence, will not avoid the policy, although in his application he denies having disease, and agrees that any untrue statement shall render the policy void,—especially where the statute provides that representations in the application are covenanted to be true, and that “wilful concealment” will avoid the policy. *Fidelity Mut. L. Asso. v. Jeffords (C. C. A. 5th C.)* 193

5. In case a man expends more than the amount allowed by statute for insurance for the benefit of his family, to the exclusion of claims of creditors, the courts will not apportion the insurance money thereby obtained between the family and the creditors, but will give the latter only the amount of excessive premiums paid, with interest. *Sternberg v. Levy (Mo.)* 438

6. An insurance company may be compelled to repay a husband the amount of premiums received by it from his wife for insurance on his life, where the policy was taken without his knowledge, and the money was paid by her out of funds with which he 53 L. R. A.

had provided her for household expenses. *Metropolitan L. Ins. Co. v. Smith (Ky.)* 817

7. Where an applicant for a loan of money from a life insurance company obtains the same upon a lawful rate of interest, giving a real-estate mortgage as security, and also procures the issue by the company of an insurance policy to one in whose life he has no insurable interest, and its assignment to the company as collateral security upon the loan, and signs premium notes with the insured in order to give value to the policy as collateral, such policy being upon the usual terms and conditions, the premiums paid and agreed to be paid thereon will not be regarded as additional interest for the loan, and usurious. *Union Cent. L. Ins. Co. v. Hilliard (Ohio)* 462

**Insurable interest.**

See also *supra*, 2.

8. A policy taken by one on his own life for the benefit of his brother is not avoided by the fact that the premiums are paid by the latter. *Fidelity Mut. L. Asso. v. Jeffords (C. C. A. 5th C.)* 193

9. Under a statute giving a woman an insurable interest in her brother's life, a sister who, with her children, is living with and supported by her brother, is entitled to the benefit of a statute permitting him as head of a family to expend a certain sum each year for insurance for their benefit free from the claims of his creditors. *Sternberg v. Levy (Mo.)* 438

**Paid-up policy.**

10. A provision in an insurance policy for the issuance of a paid-up policy for such amount as the reserve will purchase “upon surrender of this policy within six months” after lapse for nonpayment of premiums does not make time of the essence of the contract, but, the consideration having been paid, the insured is entitled to the policy, although he does not apply therefor until nearly five years after making default. *Manhattan L. Ins. Co. v. Patterson (Ky.)* 378  
**But see following cases.**

11. The right to a paid-up life policy under Mo. Rev. Stat. 1879, § 5984, after two full annual premiums have been paid, is conditioned on a demand therefor within sixty days after the unpaid premium becomes due. *Cravens v. New York L. Ins. Co. (Mo.)* 305

12. The limitation on the forfeiture of life insurance policies, made by Mo. Rev. Stat. 1879, § 5983, after two annual premiums have been paid, cannot be waived by provisions of the contract. *Id.*

13. An unconditional commutation to non-forfeitable paid-up life insurance, which will, under Mo. Rev. Stat. 1879, § 5986, exempt a policy from the provisions of the three preceding sections providing for nonforfeitable and paid-up policies, is not provided for by a policy which provides for it only in case of a demand within six months after default in the payment of the premium. *Id.*

**Cause of death.**

See also TRIAL, 1.

14. No recovery can be had on a policy of life insurance in case death is caused by voluntary submission to an illegal operation performed in order to get rid of an illegitimate fetus. *Wells v. New England Mut. L. Ins. Co. (Pa.)* 327

15. A woman who solicits and submits to a criminal abortion to get rid of an illegitimate fetus violates the criminal laws, within the meaning of a clause in a life insurance policy exempting the company from liability for death caused by violation of, or attempting to violate, the criminal law. *Id.*

**NOTES AND BRIEFS.**

See also CONFLICT OF LAWS.

Insurance; wife's right to insure life of her husband:—(I.) Scope of note; (II.) the right at common law; (III.) the right under statutes: (a) the substance and design of statutes; (b) their purpose, construction, and effect: (1) generally; (2) with reference to creditors of the husband; (3) with reference to title of wife and children; (c) what policies covered by; (IV.) promised marriage and irregular marriages; (V.) consent to use by wife of husband's funds; (VI.) conclusion. 817

Nonforfeiture statute; restrictions on business of foreign companies. 306

Validity of life insurance to secure debt to insurer:—(I.) In general; (II.) usurious transactions. 462

Untrue statements in application covenanting truth; insurable interest; warranty by assured; good faith; stranger as beneficiary; where policy permits payment to assign. 206

Innocent misrepresentations as to health of insured when he has an undiscovered disease:—(I.) In general; (II.) representations to the best of knowledge and belief, etc.; (III.) effect of statutory provisions; (IV.) representations by beneficiary; (V.) conclusion. 193

Incontestable policies. 743

Surrender for issuance of paid-up policy; time limit. 379

Rights of creditors; payment for insurance by insolvent. 438

Insurable interest, what is; wagering policies. 465

**INTEREST.**

Suspension of a bank, followed by the appointment of a temporary receiver, does not of itself mature the deposit accounts, within the meaning of a statute allowing interest on accounts from the date when they become due; but demand is necessary for that purpose. *Patten v. American Nat. Bank (Colo. App.)* 693

**NOTES AND BRIEFS.**

Interest; under statute; on unliquidated account; bank deposit; necessity of demand. 693

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**INTERNAL REVENUE.**

Congress has power to levy and collect taxes by requiring revenue stamps to be placed upon certain written instruments, and to prescribe a punishment for failure or refusal to comply with that requirement and to provide that such instruments shall not, unless stamped, be admissible as evidence in the Federal courts. It has, however, no power to prescribe rules of evidence for a state court, and therefore the act of Congress which declares that certain written instruments shall not be received in evidence in any court until stamped as required by the act is to be understood as applicable to the Federal courts only. *Small v. Slocumb (Ga.)* 130

**INTERSTATE COMMERCE.**

**NOTES AND BRIEFS.**

Interstate commerce; interference with privilege tax. 922

**INTOXICATING LIQUORS.**

1. Allegations upon information and belief are not sufficient as a basis for a forfeiture of a liquor-tax certificate, under a statute requiring the petition to state the "facts upon which the application is based." *Re Peck (N. Y.)* 888

2. Forfeiture of a liquor tax certificate for criminal acts cannot be authorized by legislation, upon failure of the holder to deny under oath the allegations of the petition, without any proof of the commission of the acts constituting the offense. *Id.*

3. An ordinance of the city of Minneapolis relating to stalls, booths, or other inclosures in saloons is one which the city council had legislative authority, in its discretion, to enact. *State v. Barge (Minn.)* 428

4. An ordinance which forbids the keeping of any inclosure in, or connected with, any room wherein intoxicating liquors may be sold by a licensed dealer, which is or can, by any ingenuity or pretense, be used as a lounging or drinking place or for any immoral purpose, is not unreasonable, but valid. *Id.*

5. A person managing and controlling a public place of amusement which he invites the public, on payment of an admission fee, to attend, and at which place he sells to his customers and patrons intoxicating liquors, who sells such liquors to one in attendance at such place, and thereby renders him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without cause or provocation, is bound to exercise reasonable care to protect his other customers and patrons from such assaults and insults, and for a failure to do so is liable for damages at the suit of one assaulted and injured. *Mastad v. Swedish Brethren (Minn.)* 803

**NOTES AND BRIEFS.**

See also MUNICIPAL CORPORATIONS.

Intoxicating liquors; transfer of surren-

der of certificate; revocation; petition for; sufficiency. 888

### JUDGMENT.

As Part of Record on Appeal, see APPEAL AND ERROR, 4.

On Appeal, see APPEAL AND ERROR, 23.

Of Eviction as Evidence, see EVIDENCE, 3.

A grantee of a judgment debtor holds the property free from the lien of the original judgment after a judgment of fiat is obtained in a scire facias thereon, although such grantee is free from any lien of the new judgment because not made a party to the scire facias. *Wright v. Ryland* (Md.) 702

#### NOTES AND BRIEFS.

See also EVIDENCE.

Judgment; new promise to pay after. 365

Effect upon existing judgment lien of proceedings to renew, revive, or extend the judgment. 702

Against one served but misnamed. 564

Scire facias; effect on old judgment; on third person not party. 703

### JUDICIAL SALE.

Of Land Held in Trust for Life Tenant, see LIFE TENANTS, 3, 4.

On Foreclosure, see MORTGAGE, 2, 3.

Recovery of Goods after, see REPLEVIN.

### JUSTICE OF THE PEACE.

1. A notice of appeal from a judgment rendered in justice court against a town, signed by three persons, with the word "Supervisor" under the last signature, the signatures and the official designation being so located that if the plural number were used instead of the singular it would clearly indicate that all signed officially, shows with reasonable certainty that it was so signed, where there is no indication in the notice to the contrary. *Patrick v. Baldwin* (Wis.) 613

2. Mistakes in a notice of appeal from a judgment rendered in justice court do not render such notice ineffective, if it contains enough to identify with reasonable certainty the judgment, the parties, and the court, and to show that it was made by the party appealing, personally, or by some person or persons duly authorized, in behalf of such party. *Id.*

### LACHES.

As to Bank Deposit, see LIMITATION OF ACTIONS, 6.

### LANDLORD AND TENANT.

Claim for Rent against Bankrupt Tenant, see BANKRUPTCY, 1-3.

Tenant Claiming under Tax Deeds, see EJECTMENT.

Liability of Receivers for Rent, see RECEIVERS.

Set-Off of Amount Paid as Rent, see SET-OFF, ETC., 2.

See also ACTION OF SUIT.

1. A tenant not under any duty or obligation to pay taxes on rented land may purchase the land at tax sale, and thus acquire an adverse title, as against his former landlord. *Smith v. Newman* (Kan.) 934

2. A landlord who agrees with his tenant to put an automatic fire extinguisher in the leased building cannot relieve himself from liability for injuries to the tenant's property caused by negligence in using apparatus the vents of which open at too low a temperature, by employing a competent independent contractor to do the work. *Peerless Mfg. Co. v. Bagley* (Mich.) 285

3. A landlord is not an insurer or warrantor, nor is he compelled to exercise constant care and inspection; but if he knows that the premises which he is about to let are defective and in a dangerous condition, and especially if such dangerous or defective place is not obvious, or is not discoverable by the tenant by the exercise of ordinary care, and he does not inform the tenant of such defective or dangerous place, and injury is occasioned thereby to the tenant or a member of his family, who is not aware of such defective or dangerous place, while in the exercise of ordinary care, the landlord is liable in damages. The law requires good faith on the part of the landlord towards his tenant. *Moore v. Parker* (Kan.) 778

#### NOTES AND BRIEFS.

See also RECEIVERS.

Landlord and tenant; damage by elements in case of lease. 673

Loss of profits as element of damages for breach of contract of. 97

Right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy:—(I.) In general; (II.) title derived from judicial sale during tenancy; (III.) title derived from tax sale during tenancy: (a) when tenant has agreed to pay the tax; (b) when tenant has not agreed to pay the tax; (IV.) adverse possession: (a) character of tenant's possession, generally; (b) power of tenant to initiate an adverse possession: (1) generally; (2) during term for years; (c) how initiated: (1) requisites, generally; kind and amount of proof necessary; (2) holding over; presumption as to tenant's possession: (3) nondemand and nonpayment of rent; (4) acquisition of outstanding title or interest by tenant; (5) successors of tenant. 934

Liability to tenant for defective condition; inherent defect; notice of; landlord's knowledge; presumption as to; duty of tenant to examine; implied obligation to repair. 778

Liability to tenant from want of or negligence in making repairs; employment of independent contractor. 286

### LATERAL SUPPORT.

#### NOTES AND BRIEFS.

Lateral support; of property abutting on street. 552



**LEGISLATURE.****NOTES AND BRIEFS.**

Legislature; power over municipalities. 422

Right of, to limit exercise of police power. 274

**LEVY.**

1. A man residing with and supporting his sister and her children is entitled to the exemptions allowed by statute to the head of a family. *Sternberg v. Levy* (Mo.) 438

2. It is no fraud for a man who is the head of a family composed of his sister and her children to apply his wages, which are exempt by statute from the reach of creditors, or his other exempt property, to the procuring of insurance for her benefit. *Id.*

**LIBEL AND SLANDER.**

Burden of Proof as to, see **EVIDENCE**, 9, 10.

Sufficiency of Evidence of, see **EVIDENCE**, 44.

1. Naming a person with whom plaintiff has committed adultery, in a cross bill in a divorce proceeding before a court having jurisdiction of the parties and subject-matter, is absolutely privileged. *Jones v. Brownlee* (Mo.) 445

2. The action of a priest in the discharge of his duties and office, in conducting the public functions of his calling, is the proper subject of comment in the public press, for which, within proper limits, an action for libel will not lie. *Klos v. Zahorik* (Iowa) 235

3. A publication condemning the conduct of a person if certain accounts of it which have appeared in the public press are true is not libelous, although the newspaper statements are false, since it does not involve a false statement of fact. *Id.*

4. An action for libel will not lie against one who contributes an article to a newspaper, for libelous matter inserted therein by the publisher of the paper. *Id.*

**NOTES AND BRIEFS.**

Libel and slander; privilege in pleading; pleadings; malice. 447

Who responsible for; newspaper publication; what constitutes publication. 235

**LICENSE.**

To Cross Railroad Track, see **EASEMENTS**, 2.

**NOTES AND BRIEFS.**

License; revocability, where improvements made; estoppel. 382

**LIENS.**

Of Factor, see **FACTORS**, 4.

Of Landlord where Tenant Bankrupt, see **BANKRUPTCY**, 1, 2.

Of Judgment, see **JUDGMENT**.

See also **JUDGMENT**, **NOTES AND BRIEFS**.

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**LIFE TENANTS.**

1. Dividends on stock held in trust under a will to pay the income to life tenants are to be distributed as income, although made from a sinking fund which had been mostly accumulated during the testator's lifetime for the purpose of meeting the corporation's obligation as indorser on bonds from which it was finally relieved. *Quinn v. Safe Deposit & Trust Co.* (Md.) 169

2. In case a trustee has power to change investments under a will establishing a fund the income of which is to be paid to one for life with remainder over, it is his duty to reserve from the income a sinking fund to offset the premium on bonds purchased and keep the principal intact. *New York L. Ins. & T. Co. v. Baker* (N. Y.) 544

3. A bill to sell realty held in trust for a life tenant, with remainder to his children and other remainders over, may be filed by the life tenant as well as against him. *Ridley v. Halliday* (Tenn.) 477

4. Nonexistence of remaindermen of the first class under a will leaving property in trust to one for life, with remainder to his children, with remainders over, will not prevent the sale of realty so as to bind such remaindermen should they come into being, if the life tenant and the living remaindermen of the other classes are before the court. *Id.*

**NOTES AND BRIEFS.**

Life tenants; rights as to stock dividends. 169

**LIMITATION OF ACTIONS.**

On Insurance Policy, see **INSURANCE**, 1.

1. That money is obtained by fraud will not prevent the running of the statute of limitations, against an action to recover it, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer. *Smith v. Blachley* (Pa.) 849

2. The rule that when the trustee is barred by the statute of limitations the *cestui que trust* is also barred has no application to a case where the deed creating the trust authorizes the *cestui que trust* to convey the property and directs the trustee to join in the deed, under which authority the property is mortgaged by an instrument in which the trustee conveys in fee simple, after which he dies, since he has no interest to descend to his heirs against which the statute can run. *Fleming v. Borden* (N. C.) 316

3. Minority of the owner of real estate of which adverse possession is taken will not prevent the running of the statute of limitations against the right to recover it, but will merely give an additional time for suit after the disability is removed. *Carney v. Hennessey* (Conn.) 699

4. Lapse of time may bar a suit by a private individual for private injuries inflicted upon him by the maintenance of a public nuisance, such as a dam across a navigable stream. *Charnley v. Shawano Water-Power & R. Improv. Co.* (Wis.) 895

5. The statute of limitations begins to run against the liability of a stockholder to creditors of the corporation on his unpaid stock subscription at the time the corporation becomes insolvent as shown by an assignment for benefit of creditors. *Swearingen v. Sewickley Dairy Co.* (Pa.) 471

6. A delay of less than three years in seeking to recover back a deposit fraudulently received by an insolvent bank is not such laches as will bar the suit, in the absence of an analogous statute of limitations, where innocent third persons have acquired no interests to be affected. *Richardson v. Olivier* (C. C. A. 5th C.) 113

#### Interruption of statute.

7. A statutory provision permitting the commencement of a new action within a certain time after judgment against plaintiff upon any ground not concluding his right of action applies in case complainant takes a voluntary nonsuit. *Hooper v. Atlanta, K. & N. R. Co.* (Tenn.) 931

8. An averment that the beneficiary of the recovery in an action is the same as that of a former one in which plaintiff took a voluntary nonsuit is not necessary to bring the case within the provisions of a statute permitting plaintiffs against whom judgment has been rendered to begin another action within a certain time, if it is averred that the suits are between the same parties and for the same cause of action. Id.

#### NOTES AND BRIEFS.

Limitations of actions; new promise after bar. 362

Disability of infancy. 699

As to cause of action based on fraud. 849

Against stockholders' liability; suit by assignees. 471

#### LIMITED LIABILITY.

Carrier's Contract for, see CARRIERS, 9.

#### LIQUIDATED DAMAGES.

See DAMAGES, 3.

#### LOCAL SELF-GOVERNMENT.

See CONSTITUTIONAL LAW, 1.

#### NOTES AND BRIEFS.

Local self-government; constitutionality of statute interfering with. 838

#### LOGS.

See WATERS, NOTES AND BRIEFS.

#### MALICIOUS PROSECUTION.

A termination of a prosecution for obtaining money by false pretenses in favor of defendant, which will support an action for malicious prosecution, is not effected by his discharge, secured by an agreement by which defendant, who insists on a postponement, which is objected to by plaintiff, agrees to pay the amount found due by his accounts and half the costs. *Craig v. Ginn* (Del.) 715

#### NOTES AND BRIEFS.

Malicious prosecution; favorable termination to support action for; discharge by magistrate; probable cause; implied malice from want of; good character as affecting probable cause. 715

Reasonable and probable cause. 447

#### MANDAMUS.

#### NOTES AND BRIEFS.

Mandamus; to reinstate pupil in public schools. 787

#### MARKET.

It is competent for the city of New Orleans, under existing laws, to authorize persons to build markets and to collect the revenues thereof for a fixed period, in consideration of their conveying the property to the city; such markets to be under the control of the city, and to be, in all respects, governed by the regulations applicable to other public markets. *New Orleans v. Faber* (La.) 165

#### NOTES AND BRIEFS.

Markets; regulations restricting sales; monopoly. 165

#### MASTER AND SERVANT.

Presumption of Negligence, see EVIDENCE, 4.

Evidence as to Terms of Contract, see EVIDENCE, 38.

Recoupment by Employer in Action for Services, see SET-OFF, ETC., 1.

#### Discharge of servant.

See also CONTRACTS, 6, 10.

1. A servant who is prevented from performing his contract by reason of being discharged from the master's service, whether rightfully or wrongfully, is entitled to recover for the services actually rendered, subject to the right of a recoupment of such damages as the master may be entitled to, in case of a rightful discharge. *Hildebrand v. American Fine Art Co.* (Wis.) 826

2. The rule that where an employee under an entire contract wrongfully terminates it he cannot recover thereon, or at all, for services rendered up to the time of such termination, does not apply to a case where such a contract has been terminated by the employer for cause. Id.

#### Liability for injury to servants.

See also TRIAL, 9.

3. Ignorance of an employer of the technical mechanism of a machine, which prevents his releasing an employee who has been caught therein through his own negligence, as quickly as he otherwise could have done, whereby the injury to the employee is aggravated, will not render him liable for the injury, if he did all he could to effect the release. *Stager v. Troy Laundry Co.* (Or.) 459

4. A member of a construction gang of a passenger railway, whose contract provides for transportation to and from work, and who is furnished with a book of tickets for

that purpose, is not, after quitting work for the day and while riding on a regular passenger car of the employer towards his home, a servant of the employer so as to be a fellow servant of those operating the car. *Peterson v. Seattle Traction Co.* (Wash.) 586

#### Assumption of risk.

See also **CARRIERS**, 2.

5. A contractor's employee does not assume the risk of the service, and is not guilty of contributory negligence, as matter of law, in obeying the contractor's order to go into a narrow trench which has been run under the foundation of a chimney, and level the bottom to receive mason work to support the chimney, where he is unacquainted with the actual perils of the situation, and no perils are visible. *Finn v. Cassidy* (N. Y.) 877

6. A servant operating a mangle in a laundry does not, as matter of law, assume the risk of her hand passing under the guard rail into the rollers, where the rail is adjusted by the employer so as to afford some protection, the employee is forbidden to interfere with the adjustment, and the improper adjustment is not obvious. *Stager v. Troy Laundry Co.* (Or.) 459

7. A locomotive fireman who, after complaining of the absence of a shield on the glass indicating the oil supply for the cylinder, the presence of which is necessary for his safety, and receiving the engineer's promise to fix it, leaves the terminal station where the shield can be procured and proceeds on a trip, knowing that the promise has not been and cannot be fulfilled until the return, assumes the risk of injury from its absence. *Albrecht v. Chicago & N. W. R. Co.* (Wis.) 653

#### Liability for servants' acts.

See also **LANDLORD AND TENANT**, 2.

8. When a city having power to contract for the construction of a sewer enters into a contract with competent contractors doing an independent business, who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum or its equivalent, they are independent contractors. *Uppington v. New York* (N. Y.) 550

9. The reservation by a municipality in letting a sewer contract, of the right to change, inspect, and supervise to the extent necessary to produce the result intended by the contract, will not render it liable for the negligence of the independent contractor which results in injury, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers. *Id.*

10. One who employs a competent independent contractor to repair chimneys of a house, without any dictation or supervision on the part of the owner over the details of the work or the manner in which it shall be done, is not answerable for the failure of the contractor to take proper precautions to protect travelers upon the high-  
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way from falling bricks, as the work, if properly done, does not create a peril, and the negligence, if any, is a mere detail of the work not contemplated by the contract. *Boomer v. Wilbur* (Mass.) 172

11. An employer is liable for an assault committed upon a child in his employ by his overseer, who, by conduct extending back for a period of years, has established a reputation for being hightempered and cruel to children and other help, and who is therefore incompetent for the position in which he is placed. *Lamb v. Littman* (N. C.) 852

#### Liability of servant.

12. The manager of a company doing a commission business, who, in making a wrongful sale of property consigned to it, acts solely in his capacity of manager, and who has no possession of the property, cannot be held liable for its return. *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* (Iowa) 775

#### NOTES AND BRIEFS.

See also **DAMAGES**; **INDEPENDENT CONTRACTOR**; **MUNICIPAL CORPORATIONS**; **NEGLIGENCE**.

Master and servant; injury to servant while being transported; fellow servants. 587

Promise to repair; authority of promisor; continuance in employment; assumption of risk. 656

Duty of master as to machinery; assumption of risk by infants; vice principal or fellow servant. 852

Safe place to work; obvious danger; assumption of risk; obeying orders. 877

Assumption of risk; contributory negligence. 460

Entire or divisible contract; right to compensation. 828

#### MILEAGE TICKET.

See **CARRIERS**, 5.

#### MINES.

For Oil and Gas, see **CORPORATIONS**, 1.

1. Where the apex of a vein leaves a mining claim by crossing the side lines, so that the supposed side lines are in fact end ones, the right to follow the dip is limited by a vertical plane passing downward through the side line, maintaining its direction as marked; and there is no right to follow the dip into territory which might properly have been reached had the side lines as marked proved in fact to be such. *Parrot Silver & C. Co. v. Heinze* (Mont.) 491

2. In case the apex of a vein entering across the end line of a mining claim passes out across the side line, the right to follow the dip of the vein is limited by a vertical plane passing downward through the point where it leaves the side line, parallel with the end line of the claim. *Id.*

3. A mining claim need not contain the apex of a vein to be valid, but in case claims located along the apex fail to keep it with-

in their end lines, so that the vertical planes drawn to limit the right of owners of adjoining claims to follow the dip of the vein under U. S. Rev. Stat. § 2322, make a right angle, a valid claim may be located on such dip within the lines of such angle, where it has passed beyond the lines of the former locations. *Id.*

4. A location of a mining claim, void because of the absence of valid discovery of mineral, may be made good by a subsequent valid discovery within its limits, made before the rights of third persons have attached, but after the filing of the location certificate and all acts of location have been performed. *Brewster v. Shoemaker (Colo.)* 793

5. A surface location of a mining claim may be based on an underground discovery of mineral through a tunnel not claimed under the tunnel-site act of Congress, on a vein, the apex of which is calculated from its dip, but which has never been opened on the surface or shown by actual working to have its apex within the limits of the claim as staked. *Id.*

#### NOTES AND BRIEFS.

Mines; the right to follow a vein or lode on its dip beyond the surface lines of the location:—(I.) In general; (II.) parallelism of lines; (III.) when the apex crosses both side lines; (IV.) when the apex crosses an end line and a side line; (V.) when the apex enters across a side line and departs across the same side line; (VI.) identity of the vein or lode; (VII.) conflict and priority of rights; (VIII.) uniting interests; laying lines of junior, upon senior, location; (IX.) the right as affected by contract; (X.) degree of dip; (XI.) rights as to veins other than discovery vein; (XII.) title to ore bodies that apex beyond claim, when adverse party cannot follow dip; (XIII.) miscellaneous. 491

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#### MONOPOLY.

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See also *CONSTITUTIONAL LAW*, 6.

##### NOTES AND BRIEFS.

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#### MORTGAGE.

Remedy of Purchaser on Foreclosure of Leasehold, see *ACTION OR SUIT*, 6.

By Married Woman, see *HUSBAND AND WIFE*, 2.

Counterclaim by Purchaser on Foreclosure, see *SET-OFF, ETC.*, 2.

See also *BILLS AND NOTES*; *ESTOPPEL*, 2; *FIXTURES*.

1. That a woman who mortgaged her property for her husband's debt is dead, and that no administrator has been appointed for her property and no guardian for her children, so that there is no one to pay the debt at the time of a contract for its extension, will not prevent the extension from operating as a discharge of the mortgage. *Fleming v. Borden (N. C.)* 316

2. A purchaser of land at a mortgagee's sale acquires no title, legal or equitable, where the mortgage was given by a wife to secure her husband's debt, and the lien on the land has been discharged by an agreement for an extension of time, made without her knowledge or consent. *Id.*

3. A purchase for full value from the mortgagee, who purchased at foreclosure sale under a purchase-money mortgage, made without collusion with the mortgagee, will give a man a good title, to the exclusion of his minor children, to property the equity of redemption of which his wife died seized of, leaving surviving her the husband and children, where none of the survivors were able to pay the accrued interest on the mortgage to avoid the sale, and the value of the property did not exceed the amount of the judgment. *Kullmann v. Cox (N. Y.)* 884

4. When an agreement is entered into between a mortgagor of chattels and the mortgagee, that the former may sell the property for the purpose of applying the proceeds in payment of the mortgage debt, the mortgagor is constituted the agent of the mortgagee; and if, in a proper case, he represents or warrants the quality or condition of the property sold, the mortgagee is bound by such representations and warranty. *National Citizens' Bank v. Ertz (Minn.)* 174

##### NOTES AND BRIEFS.

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Mortgage; chattel mortgagor as agent of mortgagee to sell. 174

#### MUNICIPAL CORPORATIONS.

Ordinance for Killing Unmuzzled Dogs, see *ANIMALS*.

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Power as to Markets, see MARKET.

Liability for Negligence of Independent Contractor, see MASTER AND SERVANT, 8, 9.

Waiver of Notice before Commencing Action, see PLEADING, 2.

Liability for Relief of Paupers, see POOR AND POOR LAWS, 1, 2.

Validity of Statute as to, see STATUTES, 4.

Special Laws as to, see STATUTES, 11-14.

Power as to Street Railway, see STREET RAILWAYS, 1, 2.

Subrogation to Rights of, see SUBROGATION.

See also COURTS, 1, 2.

1. The expedients provided by the schedule for the temporary adjustment of the changes necessitated by the substitution of a new system of municipal government for one under which a city had been previously carried on would need to be very clearly unconstitutional to justify a court in overturning them. *Com. ex rel. Elkin v. Moir* (Pa.) 837

2. The power to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, is impliedly granted to cities incorporated under Burns's (Ind.) Rev. Stat. 1894, §§ 3541, 3615, 3616 (Hornor's Rev. Stat. 1897, §§ 3106, 3154, 3155), providing that the common council of a city may enact ordinances for the protection of life, health, and property. *Walker v. Towle* (Ind.) 749

3. Imperfection of an act for the government of cities, in failing to provide a complete system for the passage of ordinances, does not make the act unconstitutional, in the absence of anything to show that the municipal government cannot be administered on account of such imperfection. *Com. ex rel. Elkin v. Moir* (Pa.) 837

4. An ordinance, like a statute, may be subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences. *State v. Barge* (Minn.) 428

5. The establishment of a pesthouse by city authorities within 1 mile of the boundary line of the city, in violation of Ky. Stat. § 3909, renders the city, which is authorized § 53 L. R. A.

by law to establish a pesthouse in a proper location, liable in damages to persons to whom smallpox is communicated by the pesthouse, although the statutes expressly impose both civil and criminal liability on the municipal officers for such illegal act, and are silent as to any remedy against the municipality. *Henderson v. Clayton* (Ky.) 145

#### Officers.

See also CONSTITUTIONAL LAW, 3.

6. The requirement of confirmation by the senate of the governor's appointments to office, made by Pa. Const. art. 4, § 8, has no application to municipal officers. *Com. ex rel. Elkin v. Moir* (Pa.) 837

7. The prolongation of the term of the executive of a city appointed by the governor beyond an election not unduly close at hand, thereby depriving the citizens of the power of election, does not render unconstitutional a statute devising a scheme of government for the city. Id.

8. Substituting an executive officer of a municipality under a different name, but with similar powers and duties, for one elected by the people, before his term of office has expired, does not render void a new charter making the change. Id.

9. All offices pertaining to the police department, whether now named or not by the names they bore prior to the adoption of Wis. Const. art. 13, § 9, providing for the election of city officers by the voters or their appointment by such city authorities as the legislature shall prescribe, are included within the scope of that provision; and the legislature is thereby prohibited from interfering with such appointments. *O'Connor v. Fond du Lac* (Wis.) 831

10. The creation of a board of police commissioners by Wis. Laws 1897, chap. 247, with exclusive authority to appoint all members of the police force, is in violation of Wis. Const. art. 13, § 9, which requires all municipal officers not specifically provided for by the Constitution to be elected by the voters or appointed by such municipal authorities as the legislature may provide. Id.

11. An act of the legislature, so far as it expressly or by its effect extends the term of office of a member of the police force of a city beyond that for which he was specifically elected or appointed by legitimate municipal authority, so as to keep such officer in place for any period of time regardless of such authority, is in violation of Wis. Const. art. 13, § 9, providing that such officers, when not specifically provided for by the Constitution, shall be elected by the voters or appointed by such city authorities as the legislature may designate. Id.

#### NOTES AND BRIEFS.

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 Of Railroad Company, see RAILROADS.  
 Of Street Railroads, see STREET RAILWAYS, 3-6.  
 In Delivery of Telegram, see TELEGRAPHS.  
 See also ELECTRICAL USES AND APPLICATIONS; PARENT AND CHILD, 1.

1. Contributory negligence, however slight, of the plaintiff in an action for personal injuries, precludes his recovering against the defendant on the ground of negligence, regardless of the degree thereof, in the absence 53 L. R. A.

of wilful and intentional misconduct. *Tesch v. Milwaukee Electric R. & L. Co.* (Wis.) 618

2. In case a young girl whom a boy is escorting across a railroad bridge falls in attempting to escape from an approaching train, he is not guilty of contributory negligence in remaining on the bridge and attempting to rescue her. *Becker v. Louisville & N. R. Co.* (Ky.) 267

**NOTES AND BRIEFS.**

See also DANGEROUS AGENCIES; DRUGGISTS; HIGHWAYS; MASTER AND SERVANT; PROXIMATE CAUSE; RAILROADS; RELEASE; TRIAL.

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**NEW TRIAL.**

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The trial judge has no power to order that, as a condition of the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where, from the application of the law to the evidence, the excess can be accurately ascertained. *Central of Ga. R. Co. v. Perkerson* (Ga.) 210

**NONSUIT.**

Time for Commencing Suit after, see LIMITATION OF ACTIONS, 7, 8.

Commencement of Action after, see REMOVAL OF CAUSES, 1.

**NOTICE.**

That Stock is Held as Trustee, see CORPORATIONS, 4.

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Of Ice on Sidewalk, see HIGHWAYS, 7; TRIAL, 6.

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To City before Commencing Action, see  
PLEADING, 2.

Any documents in possession of owners of corporate stock, which will charge them with knowledge of the amount of its property, will likewise charge one who is about to purchase the stock with like knowledge, if put into his possession. *Boddy v. Henry* (Iowa) 769

NOTES AND BRIEFS.

Notice; to purchaser of stock by "trustee" after owner's name. 686

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Ice on Sidewalk as, see HIGHWAYS, 7.  
Bar of Limitation as to, see LIMITATION OF ACTIONS, 4.

City's Power to Declare What Constitutes, see MUNICIPAL CORPORATIONS, 2.

The right to conduct water from a roof across a sidewalk in such a way that it freezes and renders the walk dangerous to public travel, thereby creating a public nuisance, cannot be acquired by prescription. *Leahan v. Cochrane* (Mass.) 891

NOTES AND BRIEFS.

See also MUNICIPAL CORPORATIONS.

Nuisance; prescriptive right to maintain a public nuisance:—(I.) General doctrine; (II.) matters relating to health: (a) offensive trades; (b) burial of the dead; (c) pollution of streams, etc.; (III.) highways and places held for public use: (a) obstructions and encroachments in general; (b) railroads; (c) fences, buildings, and other structures; (d) sidewalks; (e) nuisances relating to waterways. 891

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PARDON.

See also CRIMINAL LAW, 1.

A pardon by one who received a certificate of election as governor, and who was inducted into office, but whose title has been adjudged invalid in a contest duly inaugurated, in which another has been declared elected, is of no effect. *Powers v. Com.* (Ky.) 245

NOTES AND BRIEFS.

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PARENT AND CHILD.

Right of Action for Death of Child, see DEATH.

Mother's Contract for Disposition of Child, see HUSBAND AND WIFE, 1.

Liability for Support of Mother, see POOR AND POOR LAWS, 4, 5.

See also INFANTS.

1. A parent who permits his child to have possession of a deadly weapon, when from youth or mental weakness or the use of intoxicants he is incompetent to be entrusted with it, and the parent knows the danger, or in the exercise of reasonable care should know it,—will be liable for injuries inflicted upon other persons by the child's discharge of the weapon. *Meers v. McDowell* (Ky.) 789

2. A daughter's willingness to provide in her home a comfortable bed and sufficient food for her indigent mother is not conclusive of absence of neglect, within the meaning of a statute authorizing the court to interfere in case of neglect, where the provision is coupled with such harsh treatment from the daughter as justly compels its refusal. *Condon v. Pomroy-Grace* (Conn.) 696

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Effect of, on Dower Rights, see DOWER.

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## PHOTOGRAPHS.

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## PHYSICIANS AND SURGEONS.

No obligation to respond to every call is imposed upon a physician by a state's license to practise medicine, so as to render him liable for arbitrarily refusing to attend a sick person, although no other physician is procurable. *Hurley v. Eddingfield* (Ind.) 135

## NOTES AND BRIEFS.

See also EVIDENCE.

Physicians; implied contract of municipality for services to poor. 614

## PLEADING.

Admissibility under Pleading, see EVIDENCE, 39, 43.

See also EVIDENCE, 9; INTOXICATING LIQUORS, 1, 2.

1. Failure to make objection by some preliminary pleading to the jurisdiction of a court of chancery over a suit to convert realty into personalty is a waiver of objection that the court is without jurisdiction to act in the cause, since it has unquestionable power to make such conversions. *Ridley v. Halliday* (Tenn.) 477

2. Failure to perform a statutory condition precedent to the commencement of an action—as, one that no action shall be commenced to enforce a city liability until notice shall have been given of the existence thereof, and the common council of the city has had an opportunity to pass upon the same—is waived if objection is not taken by answer or demurrer, the statute being in the nature of a statute of limitations simply. *O'Connor v. Fond du Lac* (Wis.) 831

3. An allegation that it was the duty of a railroad company to place a car at a derrick to be loaded by employees of an ice company with which it had contracted for a supply of ice, without stating how such duty arose, is a mere conclusion of law and 53 L. R. A.

immaterial. *Baker v. Louisville & N. Terminal Co.* (Tenn.) 474

4. A denial of an alleged contract is not aided by an attempted pleading of defendant's version of the contract. *Peterson v. Seattle Traction Co.* (Wash.) 586

5. Jurisdiction of the bankruptcy court need not be shown in pleading a discharge in bankruptcy to defeat an action for conversion of property sold on condition. *Bryant v. Kinyon* (Mich.) 801

## Amendments.

6. It is within the sound discretion of the court to permit an amendment of a petition to be filed after the evidence in the case is all in, for the purpose of alleging that plaintiff has acted with reasonable diligence in bringing his action. *Metropolitan L. Ins. Co. v. Smith* (Ky.) 817

7. Allegations in a declaration cannot be considered as part of an amended declaration subsequently filed which is complete in itself and does not refer to or adopt the former as a part of it. *Baker v. Louisville & N. R. Terminal Co.* (Tenn.) 474

## NOTES AND BRIEFS.

See also LIBEL AND SLANDER.

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## PLEDGE.

The sale of a note held as collateral to another, without notice to the maker of the principal note, is illegal when made four years after the principal note has matured, and when it has been reduced to a small part of its original amount, although the contract of pledge expressly provides that in case of default the collateral may be sold without notice. *Moses v. Grainger* (Tenn.) 857

## NOTES AND BRIEFS.

Pledge; rights of pledgeor and pledgee in respect to sale of collateral bonds and commercial paper:—(I.) Authority to sell: (a) express contract: (1) bonds; (2) commercial paper; (b) implied contract: (1) bonds; (2) commercial paper; (II.) notice of time, place, and manner of sale; (III.) judicial and execution sales; (IV.) who may purchase; (V.) remedy of pledgeor. 857

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**POOR AND POOR LAWS.**

Charging Town with Maintenance of,  
see CONSTITUTIONAL LAW, 9.

See also COSTS, 1.

1. There is no legal obligation resting on a municipal corporation to maintain or relieve poor persons, in the absence of a statute creating one; and the court has no power, upon the ground of moral obligations or the equities of any given case, to hold such a corporation liable to a private person who may have relieved or supported a poor person. *Patrick v. Baldwin* (Wis.) 613

2. Where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants, upon which such party can act and hold the municipality liable as upon an implied contract. *Id.*

3. A statute requiring each town in the state to support poor persons in certain cases, and the supervisors thereof to see that such support is furnished, does not permit a private party to aid or relieve such a person at the expense of the town, without a contract to that effect, made between him and such supervisors or a majority thereof. *Id.*

4. The mere imposition upon a person, of a statutory obligation to support his mother, does not carry with it a right to determine where the support shall be furnished. *Condon v. Pomroy-Grace* (Conn.) 696

5. Conn. Gen. Stat. § 3318, as amended by Conn. Pub. Acts 1893, chap. 88, imposing the duty of providing support and maintenance for indigent relatives in such manner and proportion as the court shall judge just and reasonable, does not change the moral duty of support into an absolute legal obligation, but such obligation is not complete until the court has found the necessity for aid, the ability to aid, and prescribed to what extent the aid shall be furnished. *Id.*

**NOTES AND BRIEFS.**

See also CONSTITUTIONAL LAW.

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**POSTOFFICE.**

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Admissions by Agent, see EVIDENCE, 23.

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Release of Surety, see USURY.

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The receipt, by the creditor's agent, of the money stipulated for in an agreement between debtor and creditor for extension of the debt, is sufficient to make the contract binding so as to discharge the surety. *Fleming v. Borden* (N. C.) 316

**NOTES AND BRIEFS.**

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Principal and surety; effect on surety's liability of usury in consideration for extension of time to principal:—(I.) Effect of payment of usury; (II.) effect of contract to pay usury; (III.) summary. 316

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**PROFITS.**

Loss of, as Damages, see DAMAGES, 10-13, NOTES AND BRIEFS.

**PROPRIETARY MEDICINE.**

See DRUGGISTS.

**PROXIMATE CAUSE.**

**NOTES AND BRIEFS.**

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**PUBLIC IMPROVEMENTS.**

See also DRAINS AND SEWERS.

An assessment, on every lot in the city

of St. Paul, of an annual frontage tax, under Special Laws 1885, chap. 10, §§ 26, 27 (St. Paul city charter), where water pipes are laid in front of said lot, for the use of the water commissioners, is not unconstitutional, as in violation of the 14th Amendment of the Federal Constitution, as a taking of property without due process of law. *Ramsey County v. Robert P. Lewis Co.* (Minn.) 421

#### NOTES AND BRIEFS.

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Easement for Crossing Track, see EASEMENTS, 2.

Failure to Give Signals at Crossing, see EVIDENCE, 39.

Grant of Land under Water for, see WATERS, 3, 4.

See also NEGLIGENCE, 2; TRIAL, 7.

1. A railroad company is not liable to an employee of an ice company with which it has contracted for a supply of ice for its refrigerator cars, who is injured by falling from the top of a car which he is storing with ice, either because the car is left on a curve which causes it to incline sideways unduly, or because the roof is slippery with ice, since these are not defects in the premises, the duty to remedy which the railroad company owes to persons impliedly invited to its premises. *Baker v. Louisville & N. Terminal Co.* (Tenn.) 474

2. A trespasser on a railroad bridge when discovered by those in charge of an approaching train must be given a reasonable chance to escape from the bridge in safety by checking the speed of the train. *Becker v. Louisville & N. R. Co.* (Ky.) 267

3. A railroad company is liable for the killing of a boy by its train, only in case of gross negligence, where he was trespassing on the track, remote from a public highway, at a place where those in charge of the engine had no reason to expect him to be. *Trudell v. Grand Trunk R. Co.* (Mich.) 271

4. One in charge of a locomotive is justified in believing that a good sized boy on the track in front of the train will step off in time to avoid being struck, and is not required to check the speed of the train until he sees that the boy does not appreciate the danger. Id.

5. A boy a little over seven years old, who knows and appreciates the danger of being on a railroad track in front of a moving 53 L. R. A.

train, is guilty of negligence, as matter of law, in standing on a track on which a train is approaching, which will preclude a recovery in case he is killed by the train, although he does not realize that a train is approaching on the track on which he is standing. Id.

6. A railroad company is liable for causing the death of an infant upon its track, if the direct and proximate cause of the accident was negligence in failing to keep a reasonable lookout, and to discover the child in time to prevent the injury. *Mason v. Southern R. Co.* (S. C.) 913

#### FENCES.

7. A railroad company is liable for the death of horses killed on its track, where it is clearly shown that if the company had fenced its track as required by statute the horses would not have wandered thereon and been killed. *Johnson v. Oregon Short Line R. Co.* (Idaho) 744

8. A statute requiring railroad companies to fence their right of way where the same is contiguous to private property is a police regulation adopted to protect human life and property, for the benefit of the general public, and not for the sole benefit of adjoining or contiguous landowners. Id.

9. A homestead entry, after it is entered, but prior to patent, is private property, within the meaning of a statute requiring railroad companies to fence their track when their right of way "passes through or along, or abuts upon, or is contiguous to, private property." Id.

#### NOTES AND BRIEFS.

Railroads; Damages for Breach of Contracts as to, see DAMAGES.

Prescriptive right to maintain. 900

Contributory negligence of person at crossing; duty to stop, look, and listen; limit of rule. 621

Fence between railroad and adjacent land; liability for stock killed. 745

Farm crossing; way of necessity; permissive use; duty to close gate in railroad fence. 782

Duty to trespassers; to children; contributory negligence; statutory signals. 913

Control of, under police power. 445

Lookout for trespassers; duty to stop train. 268

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Duty to keep premises safe for trespassing children. 271

#### RATES.

Power to Fix, see CARRIERS, 10-12; CONTRACTS, 16.

#### REAL PROPERTY.

See FRAUD, ETC., NOTES AND BRIEFS.

#### RECEIVERS.

1. A common-law receiver of leasehold property is not liable for rents accruing while he is in possession of the property,

since he acquires no title to the property, but mere possession as an officer of the court. *Stokes v. Hoffman House* (N. Y.) 870

2. A common-law receiver of leasehold property who, after a judicial sale of the property and the placing of the purchaser in possession, pays accrued rent, thereby wrongfully applies a fund in court for the benefit of the purchaser, which the latter may be compelled to repay to him in an action at law in which the rights of all parties cannot be adjusted, although by the terms of sale the purchaser was to receive the property free from claims for such rent. Id.

3. A common-law receiver who takes possession of a hotel operated under a lease is not required to pay the rent by a clause in the order appointing him, authorizing him to take possession of and carry on the hotel, and to do any and all other things which may be necessary or proper to be done in the general and ordinary conduct of similar places of business. Id.

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Receivers; liability for rent. 872  
Rights as to funds for which cashier's check given. 233

**RECOUNPMENT.**

See SET-OFF, ETC., 1.

**REHEARING.**

See APPEAL AND ERROR, 24.

**RELATIVES.**

NOTES AND BRIEFS.

Relatives; promise to pay for past support of. 355

**RELEASE.**

A release in full by one injured by the negligence of a railroad company, upon a consideration adequate for the injury then known, cannot be set aside on the ground of mistake, upon the subsequent discovery of internal injuries not known or suspected at the time of the settlement and a recovery permitted for such injuries, although the compensation received is wholly inadequate in view of the injuries actually received. *Houston & T. C. R. Co. v. McCarty* (Tex.) 507

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Release; impeachment of. 508

**REMOVAL OF CAUSES.**

1. Complainant may take a voluntary nonsuit in an action removed by defendant to a Federal court, and begin another action in the state court for a less sum than will entitle defendant to removal. *Hooper v. Atlanta, K. & N. R. Co.* (Tenn.) 931

2. Absence of the record of an indictment in a United States district court will not affect the jurisdiction of a circuit court to which the cause has been remitted. *Jewett v. United States* (C. C. A. 1st C.) 568  
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3. The sending of the original indictment forward to the circuit court upon remission of a cause into it from the district court under the provisions of U. S. Rev. Stat. § 1037, is not such an irregularity as will defeat the jurisdiction of the former court. Id.

4. Discrepancies between an order remitting a cause from a United States district court to a circuit court, and the docket entry in the district court, will not affect the validity of the remission. Id.

NOTES AND BRIEFS.

Removal of causes; removal of criminal causes into Federal courts from other Federal, or from state, courts:—(I.) From other Federal courts; (II.) from state courts: (a) power of Congress to authorize removals; (b) removals under U. S. Rev. Stat. § 641, to protect Federal rights: (1) terms of statute generally; (2) local prejudice; (3) discrimination as to jurors; (4) effect of removal; (c) removals under U. S. Rev. Stat. § 643, of causes against Federal officers: (1) terms of statutes generally; (2) commencement of prosecution; (3) who entitled to removal; (4) effect of removal; (d) removals under act of Congress of March 3, 1863; (III.) from territorial courts. 568

Transmission of indictment. 570, 573

Effect on original jurisdiction of state court. 931

**RENT.**

Liability of Receivers for, see RECEIVERS.

Set-Off of Amount Paid as, see SET-OFF, ETC., 2.

**REPEAL.**

Of Prior Statutes within Title of Act, see STATUTES, 5.

**REPLEVIN.**

Replevin will not lie to recover goods obtained by fraud, where before the commencement of the action they have been taken from defendant's possession on an execution in favor of a third person and sold without any collusion on his part, so that they are no longer in his possession, custody, or control. *Sinnott v. Feiock* (N. Y.) 565

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Replevin; against one who has parted with possession. 565

**RÉSUMÉ.**

For *Résumé* of contents of book, see p. 961.

**SALE.**

Local Custom as to, see CUSTOM.

Mortgagee Bound by Mortgagor's Warranty, see MORTGAGE, 4.

Of Note Held as Collateral, see PLEDGE.

An implied warranty by a trust company, that stock offered by it for sale under an arrangement for the marketing of the stock of an English corporation was marketable and

free from lien, arose from the sale thereof and the giving of a certificate to the purchaser by such company acting as agent for the transfer of certificates for an undisclosed principal, upon the surrender of which shares and a deed of transfer held by it in trust were deliverable, where it knew, but such purchaser did not, that the shares in its possession were issued by the corporation subject in express terms to its articles of association and regulations, and the deed of transfer was likewise subject to the several conditions on which the transferor held the shares immediately before the execution thereof, and that it also contained a covenant on the part of the transferee "to accept and take the said shares subject to the conditions aforesaid;" since its position and superior knowledge put it upon inquiry, and the law charged it with the knowledge, which proper inquiry would have disclosed, that the stock was, under the articles of association, subject to a lien in favor of the corporation for money owing by the transferor, rendering it of no value. *McClure v. Central Trust Co. (N. Y.)* 153

#### NOTES AND BRIEFS.

See also CORPORATIONS; GOODWILL.

Sale; remedies of purchaser in case of fraud. 158

Partial delivery; recovery by vendor; liability for nondelivery in case of destruction. 682

Resale by vendor; time for; purchase by vendor. 868

#### SANITY.

See INCOMPETENT PERSONS.

#### SCALPERS.

See CARRIERS, 15-17.

#### SCHOOLS.

The question of guilt or innocence of a pupil expelled from the public schools in accordance with established rules cannot be reviewed by the courts, unless it appears that he was expelled arbitrarily or maliciously. *Board of Education v. Booth (Ky.)* 787

#### NOTES AND BRIEFS.

Schools; right of board to make rules as to suspension and expulsion; reinstatement of pupils. 787

#### SEAWEED.

Right to Take, see WATERS, 1, NOTES AND BRIEFS.

#### SET-OFF AND COUNTERCLAIM.

1. In an action against an employer, by an employee who has been discharged for cause, to recover for services rendered, the employer may recoup such damages as he is legally entitled to by reason of the facts which rendered such discharge justifiable. *Hildebrand v. American Fine Art Co. (Wis.)* 826

2. A purchaser at foreclosure sale of a 53 L. R. A.

leasehold, by the terms of which it is to obtain the property free from the lien of unpaid rent, cannot set up the amount which it has been compelled to pay on account of such rent, as a counterclaim in an action against it by the receiver to recover advancements alleged to have been made on its behalf. *Stokes v. Hoffman House (N. Y.)* 870

#### SEWERS.

See DRAINS AND SEWERS.

#### SHERIFF.

Local Act as to Fees of, see STATUTES, 8.

#### SHIPPING.

Duty as to Telegram to Passenger, see EVIDENCE, 5.

See also CARRIERS, 1.

A steamship company is not, merely by reason of its relation as carrier to its passengers, bound to receive telegrams to be delivered to them. *Davies v. Eastern Steamboat Co. (Me.)* 239

#### NOTES AND BRIEFS.

Shipping; liability for collision caused by break in machinery. 286

#### SIDEWALKS.

See HIGHWAYS; MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

#### SLEEPING-CAR COMPANY.

Liability for Baggage, see CARRIERS, 6, 7; DAMAGES, 7.

#### SMALLPOX.

Excessiveness of Damages for Communication of, see DAMAGES, 9.

City's Liability as to, see MUNICIPAL CORPORATIONS, 5.

#### SPECIFIC PERFORMANCE.

Of Oral Contract, see CONTRACTS, 8.

#### NOTES AND BRIEFS.

Specific performance; of voluntary agreements. 651

#### STAMP.

See INTERNAL REVENUE.

#### STATE.

Grant of Land under Water by, see WATERS, 3.

#### NOTES AND BRIEFS.

State; liability of, for injuries by misconduct or negligence of officers or agents. 855

#### STATE INSTITUTION.

1. No liability exists on the part of the state for injuries caused to a prison guard by a defective ladder which he was compelled to use by the officers in charge of the state's prison, which is a mere agent of the state in the administration of its government. *Moody v. State's Prison (N. C.)* 855

2. General statutory authority to corpora-

tions to sue and be sued does not apply to a public corporation under control of the state, such as a state's prison. *Id.*

#### NOTES AND BRIEFS.

State institutions; liability of, for injuries. 855

#### STATE'S PRISON.

See STATE INSTITUTION.

#### STATUTE OF FRAUDS.

See CONTRACTS, 7, 8, NOTES AND BRIEFS.

#### STATUTES.

Constitutionality of, see CONSTITUTIONAL LAW.

Construction of, as to Time, see TIME.

1. Publication of an act of the legislature prior to its taking effect being for the purpose of enabling persons affected to shape their course accordingly, a provision in an act that it shall take effect from and after publication thereof must be interpreted as excluding the day of publication. *O'Connor v. Fond du Lac (Wis.)* 831

2. A statutory limitation of the use of low-test petroleum products for illuminating purposes, to the Welsbach hydrocarbon incandescent lamps, cannot, to uphold the statute, be held to refer to lamps as a class operated on the principle of the one specified, where at the time of the passage of the statute at least one other lamp operated on that principle was on the market. *State v. Santee (Iowa)* 763

#### Invalid in part.

3. A statute prohibiting the use of the lighter products of petroleum for illuminating purposes, except when the gas is generated outside of the building, or when they are used in a particular lamp, is not wholly void because of the unconstitutionality of the latter exception. *Id.*

4. A statute for the government of cities is not made unconstitutional by a provision for a temporary appointment by the governor of an executive having the powers of a justice of the peace, who under the Constitution is an elective officer, since the provision as to his powers, if invalid, is a subordinate and severable feature of the statute. *Com. ex rel. Elkin v. Moir (Pa.)* 837

#### Title.

5. The repeal of previous acts upon the same subject is always germane to the title of a statute. *Id.*

6. The title of a statute when its sufficiency is questioned is not conclusively determined by the legislative journals, but the court will determine the matter as a question of law on an examination, not only of the legislative journals, but of the original bill, or any other source of information which it considers trustworthy. *Milwaukee County v. Isenring (Wis.)* 635

#### Local or special.

7. A law is "general" in the broad sense of the term, if it extends to the whole state, or to the whole of a legislative class of localities legitimately created for the purposes of general legislation. *Milwaukee County v. Isenring (Wis.)* 635

calities legitimately created for the purposes of general legislation. *Milwaukee County v. Isenring (Wis.)* 635

8. An act regulating the sheriff's fees for a particular county only is local within the meaning of Wis. Const. art. 4, § 18, providing that no private or local bill shall embrace more than one subject, and that shall be expressed in its title. *Id.*

9. A statute imposing a tax on bicycles in certain counties of the state only, which shall be used for the construction of bicycle paths, contravenes a constitutional provision against special or local laws for laying, opening, or working on highways. *Ellis v. Frazier (Or.)* 454

10. A constitutional provision against diminishing corporate powers by special laws does not apply to the mere imposition of a privilege tax on a company which is not exempt therefrom. *Knoxville & O. R. Co. v. Harris (Tenn.)* 921

11. A statute for the government of cities, based upon classification, cannot be held unconstitutional as local or special, although it was intended and the classification made so as to apply to only a limited number of existing cities. *Com. ex rel. Elkin v. Moir (Pa.)* 837

12. An act for the government of cities of a certain class cannot be declared unconstitutional because it provides for methods of government and administration different from those required in the other classes, in particulars where there is no real difference, if the classification is made with reference to municipal, and not to irrelevant or wholly local, matters. *Id.*

13. A temporary and transitory provision in an act for the government of cities of a certain class, which applies to all the present members of the class, meets all the requirements of the temporary situation, and ends with the end of that situation, does not make the whole act local or special, although there is no provision as to other cities which ought to be included within the class during its operation. *Id.*

14. A provision in a statute providing a government for cities of a certain class, that cities passing into the class by reason of increase of population shall retain all their old laws except so far as they are in conflict with the new statute, even if invalid for lack of uniformity, will not invalidate the whole act. *Id.*

#### NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Statutes; in derogation of common law; penal; how construed. 549

Local legislature; what constitutes; county government; operating in part of state; expression of subject in title; sufficiency of title; construction. 636

Construction to sustain constitutionality; scope and effect; object of; when proviso strictly construed; invalidity of part. 764

Invalidity by reason of injustice and oppressive provisions. 839

Uniformity of operation; local or special legislation; revenue act; where to originate. 455

**STOCKHOLDER.**

Liability of, see CORPORATIONS, 7-9.

**STREET RAILWAYS.**

Consolidation of, see CORPORATIONS, 2.

Question for Jury as to Contributory

Negligence, see TRIAL, 8.

See also HIGHWAYS, 2.

1. A municipal corporation in whose streets a street railroad cannot be operated without its consent may, in granting the consent, limit the use of the railway to the carriage of passengers; and acceptance of the terms will be binding on the company, although it has charter power to carry freight also. *St. Louis & M. R. R. Co. v. Kirkwood (Mo.)* 300

2. An ordinance making the running of street cars in city streets for any purpose not authorized by the company's franchise, a misdemeanor subjecting the offender and the officers causing the operation to fine of not less than \$95, or to imprisonment for not less than two months, is not in excess of the power of the city over its streets, and is not so unreasonable that the court will declare it void. *Id.*

**Negligence of person on track.**

3. Failure to look and listen for an approaching electric car at the proper time and place is not excused by the fact that the traveler's attention is diverted by another car coming from the opposite direction, or by the fact that the car is approaching at an improper speed. *Tesch v. Milwaukee Electric R. & L. Co. (Wis.)* 618

4. A traveler's duty to look both ways and listen for the approach of an electric car before he crosses the track must be performed at such time and place as will be reasonably certain to effect its purpose, and therefore it is not sufficient to look and listen just when the approaching car is hidden from view by a car standing on another track. *Id.*

5. A traveler on a highway across a street-car track has the right of way, and is not guilty of contributory negligence in attempting to cross, if there is reasonable time for him to cross before an approaching car will reach the point by running at lawful speed, and it does not appear to be running at an unlawful speed. *Id.*

6. An ordinary traveler upon a public street where a street-car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars has not the same right to go upon the track, and compel the stopping of a car to enable him to pass over the track, as the operator of the car has to delay his passage to enable the car to pass. *Id.*

**NOTES AND BRIEFS.**

Municipal Regulation, see MUNICIPAL CORPORATIONS.

Street railways; contributory negligence in crossing tracks; assumption as to speed; rights of vehicles at street crossings. 621  
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**STREETS.**

See HIGHWAYS.

**SUBROGATION.**

Subrogation to the rights of the municipality against the contractor and his sureties is not the remedy of one who has furnished materials to enable a contractor to perform his contract to construct a plant for the municipality, to secure payment for such materials after the municipality has accepted the plant and paid the contractor therefor, since the municipality has no claim, having suffered no loss or injury. *Electric Appliance Co. v. United States Fidelity & G. Co. (Wis.)* 609

**TAXES.**

Classification of Railroad for Purpose of, see CONSTITUTIONAL LAW, 8.

On Railroad, see also COMMERCE, 1; COURTS, 3.

Tenant Claiming under Tax Deeds, see EJECTMENT.

Tenant's Purchase at Tax Sale, see LANDLORD AND TENANT, 1.

Special Act as to, see STATUTES, 9, 10.

1. A legislature which has the legal right to impose a privilege tax can exercise its discretion as to the amount of the tax. *Knoxville & O. R. Co. v. Harris (Tenn.)* 921

2. A corporation is not entitled to have the assessment of its capital stock for purposes of taxation limited to the value of its property other than patents granted by the United States, since, under Md. Code, art. 81, §§ 2, 4, 141, 144, the tax is levied, not upon the corporation or its stock, but upon the owners of the shares. *Crown Cork & S. Co. v. State (Md.)* 417

3. The setting apart of four fifths of a tax imposed upon bicycles as a fund for the purpose of constructing and maintaining bicycle paths shows that it was primarily designed as a means of raising revenue, and the burden imposed must be treated as a tax, and not as a license. *Ellis v. Frazier (Or.)* 454

**Equality; uniformity.**

4. The imposition of a uniform tax upon bicycles regardless of their value, for the construction of bicycle paths, violates a constitutional provision requiring uniform and equal rates of taxation and the prescribing of regulations to secure a just valuation for the taxation of all property. *Id.*

5. The imposition, for the construction of bicycle paths, of a tax of a specified amount on all bicycles, which class of property is included in the terms of the statute imposing general taxes on personal property, subjects such property to a burden from which other classes are exempt. in contravention of a constitutional requirement that all taxation shall be equal and uniform. *Id.*

**What taxable; exemptions.**

Railroads, see also COURTS, 3.

6. A clear grant of organic or statute law must be shown by one who claims exemption

from taxation. *Knoxville & O. R. Co. v. Harris* (Tenn.) 921

7. Exemption from ad valorem taxation does not include exemption from privilege taxation. Id.

8. An exemption from privilege taxation is not included in the exemption by charter of the capital stock, dividends, road, and fixtures, depots, workshops, and vehicles of a railroad company. Id.

9. A privilege tax on the occupation of railroad companies which do not pay ad valorem taxes is not invalid as being a tax on the privilege of exemption from ad valorem taxation, given by charter. Id.

10. A tax upon corporate stock is not prohibited by the Constitution of the United States, although the corporation is the owner of, and its stock was largely paid for by the assignment of, patents granted by the United States. *Crown Cork & S. Co. v. State* (Md.) 417

#### NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Taxation; of railroads; privilege tax; exemption from ad valorem tax as affecting; to what property exemption applies; transfer of exemption. 922

Of capital stock; investment in patents; in United States bonds; exemption of corporation as agent of United States. 417

Uniformity. 455, 637

Validity of tax deed; failure to file notice. 934

#### TELEGRAPHS.

Duty to Deliver Telegram to Passenger on Vessel, see CARRIERS, 1; EVIDENCE, 5; SHIPPING.

1. Compliance with its statutory duty to use great care and diligence in transmitting messages is established in favor of a telegraph company by a finding that it has not been guilty of any negligence. *Coit v. Western U. Teleg. Co.* (Cal.) 678

2. Transmission of a telegram at a time when a storm has made the wires work badly is not gross negligence on the part of the telegraph company, if when it is actually sent the wires are in good working order, and the statute requires the forwarding of messages at the earliest practicable moment. Id.

3. An agent of a telegraph company in charge of an office at which a message is tendered for transmission is not bound to know the time of closing of the terminal office, so as to charge the company with negligence in case the message is received after such office is closed. *Sweet v. Postal Teleg. Cable Co.* (R. I.) 732

4. A telegraph company is not liable for breach of contract to send a telegram because it was transmitted to the terminal office after it had been regularly closed for the day, and was taken from the wires by one in possession of the office for purposes of his own, and not in the employ of the 53 L. R. A.

company, and not its agent for the receipt of messages. Id.

5. One who complies with a telegraphed request to furnish information by telegram is the agent of the one making the request, so that the latter will be bound by his agreement that the company shall not be liable for mistakes in unrepeat messages. *Coit v. Western U. Teleg. Co.* (Cal.) 678

#### NOTES AND BRIEFS.

See also DAMAGES.

Telegraphs; liability of telegraph company sending message to office after hours of closing:—(I.) Nature of subject; (II.) rules as to office hours, reasonableness; (III.) notice to patrons; (IV.) special contracts as to delivery: (a) nature, application, and effect generally; (b) excuses for noncompliance; (c) contracts restricting liability; (V.) damages; (VI.) the rule under statutes imposing penalty for delay; (VII.) conclusion. 732

Loss of profits as element of damage for breach of contract as to. 91

Contracts limiting liability for unrepeat messages. 678, 734

#### TELEPHONES.

Impairing Rights of Company, see CONTRACTS, 17.

#### NOTES AND BRIEFS.

Telephones; use of highway for poles and wires; legislative power as to; municipal grant; impairment of; placing wires under ground. 176

#### THREATS.

Evidence of, see EVIDENCE, 33.

#### TICKET BROKERS.

See CARRIERS, 15-17; CONSTITUTIONAL LAW, 4.

#### TICKET OFFICE.

Duty to Keep Open, see CARRIERS, 13, 14; COURTS, 4.

#### TICKETS.

See CARRIERS, 5, 15-17; CONSTITUTIONAL LAW, 4.

#### TIMBER.

Enjoining Vendee from Cutting, see INJUNCTION, 3.

#### TIME.

Of Taking Effect of Statute, see STATUTES, 1.

The words "from and after," used in a statute in regard to time, are ordinarily held to signify exclusion of the day from which reckoning is to be made; and such meaning should prevail in the absence of some clear legislative intent to the contrary. *O'Connor v. Fond du Lac* (Wis.) 831

#### TORT.

##### NOTES AND BRIEFS.

Torts; liability for natural consequences of act; effect of act of other. 803

**TOWN.**

Liability for Relief of Paupers, see  
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**TRADEMARK.****NOTES AND BRIEFS.**

Trademark; temporary nonuser; right to use own name conflicting with another's trademark; intentional use of another's trademark as fraud; passing of, as part of goodwill. 385

**TRADENAME.**

1. The use of a name under which to conduct business for a period of twenty-two years or more will establish a right to prevent the adoption of that name by a rival concern. *Nolan Bros. Shoe Co. v. Nolan* (Cal.) 384

2. No right exists to use upon the sign of a retail store the words "successor to" a firm which carried on a wholesale business, but which discontinued without a successor. *Id.*

3. The acquisition of a right to a tradename is not prevented by the use of the word "company" before incorporation, as being a fraud upon the public. *Id.*

4. Abandonment of the tradename "N. Bros." is not shown by the fact that for a portion of the time during which the use of the name is alleged the claimant used as a trademark the name "N. & Sons," where during none of the time was the name as claimed absent from the place of business. *Id.*

5. The use of a family name as a tradename by another member of the same family may be prevented by one who has by long use acquired a right to it, if the new use clearly indicates an intent to mislead and deceive the public. *Id.*

6. Failure of a retail dealer for a period of ten years to protest against the use in the wholesale business of a tradename which conflicts with the name under which his business is conducted will not deprive him of the right to restrain the use of such name in a rival retail business. *Id.*

**TRENCH.**

See TRIAL, 9.

**TRESPASS.**

In Removing Body from Burial Lot, see  
CORPSE, 4.

Measure of Damages for, see DAMAGES,  
8, NOTES AND BRIEFS.

In Taking Seaweed, see WATERS, 1.

**TRESPASSER.**

On Railroad Track, see RAILROADS, 2, 3.

**TRIAL.**

Of Question of Sanity, see CRIMINAL  
LAW, 3.

**Questions for court or jury.**

1. The question of the medical necessity for an abortion to get rid of an illegitimate  
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fetus should not be submitted to the jury in an action upon a policy upon the life of deceased, where no suggestion of such necessity appears in the evidence. *Wells v. New England Mut. L. Ins. Co. (Pa.)* 327

2. Having a stand in a public market, and selling from a wagon on the street butter, cheese, eggs, and poultry, are sufficient to require the opinion of a jury whether or not such acts constitute a breach of a covenant not to engage in the grocery business. *Love v. Stidham (D. C. App.)* 397

3. One charged with conspiracy to murder is entitled, where the evidence tends to show a conspiracy to bring a large number of men to the state capitol to alarm the legislators, to have the jury pass upon the question whether the killing of a legislator would necessarily or probably result from such an assemblage. *Powers v. Com. (Ky.)* 245

4. Whether or not a city performs its duty by seeing that slippery ice on a sidewalk is covered with malt sprouts is a question of fact for the jury. *Reedy v. St. Louis Brewing Assn. (Mo.)* 805

5. It cannot be assumed conclusively, as matter of law, that a sidewalk covered with slippery ice, over which malt sprouts have been spread, is safe until they are swept off. *Id.*

6. Although the question of notice to the city of dangerous ice on the sidewalk is for the jury, where it froze during the night, and in the morning was covered by the abutting owner with malt sprouts, which were swept off by boys about dark on the evening of the accident, yet, if the jury is not from the vicinage, it should not be permitted to draw the inference of notice from consideration of the care that would be exercised by the city's "proper officers having charge of keeping its streets in repair." *Id.*

7. Whether or not those in charge of an engine approaching a bridge saw children on the bridge in time to stop the train before striking them is for the jury, where the evidence shows that the engineer could have seen the whole length of the bridge for more than 1,000 feet before reaching it, and that the train was running up grade, in view of the risk that would result to the train by running onto the bridge without looking to see if it was in good condition. *Becker v. Louisville & N. R. Co. (Ky.)* 267

8. The contributory negligence of a person who, having waited for two street cars going in opposite directions to pass, attempts to cross the track, after looking in both directions and seeing another car coming from one side but at a safe distance, without seeing any approaching from the other side, though one running at unusual speed has just passed out of sight behind a car that has stopped, is not to be declared as matter of law, but is a question for the jury. *Tesch v. Milwaukee Electric R. & L. Co. (Wis.)* 618

9. It is for the jury to determine whether or not a contractor provided a safe working place for his servants, where he was engaged



in cutting a trench along the foundation of a chimney, under which he had run narrow tunnels to be filled with masonry to support the chimney, leaving a layer of earth between the top of the tunnel and the foundation, in which tunnel the servants were required to work after the contractor had knowledge that the undisturbed earth had become saturated with water. *Finn v. Cassidy* (N. Y.) 877

#### Instructions.

10. If in taking a special verdict questions be submitted covering singly all the material controverted facts in issue, a refusal to submit other questions covering the same subjects in a different form, or covering evidentiary facts, is proper. *Tesch v. Milwaukee Electric R. & L. Co.* (Wis.) 618

11. Acquiescence in an erroneous view of the law by offering evidence to meet it will not prevent the party from insisting upon a correct statement of the law in the instructions to the jury. *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* (Iowa) 775

12. A caution to the jury to closely scan evidence prepared by inspectors of an insurance company, in an action to enforce payment of a policy, is justified where one of the persons from whom statements were obtained expressly reserved the right to make corrections, and another, who is a beneficiary, testifies that her statement was written partly at the inspector's dictation, after assurance that her claim would be paid, and that she was much agitated when she prepared it. *Fidelity Mut. L. Asso. v. Jeffords* (C. C. A. 5th C.) 193

13. An erroneous instruction may be corrected after four of the five speeches to the jury on each side of the case have been made. *Powers v. Com.* (Ky.) 245

#### Directing verdict.

14. In the absence of any evidence to sustain a charge of undue influence, made for the purpose of overthrowing a will, the court may direct a verdict in favor of proponent. *Re Shell's Estate* (Colo.) 387

#### NOTES AND BRIEFS.

Trial; reliance on promise to repair machinery, question of fact; continuance in employment as negligence. 656

Contributory negligence for jury. 792

Privileged communication, question of fact; malice, question for jury. 447

#### TROVER.

Of Goods Consigned to Factor, see FACTORS, 3.

#### NOTES AND BRIEFS.

Trover; by principal. 648

#### TRUST COMPANIES.

Implied Warranty by, see SALE.

#### TRUSTS.

Created by Husband's Promise to Wife, see CONTRACTS, 4, 5.

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In Corporate Stock, see CORPORATIONS, 4, 5.

Presumption as to Trustee's Power, see EVIDENCE, 2.

Establishing by Parol, see EVIDENCE, 19.

Duty of Trustee, see LIFE TENANTS, 2.

Sale of Realty Held in Trust, see LIFE TENANTS, 3, 4.

See also LIMITATION OF ACTIONS, 2; WILLS, 3, 4.

1. Equity will establish and enforce the trust where an heir prevents the execution of a will by a promise to convey the property to a third person according to the intention of the ancestor. *Ransdel v. Moore* (Ind.) 753

2. A letter written by one who has taken the title to real estate under a parol promise to carry out the trusts which the owner desires to establish in regard to it, to one of the beneficiaries, which, by means of reference to other papers, sets out the terms of the trust, the beneficiaries, and the property subject to it, is sufficient to authorize the court to carry out the trust against the trustee's heirs, in case he dies without executing it. Id.

#### NOTES AND BRIEFS.

For Charities, see CHARITIES.

See also EVIDENCE; WILLS.

Trusts; constructive, for benefit of third person; necessity of fraud; preventing making of will; agreement to convey to another as creating; consideration. 753

Following trust property; conversion of money to unauthorized purpose. 818

Premiums paid for investments; against what chargeable; intention of testator. 545

#### TUNNEL.

See MINES, 5.

#### UNDUE INFLUENCE.

Burden of Proof as to, see EVIDENCE, 7.

In Procuring Will, see EVIDENCE, 35; TRIAL, 14.

#### USURY.

Insurance Policy as, see INSURANCE, 7.

That interest paid for the extension of time for payment of a debt is usurious will not destroy the contract for the extension so as to prevent a release of the surety's liability. *Fleming v. Borden* (N. C.) 316

#### NOTES AND BRIEFS.

See also PRINCIPAL AND SURETY.

Usury; by contract for life insurance. 462

#### VENDOR AND PURCHASER.

Recovery for Improvement made by Vendee, see FRAUD, ETC., 5.

Vendee's Recovery for Improvements, see IMPROVEMENTS.

Lien of Judgment against Vendor, see JUDGMENT.

See also CONTRACTS, 7; COVENANTS; FIXTURES; INJUNCTION, 3.

## NOTES AND BRIEFS.

See also IMPROVEMENTS.

Vendor and purchaser; rescission for fraud. 158

Election to affirm or rescind; passing of title; estoppel. 804

What is a marketable title. 884

## VOTERS AND ELECTIONS.

Congress having no power to punish the intimidation of voters at purely state elections where the conduct is not grounded upon race, color, or previous condition of servitude, U. S. Rev. Stat. § 5507, which provides for the punishment of everyone who prevents another from exercising the right of suffrage to whom the right is guaranteed by the 15th Amendment, is void in its application to state elections, since it includes within its operation offenses not grounded upon race, color, or previous condition of servitude. *Lackey v. United States* (C. C. A. 6th C.) 660

## NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Voters and elections; Federal control of elections:—(I.) Existence, sources, and extent of power: (a) existence; (b) sources; (c) extent: (1) congressional elections; (2) other elections; (3) requiring state officers to obey state laws; (II.) under art. 1, U. S. Const.; (III.) under art. 2, U. S. Const.; (IV.) under 14th Amendment; (V.) under 15th Amendment; (VI.) summary of present statutes. 660

Preventing citizen from voting at state election as violation of United States laws. 661

## WAITING ROOM.

Duty to Keep Open, see CARRIERS, 13, 14; COURTS, 4.

## WAREHOUSEMEN.

The destruction, by an incendiary fire, of wheat stored in a warehouse under a contract calling for its redelivery, "damage by the elements excepted," does not excuse the warehouseman from his obligation, since the exception of damage by the elements is equivalent to an exception of damages by the act of God. *Pope v. Farmers' Union & Mill. Co.* (Cal.) 673

## WARRANTY.

By Mortgagor, Mortgagee Bound by, see MORTGAGE, 4.

Implied, see SALE.

See also CORPORATIONS, NOTES AND BRIEFS.

## WATERS.

Parol Agreement as to, see CONTRACTS, 7.

Definition of Stream, see DEFINITIONS.  
Prescriptive Right to Flow Land, see EVIDENCE, 1.

Injuries by Dam, When Barred, see LIMITATION OF ACTIONS, 4.

1. The right to take seaweed stranded on 53 L. R. A

the beach below high-water mark belongs to the owner of the upland, and he may maintain an action of trespass against one who removes the seaweed without his consent. *Carr v. Carpenter* (R. I.) 333

2. The right to navigate a stream does not include the right to use the banks in aid of navigation, and to fasten booms to trees growing thereon. *Smith v. Atkins* (Ky.) 790

3. A grant of land covered by the waters of Lake Michigan, for the private use of a railroad company, is not within the power of the state, as it holds the title to the land in trust in its sovereign capacity for the people of the entire state. *Illinois C. R. Co. v. Chicago* (Ill.) 408

4. Lands covered by the waters of Lake Michigan are not within the provision of Ill. act Feb. 10, 1851, § 3, incorporating the Illinois Central Railroad Company, which authorized it to take "any lands, streams, and materials of every kind for the location of depots" and other specified purposes. *Id.*

## NOTES AND BRIEFS.

Waters; prescriptive right to pollute or obstruct. 895, 903

Booms; right to construct under right of floatage; liability for injury to land by logs. 790

Held in trust for public use. 315

Right to seaweed; ownership of shore; rights of upland owner. 333

## WAY OF NECESSITY.

See EASEMENTS, 1.

## WILLS.

As to Disposition of Testator's Body, see CORPSE, 1.

Burden of Proving Undue Influence, see EVIDENCE, 7.

Evidence of Undue Influence, see EVIDENCE, 35.

Undue Influence in Procuring, see TRIAL, 14.

1. A will in favor of a second wife to the exclusion of children of the first one is not unnatural, although one of the children was a cripple from infancy,—especially where testator had already made provision for such children. *Re Shell's Estate* (Colo.) 387

2. A legacy to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church," for the education of girls in India, no body of that name being in existence, will go to the Woman's Foreign Missionary Society of said church, that being the only foreign missionary society in the Methodist Church that is engaged in the particular work to which the legacy is devoted. *Woman's Foreign Missionary Soc. v. Mitchell* (Md.) 711

3. A legacy to a missionary society, "to be held in trust" to educate six girls in India who shall be given certain names, and to purchase a building, which shall be called a certain name and be used for the education of girls there; the location of which shall be

left to the decision of a certain bishop and his successors,—does not create a trust void because vague, indefinite, and uncertain, where the society is engaged in that work, but is merely a bequest to the society for the prosecution of its work upon conditions annexed to the gift. *Id.*

4. No precatory trust is created by a clause, "I desire that my friend," naming him, "be retained in the employ of the firm on such liberal terms as his long and faithful service entitle him to," in a will of a merchant, which contemplates the continuance of the business by his widow and partner, so as to be enforceable against the widow where she has purchased the partner's interest and is carrying on the business alone. *Jewell v. Louisville Trust Co. (Ky.)* 377

#### NOTES AND BRIEFS.

See also CHARITIES; EVIDENCE; TRUSTS.

Wills; creation of trust by precatory word. 377

#### WIRES.

Requiring Building of Conduits for, see CONSTITUTIONAL LAW, 12; CONTRACTS, 17.

Placing under Ground, see HIGHWAYS, 1.

#### WITNESSES.

1. Testimony as to declarations of employees after an accident for which the employer is sought to be held liable may be admitted to contradict a witness, when the 53 L. R. A.

foundation has been properly laid therefor. *Mason v. Southern R. Co. (S. C.)* 913

#### Cross-examination.

Waiver of Error as to, see APPEAL AND ERROR, 9.

2. The denial on cross-examination, by a witness for the prosecution, of statements indicating that his testimony was purchased, may be contradicted. *Powers v. Com. (Ky.)* 245

3. On cross-examination of one of the parties for whose use a suit is brought he cannot be asked what he paid a woman for her interest in the suit, in order to affect the credit of her husband as a witness in the case, where there is no issue to which the inquiry is pertinent. *Livermore Foundry & M. Co. v. Union Compress & Storage Co. (Tenn.)* 482

4. Witnesses cannot be prevented from explaining statements made on cross-examination, so as to facilitate impeaching them by contradiction. *Powers v. Com. (Ky.)* 245

#### WRIT AND PROCESS.

See also EVIDENCE, NOTES AND BRIEFS.

A mistake in the Christian name of a defendant who is duly served with process will not prevent the court from acquiring jurisdiction of him, if at the time the summons is served on him he is duly apprised that he is the person intended to be named therein and affected thereby, where the statutes provide for correcting mistakes in the names of parties as they appear in the summons. *Stuyvesant v. Weil (N. Y.)* 532



























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